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Transparency and Judicial Review

An empirical study of the duty of candour

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About the research team

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Glossary

Civil Procedure Rules (CPR) The Civil Procedure Rules are a procedural code that apply to all civil cases (including judicial review). They are designed to improve access to justice by clarifying and simplifying rules of procedure to be followed.

Freedom of Information (FOI) The Freedom of Information Act 2000 makes provision for public access to information held by public authorities.

Government Legal Department (GLD) The Government Legal Department is a non-ministerial department. They are the government's principal legal advisors, providing legal advice to the government and representing them in court proceedings.

***Hamid* hearing** The Court has an inherent jurisdiction to govern its own procedure, including by ensuring lawyers conduct themselves according to appropriate standards of behaviour. *Hamid* hearings are arranged to scrutinise the conduct of legal representatives in judicial review proceedings.

Independent Review of Administrative Law (IRAL) The Independent Review of Administrative Law was established in 2020 to consider options for reform to the process of judicial review. The Independent Panel completed its review in January 2021.

Judicial Review Pre-Action Protocol (PAP) Pre-Action Protocols are codes of good practice to be followed by parties prior to seeking a judicial review of a decision.

Part 18 Request for Further Information The CPR sets out a process, in Part 18, by which parties can submit a formal request for a party to clarify or provide additional information about a matter in proceedings. The CPR provides guidance for steps a party should follow to ask the relevant party for information before making an application to the Court for an order under Part 18.

Part 31 Application for Disclosure An application for disclosure of specific documents or a particular class of documents may be made during a judicial review claim. Under CPR 31.12(1), the Court may order disclosure where it is necessary to fairly and justly deal with a particular issue in the judicial review.

Practice Direction (PD) There are Practice Directions contained within the Civil Procedure Rules that provide supplementary practical guidance on how to interpret the relevant rules of procedure. There is a specific Judicial Review Practice Direction.

Subject Access Request (SAR) Individuals have the right to ask for all the information an organisation (including government departments) holds about them. Exercising the right of access is known as making a Subject Access Request.

Treasury Solicitor Guidance (TSOL Guidance) provides a practical guide to government departments and government lawyers to help discharge their duty as a public servant to assist the court in judicial review proceedings.

Executive Summary

In England and Wales, all parties to judicial review proceedings are under a general duty of candour, requiring them to provide a full and accurate account of all the facts and information relevant to the issue under review. However, the duty is under strain from a variety of pressures, including changing litigation practices, the use of digital technology and remote working in government decision-making, and the rising use of complex decision-making systems in public administration. Further, as outlined by submissions to the Independent Review of Administrative Law panel, there is uncertainty in legal doctrine and amongst practitioners over the parameters of the duty. Though the duty of candour is central to the operation of public law litigation, it has received surprisingly little scholarly study. This report responds to this evidence gap. It outlines the findings from a detailed study capturing how the duty of candour is operating in practice.

Based on a systematic case study of 322 judicial review cases on the duty of candour in judicial review, followed by 19 in-depth interviews with public law practitioners, the report's key findings are as follows:

1. the case law is unclear on when the duty of candour and cooperation begins to apply to parties in judicial review. In practice, the duty of candour is generally treated by parties as applying during pre-action steps taken prior to the commencement of judicial review proceedings. There is a gap between judicial articulations on the question of when the duty of candour applies and practitioner approaches in practice. There is scope for the position to be clarified, either in case law or in relevant procedure rules and directions.

2. the "Unpleaded Grounds Principle" – that the duty extends to documents and information that may give rise to further grounds of challenge in the judicial review claim – is an important tool of transparency that guides the sharing of potentially relevant information to help narrow the issues, particularly in the early stages of a potential judicial review claim. The case law shows that it should not, however, be used to widen the judicial review claim once permission has been granted, and the judicial review evidence base should track the issue in dispute.

3. there are differing views – both in case law and amongst practitioners – as to whether the duty of candour always requires the disclosure of relevant documents.

4. a wide range of experiences were reported amongst practitioners on the provision of underlying documents prior to the grant of permission, and divergent perspectives on whether the duty of candour requires such disclosure. Early disclosure of documents has several benefits: it can lead to early resolution of cases, narrow the issues in dispute, and prevent the extension of proceedings via applications to amend grounds arising from late disclosure. There may be, however, practical limitations to the extent to which public authority defendants can provide early disclosure, including the volume of documents that may be required to be searched and considered.

5. there is some evidence of public authorities directing claimants to seek information relevant to their claim by way of Subject Access Request or Freedom of Information Request in correspondence, rather than providing information or documents as part of their duty of candour. The timeliness of responses via this route has the potential to frustrate a claimant's capacity to bring a claim promptly and to narrow their grounds of challenge.

6. there is a clear requirement that material should be shared between parties in a clear, contextualised and manageable format. Resources, time restraints, and the quality of IT systems place pressure on the capacity for parties, particularly public authorities, to organise disclosure appropriately.

7. interviewees reported that it was common to receive redacted disclosure without sufficient explanation or justification from defendant public authorities. This has implications for the costs incurred in responding to and providing disclosure, leading to significant correspondence between parties to a judicial review, and occasionally has required court intervention, adding to court time and costs.

8. most interviewees thought the courts' approach to moderating and enforcing consequences for non-compliance with the duty of candour was appropriately balanced, considering that the duty engages lawyers' professional duties to the Court.

9. There is evidence of a demand for clarification of the duty of candour and cooperation in judicial review. Public law practitioners in this study considered that the duty should be more clearly recognised and outlined in the Civil Procedure Rules. **The Civil Justice Council should consider the formation of a working group to test and consult upon proposals for the development and incorporation of guidance on discharging the duty of candour into the Civil Procedure Rules.** Consideration should be given to providing:

   » clarification on what stage of proceedings the duty of candour is engaged;

   » guidance on when redactions can be used, and their explanation/justification;

   » clarification on the relationship between the duty of candour and the duty to disclose, including guidance on the practice of providing 'gists' of material;

   » an outline of potential consequences for breaches of the duty, subject to the retention of residual judicial discretion to utilise their case management powers as required.

   Further elucidation of the duty should not be overly prescriptive, to allow the court to maintain flexibility over the level of information and disclosure required to meet the duty taking account of the nature of the issue under review.

Introduction

Judicial review is a key legal mechanism for holding accountable the exercise of public power through administrative decision-making. In England and Wales, the evidence base in a judicial review challenge is determined, not by way of formal disclosure regime, but via the operation of the duty of candour. The duty of candour is engaged if a person seeks judicial review of an administrative action or decision or challenges the lawfulness of government action. The duty ensures that parties to a judicial review, and the reviewing court, have all the information required to understand the decision under review and to determine its lawfulness. The duty is therefore a vital tool for securing transparency of decision-making in the context of the judicial review accountability model. Moreover, the smooth sharing of information between parties and the court ensures that judicial reviews are conducted in a more timely and cost-effective manner, and engagement with the duty may result in the early resolution of potential disputes, including triggering a public authority to take a 'second look' at a potentially unlawful action.[1] The duty of candour is therefore a central principle in judicial review, and has implications for good government more generally.

The duty

The duty of candour and cooperation is a common law duty, and its origins are commonly traced back to the much-cited 1986 case of *Huddleston*, which stated that the remedy of 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'.[2] The duty requires all parties (claimants, defendant public authorities, and third parties) to assist the court by providing 'full and accurate explanations of all the facts relevant to the issue that the court must decide'.[3] Parties cannot mislead the court by, for example, 'non-disclosure of a material document or fact or by failing to identify the significance of a document or fact'.[4] They cannot obfuscate what has happened, by, for example, placing 'spin' on information filed in witness statements.[5]

The parameters of the duty of candour and cooperation have been principally developed through case law, but it operates alongside the wider Civil Procedure Rules (CPR), Practice Directions, and relevant protocols and practitioner guides. The Judicial Review Practice Direction outlines that the disclosure of documents is not automatically required in judicial review 'unless the court orders otherwise'.[6] The *Treasury Solicitor Guidance on Discharging the Duty of Candour (TSOL Guidance)*, which provides practical guidance to central public departments and lawyers on how to assist the court in a judicial review, advises public servants 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'.[7] The Pre-Action Protocol (PAP) for judicial review claims requires the defendant to engage in sharing 'relevant information and documents'.[8] Moreover, the *Administrative Court Judicial Review Guide* provides practical guidance on the duty of candour and cooperation.[9] Guidance on what the duty of candour and cooperation requires and how it is to be discharged is therefore spread across a range of sources.

1 T. Hickman K.C. and J. Tomlinson, 'Judicial Review during the Covid-19 Pandemic' (2023) 27 (3) *Edinburgh Law Review* 252, 279.
2 *R. v Lancashire CC Ex p. Huddleston* [1986] 2 All E.R. 941. For a more detailed outline of the evolution of the duty, see E.A. O'Loughlin, 'Government's Duty of Candour: On the Move?' [2023] Oct *Public Law* 567, 569.
3 *Quark Fishing* (No.1) [2002] EWCA Civ 1409 [50].
4 *R. (on the application of Citizens UK) v Secretary of State for the Home Department* [2018] EWCA Civ 1812 [106].
5 Ibid.
6 Civil Procedure Rules, Practice Direction 54A, para 11.2.
7 Treasury Solicitor's Department, *Guidance on Discharging the Duty of Candour and Disclosure in Judicial Review Proceedings* (2010), para.1.2.
8 Pre-Action Protocol for Judicial Review, para 3 (a).
9 Courts and Tribunals Judiciary, *The Administrative Court Judicial Review Guide 2024* (October 2024), section 15.

The duty of candour and cooperation, developed across case law and assisted by practice directions and guides, is a flexible duty. What is required by parties to meet the duty varies according to the context of the challenge. A more formal disclosure regime is generally viewed as not desirable because judicial review proceedings 'should not be conducted in the same manner as hard-fought commercial litigation',[10] and parties are 'engaged in a common enterprise with the court to fulfil the public interest in upholding the rule of law'.[11]

The study

The inherent flexibility of the duty of candour – requiring differing approaches to the provision of information and disclosure depending on the nature of the judicial review challenge – has given rise to concerns that there are wide-ranging understandings on the core of the duty itself. For example, the report of the *Independent Review of Administrative Law* (IRAL) underlined that consultation responses varied on the questions of when the duty of candour is triggered, the extent of the duty, and whether the duty requires disclosure of documents.[12] Moreover, the duty is likely to be under strain from a range of wider pressures. For instance, the prevalence of the use of non-corporate communications channels, and the implications this has for the public record of decision-making, has been laid bare by the recent Covid Inquiry.[13] Furthermore, public law litigation cultures appear to be changing. There is a rise in 'systemic' judicial review challenges, which require a deeper and more demanding evidence base. There is also evidence of more adversarial litigation strategies being employed both by some judicial review claimants and by some government departments.[14]

Given the centrality of the duty of candour to the operation of the judicial review jurisdiction, it is important that there is an understanding of how the duty of candour is operating in response to these pressures. The central aim of this study was to generate an evidence base to capture the current parameters and perceptions of the operation of the duty of candour. To meet this aim, the project had three research questions:

(i) what is the law on the duty of candour?
(ii) what views are there on the operation of the duty?
(iii) what changes might be required to the duty?

Research Methods

To address the above three central research questions, the project had three work packages, each broadly aligning to one of the above three research questions. A more detailed methodology can be found at: in E. A. O'Loughlin, *Transparency and Judicial Review: An Empirical Study of the Duty of Candour: Supplementary Materials* (2024) available at https://www.durham.ac.uk/media/durham-university/departments-/law-school/pdfs/Candour-Supplementary-Document.pdf

Work Package 1: mapping the law

The first phase of the research (Work Package 1) correlated to the project's first research question: *what is the law on the duty of candour?* To inform all the following project stages, the principal investigator first conducted a doctrinal review of foundational sources of law relating to the duty of candour.[15] The principal investigator then worked with two Graduate Research Associates – Cassandra Somers-Joce and Gabriel Tan – in delivering a content analysis study of judicial decision-making and practice relating to the duty of candour in judicial review. This involved reading judicial review court decisions mentioning the duty of candour and coding aspects of the decision that related to the research questions. Content analyses have the benefit of collating both basic

10 *Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment* [2004] Env. L.R. 38, [86].

11 *R. (on the application of Hoareau) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWHC1508 (Admin) [20]. One notable exception to the view that a disclosure regime should not operate in judicial review can be found here: T. Hickman, 'Candour Inside-Out: Disclosure in Judicial Review' (UK Constitutional Law Association Blog, October 2023), available at: https://ukconstitutionallaw.org/2023/10/16/tom-hickman-kc-candour-inside-out-disclosure-in-judicial-review/.

12 E. Faulks et al, *The Independent Review of Administrative Law* (2021) para.4.115.

13 On the use of of "vanishing" WhatsApp messages throughout the British government, see https://www.politico.eu/article/the-british-governments-disappearing-whatsapps/

14 See R. Thomas and J. Tomlinson, *Immigration Judicial Reviews: An Empirical Study* (Nuffield Foundation 2019) 79.

15 The results of this stage of the research can be found at: E.A. O'Loughlin, 'Government's Duty of Candour: On the Move?' [2023] Oct *Public Law* 567.

empirical data from the documents under review (in this instance judicial review decisions), and finer qualitative detail on the judicial reasoning underpinning the discussion on the duty of candour.[16]

The research team conducted a systematic analysis of 322 cases mentioning the duty of candour in judicial review. The dataset sought to capture all judicial review cases mentioning the duty of candour until 31 December 2023.[17] The research team analysed the documents by recording a mixture of basic empirical information about the cases in the dataset, alongside more qualitative information. This included:

1. Background information (Case name, date, defendant, intervener, interested party, type of claimant, type of defendant, court, litigant in person, divisional court judgment);
2. Details of the case (Decision type, target of review, type of reference to duty of candour, judicial review outcome, outcome on the duty of candour);
3. Details of explanations on the law of the duty of candour (timing of the duty, extent of the duty – does the duty go beyond the scope of pleaded issues? search requirements, disclosure requirements, consequences);
4. Further qualitative information on the duty of candour (open text boxes were provided for the researchers to give extra detail regarding the coding selections, including relevant quotations and paragraph references).

Work Package 2: perspectives on the operation of the duty

Work Package 2 addressed research question two: what perspectives are there on the operation of the duty?

Various studies have highlighted that the impact of legal rules relating to formal justice mechanisms cannot solely be captured by judicial decisions.[18] There will be wider effects of the duty of candour upon decision-making, including the effect of the duty at pre-action stage and whether this leads to settlement, and the administrative response to judicial rulings upon the extent of the duty including changes to record-keeping practices. To capture these dynamics, and to gain a more complete picture of the impact of the duty and how it is interpreted and perceived in practice, interviews were conducted with key stakeholder groups.

19 semi-structured interviews were undertaken with public law practitioners, 16 of whom were independent public law practitioners (barristers and solicitors) and 3 of whom were lawyers within the Government Legal Department.[19]

The interviews collected data on: experiences of undertaking the disclosure exercise as outlined in the *TSOL Guidance*; approaches to advice on the proportionality of searches to be conducted as outlined in the *TSOL Guidance*; the perceived impact of the duty and whether it as resulted in reform of internal procedures in departments, such as record-keeping practices; experiences of receiving or advising upon disclosure of information from defendant authorities, including during the pre-action process; experiences of the pre-action protocol stage and the relationship between candour and settlement of disputes; experiences of requesting specific disclosure or further information in the course of judicial review proceedings; views on the current scope of the duty and its operation; and views on the desirability of – and options for – reform of the duty.

16 More detail on the content analysis method design and limitations can be found in E.A.O'Loughlin, *Transparency and Judicial Review: An Empirical Study of the Duty of Candour: Supplementary Materials* (2024) 5, available at https://www.durham.ac.uk/media/durham-university/departments-/law-school/pdfs/Candour-Supplementary-Document.pdf.

17 The dataset was built using vLex Justis to capture the majority of cases, with Westlaw UK used to capture upper tribunal decisions. vLex Justis was chosen given evidence that it comprises the most comprehensive dataset of court decisions available, but it is not possible to capture all relevant decisions, due to the lack of harmonisation in case reporting. vLex Justis does not, for example, hold a recent Divisional Court consequential judgment on duty of candour failings in the course of a judicial review of the Home Office policy on seizing the mobile phones of individuals arriving in the UK by boat: *R (HM, MA, and KH) v Secretary of State for the Home Department* [2022] EWHC 2729 (Admin). The case has therefore been included in more doctrinal analysis overlaying the findings from the dataset.

18 V. Bondy, L. Platt, and M. Sunkin, *The Value and Effects of Judicial Review: The Nature of Claims, their Outcomes and Consequences (2015);* R. Thomas 'Mapping immigration judicial review litigation: an empirical legal analysis' [2015] Public Law 652.

19 More information on the Work Package 2 methodology and limitations can be found in E.A.O'Loughlin, *Transparency and Judicial Review: An Empirical Study of the Duty of Candour: Supplementary Materials* (2024) 29-32, available at https://www.durham.ac.uk/media/durham-university/departments-/law-school/pdfs/Candour-Supplementary-Document.pdf.

Work Package 3: Exploring potential reform options on the duty of candour in judicial review

Work Package 3 addressed research question three: *what changes might be required to the duty?* Based on the data collected from work packages one and two, the objective of the third work package was to explore what changes might be required to the duty of candour, and this aspect of the project was explorative and evaluative. The project did not set out to offer conclusive recommendations for reform but instead sought to explore potential options for reform derived from the analysis undertaken in work packages one and two and developed in line with a sub-set of interview participants from Work Package 2.

To support the development of these options, a focus group was conducted with a diverse sub-group of the interview sample (6 interviewees). The objective of the focus group was to explore options for reform, their benefits and risks, and their credibility.[20]

Data collected	Total
Judicial review cases	322 decisions
Interviews with independent practitioners	16
Interviews with Government Legal Department	3
Focus group with practitioners	1

Advisory group

The research was assisted by an advisory group comprising representatives from the Government Legal Department (GLD), legal non-governmental organisations, academia, a former Court of Appeal judge, and independent practice. The Advisory Group oversaw the design and development of the research project and provided valuable advice and discussions.

20 More information on the Work Package 3 methodology and limitations can be found in E.A.O'Loughlin, *Transparency and Judicial Review: An Empirical Study of the Duty of Candour: Supplementary Materials* (2024) 33-34, available at https://www.durham.ac.uk/media/durham-university/departments-/law-school/pdfs/Candour-Supplementary-Document.pdf.

Results

Case law data: general information

Parties

The dataset comprised 322 judicial review cases mentioning the duty of candour. Most cases were brought by individual claimants (n=239), with 38 cases brought by companies, and 23 cases brought by non-governmental organisations or campaign groups. Most cases were brought against central government departments (n=185), with 93 cases against other non-departmental bodies or executive agencies, and 44 cases against local authorities. Of the 322 judicial review decisions mentioning the duty of candour, 116 (36%) had the Home Office as the primary defendant. While this is a high figure, it should be noted that this figure is reflective of general trends in the judicial review jurisdiction.[21]

Courts and decision types

Most decisions mentioning or discussing the duty of candour in judicial review were heard by a single judge in the administrative court (n=248). 40 cases were Divisional Court decisions, consisting of two or more judges sitting together in the High Court for cases that 'raise issues of general public importance… which are not straightforward or are likely to set a precedent'.[22] 18 of the Divisional Court cases involved a meaningful dispute over the approach taken to the duty of candour and cooperation, and within that subset of cases, claimant approaches to the duty were more heavily criticised.[23]

Decision type	
Judicial review first instance	122
Permission decision	70
Interim application in judicial review	69
Appeal of judicial review decision	23
Rolled up hearing: permission and merits	20
Consequential judgment	13
Appeal of permission decision	5
	322

Most references to the duty of candour were made in judicial review judgments following a substantive judicial review hearing. Interim applications included case management hearings, decisions on disclosure applications, interim applications to adduce further evidence. Within the 69 interlocutory decisions in the dataset, 33 related to applications or decisions on disclosure or the provision of information. Consequential judgments are judgments dealing with consequential matters following a main judgment. This included 9 judgments related to the costs of a judicial review, 3 *Hamid* hearings on the conduct of legal professionals arising in judicial reviews, and 1 application seeking a declaration that the public authority respondent had not complied with tribunal orders arising from a successful judicial review claim.

21 In October to December 2023, Of the 670 judicial review applications received, 240 were civil immigration and asylum applications, amounting to 36%. See Civil Justice Statistics Quarterly: October to December 2023. A fuller breakdown of the figures discussed can be found at "Work Package 1: Results" in E.A. O'Loughlin, Transparency and Judicial Review: *An Empirical Study of the Duty of Candour: Supplementary Materials* (2024) 9-10, available at https://www.durham.ac.uk/media/durham-university/departments-/law-school/pdfs/Candour-Supplementary-Document.pdf.

22 Courts and Tribunals Judiciary, *The Administrative Court Judicial Review Guide 2024*, para 14.3.2.

23 For a breakdown of this case law, see "Work Package 1: Results" in E.A. O'Loughlin, *Transparency and Judicial Review: An Empirical Study of the Duty of Candour: Supplementary Materials* (2024) 10-12, available at https://www.durham.ac.uk/media/durham-university/departments-/law-school/pdfs/Candour-Supplementary-Document.pdf.

Duty of candour in the case law: an overview[24]

Type of reference to the duty of candour

Type of reference to duty of candour	
Applicability to defendant	263
No substantive discussion	110
Discussion of extent of duty	122
Applicability to claimant	49
Discussion of timing of duty	41
Applicability to third parties	9

In most cases, the reference made to the duty of candour related to the duty owed by the public authority defendant (n=263, 82%). Though this is high, it is unsurprising, given that the public authority holds most of the information related to issues under review. Further, around a third (32%) of the references to the defendant's duty of candour were also coded as comprising "no substantive discussion", meaning that only a passing reference was made to the defendant's duty of candour by the judge. Overall, 34% of cases (n=110) contained no substantive discussion on the duty of candour. 122 cases (38%) discussed the duty of candour in a manner that referred to the extent of the duty's requirements, including whether it extends to unpleaded grounds of review, what search requirements might be needed to meet the duty, and what kind of disclosure is required to meet the duty. 41 cases contain doctrinal commentary on the questions of when the duty of candour applies in judicial review proceedings.

Candour outcomes

Outcome on candour	
N/A	192
Criticism of defendant approach	34
Violation - defendant	34
No violation - defendant	32
Criticism of claimant approach	13
Violation - claimant	10
No violation - claimant	5
Criticism of third party approach	3
No violation - third party	1

In many cases (n=192) the court does not specifically comment on the parties' approach to the duty of candour and cooperation. In line with the finding that most commentary relates to the duty of candour owed by public authorities, there are 34 cases in which the court is critical of the approach taken by defendants, and 34 cases where the court explicitly employs the language of a failure or breach of the duty of candour by the defendant public authorities occurring during the judicial review proceedings. Notably, however, there a similar amount of cases (n=32) where the court was invited to scrutinise a defendant's approach to the duty, and refuted any criticism made by other parties. There are 13 cases were the claimant approach to the duty of candour invites judicial criticism, and 10 cases where the claimant party was found to have failed in their duty of candour. Of these cases, 15 (65%) relate to judicial reviews in the immigration and asylum context, including age assessment decisions by local authorities.

24 More detail on the information collated can be found at "Work Package 1: Results" in E.A. O'Loughlin, *Transparency and Judicial Review: An Empirical Study of the Duty of Candour: Supplementary Materials* (2024) 14-16, available at https://www.durham.ac.uk/media/durham-university/departments-/law-school/pdfs/Candour-Supplementary-Document.pdf.

Duty of candour: the law

When does the duty of candour apply to parties?

Once permission to apply for judicial review has been granted, parties are required to make "proper disclosure".[25] The Civil Procedure Rules reflect this position, requiring defendant public authorities to provide written evidence within 35 days of permission being granted where they wish to contest a claim[26], and to identify relevant facts and reasoning in their detailed grounds or evidence in accordance with the duty of candour[27]. Other sources, however, indicate that the duty of candour applies prior to the grant of permission. The *TSOL Guidance* on discharging the duty advises 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'.[28] Practical reasons explain this approach, given that an awareness of an impending challenge triggers the need to inform defendant departments that they should suspend any document destruction policies and preserve potentially relevant documents.[29] Further, other aspects of the judicial review process require the sharing of facts and information in a manner that mirrors the duty of candour. For instance, the judicial review PAP requires the defendant public authority to explain facts related to the issue in dispute and share relevant documents and information.[30] If a defendant chooses to file an Acknowledgement of Service, which they commonly do, Summary Grounds must identify relevant facts and reasoning underlying the decision in dispute.[31] More recently there has been judicial commentary confirming that the duty of candour applies prior to the grant of permission, and this has been captured in the latest updates to *The Administrative Court Judicial Review Guide*.[32] A key point of contestation, however, is the question of how the duty can arise at the pre-action stage, given that it is a duty of candour and cooperation that is owed to the court and not to the other party.[33]

When does the duty of candour apply to parties? The dataset[34]

Pre-issue

3 cases in the dataset indicate that the duty of candour applies before a claim for judicial review has been issued. One of the cases endorses the *TSOL Guidance* that the duty of candour applies at all stages of proceedings, including to letters of response under the pre-action protocol.[35] This mirrors the position the recent case of *HM v Secretary of State for the Home Department*, in which the Divisional Court took the position that the TSOL guidance is an accurate statement of the law.[36] Two other cases in the dataset involve a statement that information and documents should have been disclosed at pre-action stage. In *National Association of Probation Officers*, the union for probation officers made a partially successful pre-action disclosure application for details of the potential sale of Community Rehabilitation Companies so that they could make an urgent informed application for permission to judicial review.[37] In *Abdul Aziz Jalil*, 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'.[38]

Post-issue but pre-permission

9 cases acknowledge that the duty of candour applies prior to the grant of permission, without going as far as to state that it applies prior to the issuing of a judicial review claim. Some earlier case law, in the wake of the

25 *R. (on the application of I) v Secretary of State for the Home Department* [2010] EWCA Civ 727 [50] (note that this case is not in the dataset of case law mentioning the duty of candour).

26 CPR r.54.14.

27 CPR PD 54A, para 11.1.

28 Treasury Solicitor's Department, *Guidance on Discharging the Duty of Candour and Disclosure in Judicial Review Proceedings* (2010), para.1.2.

29 Treasury Solicitor's Department, *Guidance on Discharging the Duty of Candour and Disclosure in Judicial Review Proceedings* (2010), para 2.2.

30 Pre-Action Protocol for Judicial Review, para.3(a).

31 CPR PD 54A, para 6.2.

32 Courts and Tribunals Judiciary, *The Administrative Court Judicial Review Guide 2024*, para 15.3.2.

33 Faulks et al, *The Independent Review of Administrative Law* (2021), para.4.117.

34 More detail on the information collated on the timing of the duty can be found at "Work Package 1: Results" in E.A. O'Loughlin, *Transparency and Judicial Review: An Empirical Study of the Duty of Candour: Supplementary Materials* (2024) 16-18, available at: https://www.durham.ac.uk/media/durham-university/departments-/law-school/pdfs/Candour-Supplementary-Document.pdf.

35 *K, A and B v Secretary of State for Defence* [2014] EWHC 4343 (Admin) [11].

36 *R (HM) v Secretary of State for the Home Department* [2022] EWHC 2729 (Admin) [16].

37 *R (National Association of Probation Officers) v Secretary of State for Justice* [2014] EWHC 4349 (Admin).

38 *R (Abdul Aziz Jalil) v Secretary of State for Justice* [2020] EWHC 1151 (Admin) [53].

release of the *TSOL Guidance* on discharging the duty of candour, saw judges accept that the duty of candour applies prior to the grant of permission.[39] Decisions have affirmed that it applies to claimants when they file applications for urgent consideration,[40] and defendants filing an Acknowledgement of Service in advance of a permission decision.[41] More recently, cases have asserted that the duty of candour applies before the permission stage depending upon the context of the case,[42] and the duty requires disclosure at permission stage if permission is resisted.[43] While the duty of candour and cooperation has been accepted by some judges as applying prior to the grant of permission, recent cases underline that what is required to discharge the duty will be more extensive once permission has been granted.[44]

Duty applies post-permission

There are 7 cases in the dataset that support the view that the duty of candour applies once permission has been granted. Several of the cases demonstrate this view merely by way of finding that the relevant defendant should provide relevant disclosure in advance of the judicial review hearing,[45] and are therefore not explicitly endorsing a view that the duty of candour only applies once permission to bring a judicial review claim has been granted. Two earlier cases have noted that the duty upon public authorities to disclose all relevant facts and information arises as soon as permission is given.[46] The most recent case to align with this view is *British Gas Trading Ltd*, in which Singh LJ remarked that 'it is usually the grant of permission which is the trigger for the duty of candour and cooperation with the Court to arise'.[47]

When does the duty of candour apply to parties? Interim conclusion

Across 2022-2023, there were 2 cases endorsing the view that the duty of candour applies at all stages of proceedings, including at pre-action stage; 2 cases underlining that the duty applies prior to the grant of permission; and 1 case remarking that it is usually the grant of permission that triggers the duty of candour and cooperation. This demonstrates that the case law remains unclear on the question of when the duty of candour applies to parties. All relevant judicial commentary in the dataset on when the duty of candour begins to apply to parties was made in High Court level. While in a 2022 Divisional Court judgment, it was stated that the *TSOL Guidance* position that the duty of candour applies as soon as a department is aware of a potential judicial review 'accurately reflects the law', this does not appear to have settled the question.[48] There is therefore scope for the position to be clarified, either by a higher court, or in relevant procedure rules and directions.

Practitioner views on when the duty of candour is engaged

Not all public law practitioners interviewed in the course of work package 2 explicitly outlined their views on when the duty of candour and cooperation engages potential public law litigants, but those that did were almost unanimous that the duty of candour and cooperation applies at the pre-action stage of correspondence in advance of a judicial review claim being issued (14 of 19 practitioners interviewed). Participants employed slightly different ways of expressing when the duty of candour applied in the pre-action stages. Some remarked that the duty of candour applies:

'when litigation is genuinely anticipated'
(Solicitor 2 – claimant practice)

'when there is a reasonable prospect of a claim'
(Solicitor 8 – defendant practice)

'whenever a case is intimated against you'
(Counsel 4 – mixed practice)

39 *Maya Evans v Secretary of State for Defence* [2010] EWHC J0127-1 [203]; R (Chadha) v HM Senior Coroner for West London [2015] EWHC J1126-3 [161].
40 *DVP v Secretary of State for the Home Department* [2021] EWHC 606 (Admin), 5.
41 *R (on the application of M (A Child)) v Secretary of State for the Home Department (Unaccompanied Children: Art.17 Dublin Regulation: Remedies)* [2017] UKUT 124 (IAC) Appendix 1; R (on the application of Mahmood) *v Secretary of State for the Home Department* [2014] UKUT 439 (IAC) [17].
42 *R (Terra Services Limited) v National Crime Agency and others* [2019] EWHC 1933 (Admin) [14].
43 *Scott Newson v The Secretary of State for Justice* [2022] EWHC 2836 (Admin) [19].
44 *Camila Batmanghelidjh v Charity Commission for England and Wales* [2022] EWHC 3261 (Admin) [47]; *The King (on the application of Police Superintendents' Association) v The Police Remuneration Review Body* [2023] EWHC 1838 (Admin) [15].
45 *JM (Zimbabwe) v Secretary of State for the Home Department [2016]* EWHC 1773 (Admin); R (Kumar) *v Secretary of State for the Home Department* [2023] EWHC 1741 (Admin).
46 *R (Public and Commercial Services Union and others) v Minister for the Civil Service* [2011] EWHC 2556 (Admin); R (Buav) *v Secretary of State for the Home Department* [2012] EWHC 2696 (Admin)
47 *The King (on the application of British Gas Trading Ltd) v Secretary of State for Energy Security and Net Zero* [2023] EWHC 737 (Admin) [145].
48 *R (HM) v Secretary of State for the Home Department* [2022] EWHC 2729 (Admin) [16].

Others attached weight to pre-action correspondence:

'There is that obligation on, say, defendant or a respondent in preparing and drafting firstly a responding pre-action correspondence' (Counsel 7 – defendant practice)

'when we get a pre-action letter and we've got to respond to it, we've got to respond in accordance with the duty of candour' (GLD Solicitor 2)

Respondents shared a range of views on the practical benefits of engaging with the duty prior to the issuing of a claim:

'You haven't really got your grounds made out, but you know that the only way you'll get anywhere is to have sight of some documents…' (Solicitor 2 – claimant practice)

'The whole point is you don't want to go to litigation so what's the point of waiting 'til you're litigating to get the information that's going to settle the claim? It's just a waste of money and time and Court time and the whole point of it is to avoid that.' (Solicitor 3 – claimant practice)

'That narrows the issues, it means you resolve it quicker, it means you don't get cases going into court unnecessarily and you save costs, but that equally applies across the life of the case.' (Solicitor 4 – claimant practice)

'making sure a defendant has communicated with their employees… about… retention of information and preserving documentation… I think puts in the minds of people that this is documentation that may need to be disclosed in due course… I think it ultimately leads to earlier disclosure and flushing out of the key issues relevant to the decision under challenge, usually at the pre-action or early claim stages.' (Solicitor 6 – mixed practice)

Finding 1: the case law is unclear on when the duty of candour and cooperation begins to apply to parties in judicial review. In practice, the duty of candour is generally treated by parties as engaged during pre-action steps taken prior to the commencement of judicial review proceedings. There is a gap between judicial articulations on the question of when the duty of candour applies and practitioner approaches in practice. There is scope for the position to be clarified, either in case law or in relevant procedure rules and directions.

Does the duty of candour extend to unpleaded grounds of challenge?[49]

The *TSOL Guidance* interprets the scope of the duty of candour as extending to 'documents/information which will assist the claimant's case and/or give rise to additional (and otherwise unknown) grounds of challenge'.[50] Some academic commentary has suggested that such an approach may be 'to the detriment of the public interest in efficient and effective administration'[51].

Unpleaded-grounds: the case law

8 cases in the dataset affirm that the material and information need only be adduced that relates to the matters pleaded. For instance, in *Refinitiv Ltd,* the nature of the duty of candour and the requirements of disclosure were limited to the claimant's pleaded case upon which permission was granted.[52] Even where permission has not yet been granted, a defendant public authority was not required to provide information that did not relate to a ground under challenge.[53]

49 For a further breakdown of the cases in the dataset, see "Work Package 1: Results" in E.A. O'Loughlin, *Transparency and Judicial Review: An Empirical Study of the Duty of Candour: Supplementary Materials* (2024) 18-19, available at https://www.durham.ac.uk/media/durham-university/departments-/law-school/pdfs/Candour-Supplementary-Document.pdf.

50 Treasury Solicitor's Department, *Guidance on Discharging the Duty of Candour and Disclosure in Judicial Review Proceedings* (2010), para.1.2.

51 C. Harlow and R. Rawlings, *Law and Administration* (4th edn, CUP, 2021) 857.

52 *R (on the application of Refinitiv Ltd) v R & C Commissioners* [2023] UKUT 187 (TCC) [29].

53 *Secretary of State for the Home Department v First-tier Tribunal* (Social Entitlement Chamber) [2021] EWHC 1690 (Admin) [76]-[78].

4 cases in the dataset endorse the position that the duty might extends to otherwise unknown grounds of challenge. In *Abraha*, there was a breach of the duty of candour where an inconsistency arose between two Home Office caseworkers' witness statements in separate judicial review claims relating to the electronic travel document process for returns to Eritrea.[54] In that context, Singh J (as he then was) cited with approval the *TSOL Guidance* position on the extent of the duty and stated that the underlying rationale for the TSOL approach to the duty of candour is the principle that public law litigation should not be conducted in the same manner as private commercial litigation. A public authority defendant is not trying 'to win a case at all costs, for example, by answering questions strictly accurately but keeping its cards close to its chest otherwise. This is essential for the maintenance of the rule of law in this country, something everyone can take pride in, including the government.'[55] Therefore, the duty might extent to otherwise unknown grounds of challenge to 'assist the court to understand fully the decision-making process under challenge'.[56] *In Bancoult (No 2)*, the House of Lords also cited with approval the position in the *TSOL Guidance*, in the context in which draft versions of a document should have been disclosed as they contained 'material that was obviously germane to the issues between the parties'.[57] More recently, in *Police Superintendents' Association*, Fordham J summarised the position as the "Unpleaded-Grounds Principle": the duty of candour and cooperation 'extends to documents and information which will assist the claimant's case or may give rise to further grounds of challenge which might not otherwise occur to the claimant.'[58]

That the duty extends to documents and information that might give rise to further grounds of challenge has therefore been confirmed at the highest levels of the judiciary. However, the "Unpleaded-Grounds Principle", to adopt Fordham J's formulation, does not mean that claimants can request – or defendants must provide – information or documents that are not related to the general issue under challenge. Other cases have described instead the requirement that what must be put forward is everything material or *potentially* relevant.[59]

Unpleaded grounds: practitioner views

Several practitioners underlined the importance of the "Unpleaded-Grounds Principle" in practice. Some attached particular weight to the principle given the inequality of arms in relation to information between parties to judicial review:

'...we are already operating on a completely uneven playing field, right, and it's the only levelling measure really...because we rely on them to provide us the information... I just think it's key'. (Counsel 1 – claimant practice)

'I think it should [extend to unpleaded grounds] because you won't know what the policy is until you have it in your hands, and then once the claimant has it in their hands they can decide that "Actually, this policy is unlawful for another reason".' (GLD Solicitor 3)

Moreover, respondents called to attention the practical benefits that the principle can bring to proceedings:

'...if the duty of candour did not extend to... a full explanation that potentially gave you other [grounds]...Then I think that would be counterproductive because we would have to write much longer letters that raised every possible argument, even potentially without evidence, and ask them to confirm or deny...I don't think that would be hugely helpful or time saving.' (Solicitor 5 – mixed practice)

'I think it would narrow the issues if it is included in the unknown ground. Because otherwise you'd have a case where... Essentially, you might have duplicative JRs, so you might have one JR challenging the actual decision then you get disclosure in JR1 and then we're saying to the claimant, "Well you've got to file a second JR to challenge this policy," so it would just multiply resources for the Judges and for the parties. So I can see on a pragmatic basis why the unknown ground is still there.' (GLD Solicitor 3)

54 *Abraha v Secretary of State for the Home Department* [2015] EWHC 1980 (Admin) [125].
55 Ibid [123]-[124].
56 Ibid.
57 *R (Bancoult (No.2) v Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 35 [183]-[185].
58 *The King (on the application of Police Superintendents' Association) v The Police Remuneration Review Body* [2023] EWHC 1838 (Admin) [15].
59 *R (D9) v Secretary of State for the Home Department* [2021] EWHC 2784 (Admin) 9.

Some with a primarily defendant-acting practice remarked the line between the "Unpleaded-Grounds Principle" and overloading proceedings with too much information can be difficult to draw[60]:

'in principle I think it is right that that information is disclosed. It might not fall squarely within the claim as framed, and that's the whole point of the ongoing nature of the duty, but I think it shouldn't be used in a way that leads to fishing expeditions because I think ultimately that just… undermines what the administrative Court is trying to do, I think, which is to resolve these challenges fairly and robustly, and I think if parties and the Court are overwhelmed with irrelevant documentation around the fringes that might create soundbites and headlines by being aired in open Court, I think that really kind of undermines the integrity of the… system of judicial review.' (Solicitor 6 – mixed practice)

'I think there is a role for candour to be engaged where it reveals something that the claimant could not possibly have known, but is relevant to the formulation of a point they are reaching towards already… But, you know, equally, it feels problematic if the duty is said to extend to… a completely different, irrelevant consideration that has got nothing to do with anything the claimant is articulating, and indeed wouldn't be particularly relevant to the claimant's particular interest or standing. I think that feels like it's putting too much pressure on government and practitioners to go round taking down their own decisions, in a way which is ultimately not helpful and frankly impractical, and probably would only lead to more defensive approaches.' (Counsel 5 – defendant practice)

Government lawyers however noted that they did not necessarily feel that the principle was too onerous:

'…if there was something that we thought was in the interests of our duty to the court… to try and clarify, then we would try and do that. But I don't think it's overly burdensome in that sense.' (GLD Solicitor 1)

'it depends on the facts of the case, doesn't it… I think it is burdensome or can be burdensome, but that is the nature of the exercise in some cases and the point is we just comply in the interests of justice and put before the court what the court needs to see to make the right decision. And that could be… that it brings further grounds to light or along the way…' (GLD Solicitor 2)

These views shared by participants generally show that, while there is support for and practical value in the "Unpleaded-Grounds Principle", judgement should be exercised in ensuring that it does not give way to wide-ranging searches for unlawfulness, or an overloading of a claim or potential claim with irrelevant documents and information. Moreover, the courts do use their inherent case management powers to ensure that requests for further searches or disclosure do not extend into fishing expeditions.[61]

Finding 2: the "Unpleaded-Grounds Principle" – that the duty extends to documents and information that may give rise to further grounds of challenge in the judicial review claim – is an important tool of transparency that guides the sharing of potentially relevant information to help narrow the issues, particularly in the early stages of a potential judicial review claim. The case law shows that it should not, however, be used to widen the judicial review claim once permission has been granted, and the judicial review evidence base should track the issue in dispute.

60 Counsel 6 – defendant practice.

61 See, for example, *R (Alemayehu) v Secretary of State for the Home Department* [2013] EWHC 1458 (Admin), in which the scope of the duty of candour did not extend to wider searches and disclosure statements for further internal guidance and policy documents that were not known to exist.

Search requirements

Depending on the nature of the judicial review claim, the duty of candour and cooperation will sometimes require that parties – particularly public authority defendants – conduct a search of documents and records to establish what information and documents are required to be disclosed to meet the duty. The search exercise can be resource-intensive, particularly in complex policy challenges or those engaging multiple government departments or agencies. The *TSOL Guidance* outlines the practice of a 'pre-search conference' to determine how department records might be relevant to the issues in a case and then to plan searches to be undertaken. The *Guidance* underlines that searches should be sufficient to ensure that information shared in pre-action correspondence and in Summary Grounds are full and accurate, and that searches may be limited by relevance and proportionality. The *Guidance* suggests following the approach outlined in CPR 31.7, outlining factors that will influence the reasonableness of the search exercise including the 'number of the documents involved; the nature and complexity of the proceedings; the ease and expense of retrieval of any particular documents; the significance of any document which is likely to be located during the search'.[62]

There have been times where the courts have reflected upon the need to conduct searches and the approach to be taken to the search exercise.[63] For example, judges have found that earlier and more thorough searches of emails were required to secure compliance with the duty,[64] and may order searches as part of disclosure orders.[65] Depending on the nature of the issue under review, the duty of candour might also require searches of communications on private email accounts and other non-corporate communications channels,[66] including searches of claimant social media accounts where relevant.[67] In the *Al-Sweady* case, which related to serious allegations of violations of human rights by British soldiers in Iraq, a serious breach of candour resulted from government lawyers declining to search electronic communications on the basis that to do so would have been disproportionate, which the court found should have been conducted.[68] The fallout prompted the drafting of the *TSOL Guidance*.

The courts nonetheless recognise that there will be times where wide-ranging searches will not be required or proportionate. For example, it has been noted that 'it would be an unusual case where the duty of candour requires an extensive inquiry into categories of cases, and more natural for the duty of candour to relate to how a failure to make reasonable enquiries in more specific and self-contained areas'.[69] Further, it has been acknowledged that the volume of documents created through the 'ease and convenience of modern communication' present challenges for the disclosure exercise, and further documentation may come to light late on in proceedings not because of a breach of the duty of candour, but because of the continuing nature of the duty.[70]

Search requirements: practitioners' experiences

Three interviewees shared their view that the proportionality of the search exercise(s) required to discharge the duty of candour will be naturally limited by the nature of the challenge.[71] For instance:

'...what the duty requires is...it's not just disclosure of documents, it's also disclosure of information. So, [it] could be a witness statement or a letter that allows you to understand the decision-making process and what's been taken into account and why the decision has been reached. I'm not sure why turning someone's WhatsApps upside down will help. If there's an allegation...of bias, improper purpose, maybe corruption, then maybe you would. But if you're really just saying... illegality, bad process, I'm not sure you need to do all of that.' (Solicitor 5– mixed practice).

62 Treasury Solicitor's Department, *Guidance on Discharging the Duty of Candour and Disclosure in Judicial Review Proceedings* (2010), paras 3.1, 3.2.

63 For a more detailed breakdown of the case law on this point, see see "Work Package 1: Results" in E.A. O'Loughlin, *Transparency and Judicial Review: An Empirical Study of the Duty of Candour: Supplementary Materials* (2024) 20, available at https://www.durham.ac.uk/media/durham-university/departments-/law-school/pdfs/Candour-Supplementary-Document.pdf.

64 *R (Sharon Shoesmith) v Ofsted and others* [2010] EWHC 852 (Admin); *R (Abdul Aziz Jalil) v Secretary of State for Justice* [2020] EWHC 1151 (Admin) [53].

65 *R (National Association of Probation Officers) v Secretary of State for Justice* [2014] EWHC 4349 (Admin).

66 *R (Good Law Project Ltd) v Secretary of State for Health and Social Care* [2021] EWHC 2595 (TCC) [8].

67 See, for example, challenges to age assessments of asylum seekers: *R (on the Application of BG) v London Borough of Hackney (Social Media; Candour; Disclosure)* [2017] UKUT 338 (IAC) [48]; *The King on the application of AY v Essex County Council,* Upper Tribunal (Immigration and asylum chamber), 2022-12-12, JR-2022-LON-000455 (UR) [21].

68 *R (Al-Sweady) and others v Secretary of State for Defence* [2009] EWHC 2387 (Admin) [41]-[42].

69 *R (Medical Justice) v Secretary of State for the Home Department* [2019] EWHC 2391 (Admin) [65].

70 *R (Mr William Robert Legard) v Royal Borough of Kensington and Chelsea* [2018] EWHC 32 (Admin) [174].

71 Counsel 4 – mixed practice; Solicitor 5 – mixed practice; Counsel 7 – defendant practice.

Further, there was acknowledgement amongst practitioners that search requirements at PAP-stage are not capable of being as extensive as they will be once proceedings are afoot.[72] It was noted by one participant that the framing of the initial challenge might limit what can reasonably be expected to be provided in pre-action correspondence:

'I think there's quite a lot where claimants will bring quite wide-ranging sets of allegations to which it's neither proportionate or realistic in the timeframe for a pre-action piece to provide a full answer.' (Solicitor 8 – defendant practice).

In more complicated challenges the importance of returning to or widening search exercises as the challenge evolved was underlined:

'…cases have been long running and often evolved over their lifetime, material hasn't tended to be provided in one chunk… Rather, there's been, whether it's through requests for specific disclosure, whether it's been through the sheer volume and complexity of the underlying material, a process of repeatedly going back to the well to see what more is there, and that obviously includes circumstances where grounds of challenge have evolved in response to disclosure.' (Counsel 6 – defendant practice)

One participant noted the practical challenges that can arise in conducting keyword searches for information:

'…people can undervalue the skill and care that is needed to use the technology properly… when you're getting big systemic challenges about the way a system operates that it can be much harder to structure your disclosure searches.' (Counsel 7 – defendant practice.)

Moreover, the search exercise is more complicated where multiple agencies, departments, or private contractors are implicated in the action(s) under review. One participant shared a sense of greater *'disorganisation'* in the approach to the duty in such cases,[73] and government lawyers noted the impact this has on the timeliness of complying with the duty:

'… the more complex a challenge is with the more parties involved, it will or is likely to take more time sort of get everyone on board and fully informed and appropriately able to respond. So, yeah, we've had some very complex matters involving more than one department, and you'd expect that to, you know, to take a bit more time than you would. But equally some of those cases are the most urgent.' (GLD Solicitor 1)

One participant noted the perception that some respondent departments took the view that 'subcontractors aren't included in the duty of who you should disclose the information from'.[74] Another underscored the impediments faced to tracing relevant information and records by held private parties, particularly in a secure context:

'perhaps a prison where you don't have tablets or computers regularly available; they're in secure locations for security reasons. So, the difficulty that you would have with paper trails is that the standard of documentation and keeping … it's all down to that third party and what their housekeeping procedures are. So, you are hostage to whatever their standards are.' (Solicitor 7 – defendant practice)

The same participant nonetheless noted that in their experience the quality of record-keeping amongst third party providers was high, as they will: *'often put more investment into infrastructure but also into technology and therefore it can be common for there to be bespoke databases or bespoke systems implemented by a third party provider'*.[75]

The duty of candour and disclosure of documents

A key point of contestation in practice is the relationship between the duty of candour and the disclosure of documents. In civil proceedings, disclosure is a process by which parties to the litigation disclose to each other the existence of all relevant documents in their control, and the extent of disclosure required is ultimately determined by the court. In judicial review proceedings, rather than a formal process of disclosure between parties, there is reliance instead upon the operation of the duty of candour. The leading case law places emphasis, not

72 Solicitor 5 – mixed practice; Solicitor 8 – defendant practice.
73 Counsel 3 – claimant practice.
74 Solicitor 3 – claimant practice.
75 Solicitor 7 – defendant acting.

on the sharing of documents, but on the requirement to 'assist the court with full and accurate explanations of all the facts relevant to the issue the court must decide.'[76] In practice, however, public bodies commonly opt to disclose documents as part of the way they discharge the duty of candour, and the *TSOL Guidance* advises that the duty will usually be met by a 'mix of explanation by way of witness statement, and exhibiting key documents…'.[77] Moreover, the courts have generally supported the provision of documents, as 'what a witness perfectly honestly makes of a document is frequently not what the court makes of it'.[78] That being said, it is not appropriate for a defendant public authority to provide huge amounts of documentation without explanation or drawing to the attention of the parties and the court the significance of the documents.[79]

Disclosure of documents: the dataset[80]

Several cases in the dataset underlined that the nature of the duty is 'information based and not restricted to documents',[81] and it is expected that 'the public authority defendant will explain in an open and full manner how it reached the decision impugned, exhibiting the relevant supporting documents, without need for any general or specific order'.[82] The key question is whether disclosure of documents is 'in the interests of fair disposal of the case'.[83] There are also however a number of cases asserting that the duty of candour requires the disclosure of relevant documents.[84]

While the Court of Appeal appears to have confirmed that the duty of candour requires the disclosure of material documents,[85] in the recent case of *JM* it was held that relevant documents did not have to be disclosed 'per se; but the substance of the information in the documents which shed light on the decision-making process in my judgment fell to be disclosed as a matter of candour'.[86] *JM* was distinguished in Fordham J's more recent summation of the "Best Evidence" Principle, in which he outlined that '[d]ocuments should be produced, not gisted or a secondary account given, since the document is the best evidence of what it says'.[87] Fordham J took the view 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… Not gists. Nor summaries. Not descriptions of contents or features of the document. Not selected quotations. Instead, the documents themselves'.[88]

This "Best Evidence" principle is now clearly reflected in the latest version of the *Administrative Court Judicial Review Guide*, which provides that:

76 *R. (on the application of Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* (No.1) [2002] EWCA Civ 1409, [50].

77 Treasury Solicitor's Department, *Guidance on Discharging the Duty of Candour and Disclosure in Judicial Review Proceedings* (2010), para.1.2.

78 *R (National Association of Health Stores) v Secretary of State for Health* [2005] EWCA Civ 154 [49].

79 *R (on the application of Hoareau) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWHC 1508 (Admin) [20].

80 For a more detailed breakdown of the case law on this point, see "Work Package 1: Results" in E.A. O'Loughlin, *Transparency and Judicial Review: An Empirical Study of the Duty of Candour: Supplementary Materials* (2024) 20-21, available at https://www.durham.ac.uk/media/durham-university/departments-/law-school/pdfs/Candour-Supplementary-Document.pdf.

81 *Abraha v Secretary of State for the Home Department* [2015] EWHC 1980 (Admin) [123].

82 *British Union for the Abolition of Vivisection v Secretary of State for the Home Departmen*t [2014] EWHC 43 (Admin) [55].

83 *Tweed v Parades Commission for Northern Ireland* [2006] UKHL 53 [41].

84 E.g. *The King on the application of Bembridge Harbour Trust v Bembridge Harbour Improvement Company Ltd* [2023] EWHC 1185 (Admin) [71]. See "Work Package 1: Results" in E.A. O'Loughlin, *Transparency and Judicial Review: An Empirical Study of the Duty of Candour: Supplementary Materials* (2024) 21-22, available at https://www.durham.ac.uk/media/durham-university/departments-/law-school/pdfs/Candour-Supplementary-Document.pdf.

85 *R (Citizens UK) v Secretary of State for the Home Department* [2018] EWCA Civ 1812 [106]: 'The duty not to mislead the court can occur 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.'

86 *JM v Secretary of State for the Home Department* [2021] EWHC 2514 (Admin) [91].

87 *The King (on the application of Police Superintendents' Association) v The Police Remuneration Review Body [2023]* EWHC 1838 (Admin) [15]. See generally, Elizabeth O'Loughlin, Cassandra Somers-Joce and Gabriel Tan 'Fordham's Ten Principles of the Duty of Candour in Judicial Review' (Essex CAJI Blog, August2023), available at: https://essexcaji.org/2023/08/16/fordhams-ten-principles-of-the-duty-of-candour-in-judicial-review.

88 Ibid [17]-[18].

'Where a party relies on a document, and the document is significant to the decision under challenge, it will be good practice to disclose the document rather than merely summarise it, because the document is the best evidence of what it says.'[89]

That such an intervention was required demonstrates that there remained some uncertainty in practice on the question of whether relevant documents are required to be disclosed in addition to information to satisfy the duty, or whether the practice of 'gisting' can be sufficient. Further, while the prevailing position has been that the duty of candour is principally about provision of *information*, Fordham J has also recently outlined the "Information-Too Principle", which requires relevant information to be set out 'insofar as unapparent from disclosed contemporaneous documents'.[90] This "Information-Too" principle reflects the position that documents should not be disclosed absent of contextual explanation,[91] though one commentator has remarked that the principle implies 'that the provision of information is secondary to a duty of disclosure of documents'.[92]

Disclosure of documents: practitioner views

Several interviewees shared the view that the focus of the duty of candour is the provision of accurate information and explanation[93]:

'Duty of candour is not the same as a conventional definition of disclosure obligation... you've got to provide the good, the bad, and the ugly; a full detailed explanation which is accurate and which covers all the points that they have raised' (Counsel 7 – defendant practice)

'I think the duty requires the provision of information, I'll stress the information as opposed to documents, that is relevant to the matters under challenge. Legally relevant. And to enable the court to decide the issues before it.' (GLD Solicitor 1)

Participants nonetheless considered that the duty requires the disclosure of relevant documents[94]:

'...essentially have got to hand over and make plain the material that went into the decision making. And commonly I think that means it's not ideas or thoughts from officials in the initial phases, it's not necessarily drafts, but it's the papers that ultimately inform the decision that is the subject of the challenge.' (Solicitor 8 – defendant practice)

Others underlined that when documents are required to meet the duty depends upon the context of the challenge in question:

'There's also an element of the greater role of witness evidence in complying with the duty of candour. So, it may well be that you can discharge significant parts of the duty of candour in the witness statement, and then it's just a question of do we need the documents to back it up, either because they're obviously relevant or 'cos they're really the best evidence...' (Counsel 4 – mixed practice)

'I often think that it's perhaps more helpful to think of what we're talking about in terms of the provision of information, and that can include where appropriate the provision of documents, but it avoids the risk of drifting into a kind of civil disclosure mental space.' (Counsel 6 – defendant practice).

Though it did not arise much during the interviews, a couple of practitioners noted that there may be times where the practice of providing 'gists' of the information has been beneficial and appropriate. One participant provided an example of resorting to the provision of 'anonymised gists' to provide an account of decision-making that did not undermine national security, which they considered a 'creative' solution in coordination with the court and opposing counsel.[95] Though in general it appears that gists of primary documents will not be an acceptable way to discharge the duty of candour, the courts will accept gists where the circumstances of the case require it, such as where information might harm the UK's international relations or the principle of

89 Courts and Tribunals Judiciary, *The Administrative Court Judicial Review Guide 2024* (October 2024) para 15.1.3.

90 *The King (on the application of Police Superintendents' Association) v The Police Remuneration Review Body* [2023] EWHC 1838 (Admin)

91 See, for example, *R (on the application of Hoareau) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWHC 1509 (Admin) [20].

92 T. Hickman, 'Candour Inside-Out: Disclosure in Judicial Review' (UK Constitutional Law Association Blog, October 2023), available at: https://ukconstitutionallaw.org/2023/10/16/tom-hickman-kc-candour-inside-out-disclosure-in-judicial-review/.

93 Solicitor 4 – claimant practice; Solicitor 9 – defendant practice; Solicitor 5 – mixed practice.

94 Solicitor 3 – claimant practice; Solicitor 6 – mixed practice.

95 Counsel 6 – defendant practice.

collective cabinet responsibility.[96]

> Finding 3: there are differing views – both in case law and amongst practitioners – as to whether the duty of candour always requires the disclosure of relevant documents.

Timing of disclosure

Though there might be some obfuscation over whether the duty of candour and cooperation requires the disclosure of documents, it has nonetheless been expressed as good practice that the disclosure of documents should be provided.[97] This gives rise to questions regarding the optimum timing of disclosing documents to parties.

Timing of disclosure: the dataset

Pre-permission[98]

Several cases in the dataset underscore that what is required to satisfy the duty of candour after the grant of permission is more extensive than what is required before the grant of permission, that fuller disclosure of documents is normally expected once permission has been granted,[99] and the courts have generally been weary of pre-action or pre-permission disclosure applications.[100] There are, however, instances where the courts have asserted that, where centrally relevant to the lawfulness of the decision, disclosure should be provided prior to the grant of permission. For example, in *Abdul Aziz Jalil*, an email chain which showed how and who made a decision relating to the recategorization of a prisoner should have been disclosed 'much sooner. Had he done so, the concession that the decisions were unlawful might well have been made at the very outset, soon after the pre-action protocol letter… the email chain could and should have been obtained and disclosed at a very early stage'.[101]

Fordham J recently outlined – in a series of obiter comments on the duty of candour – the "Permission-Stage" principle, that the duty of candour applies:

'prior to – and for – the Court's consideration of whether to grant permission for judicial review, though what is required to discharge the duty at the substantive stage will be more extensive… If documents matter, they should be provided. If they matter prior to or at the permission stage, that is when they should be provided'.[102]

Late disclosure

Beyond the question of the level of disclosure required prior to or once permission has been granted, there are also instances in the dataset where the court has underlined that the disclosure of further evidence or information had been provided at too late a stage in the judicial review proceedings.[103] In general, in cases where the courts express their dissatisfaction at the provision of relevant information or documents it usually relates to the sharing either just before[104], or even during the judicial review hearing.[105]

In several of these cases, the provision of late-stage evidence had consequences for the timeline of the judicial review cases. For instance, in *JM*, owing to late disclosure the day before the hearing, the hearing was adjourned part heard on directions for a further half-day hearing, to allow the court and claimants time to

96 See *Solange Hoareau v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWHC 3825 (Admin) [14]-[15]

97 *R (on the application of National Association of Probation Officers) v Secretary of State for Justice* [2014] EWHC 4349 (Admin) [15].

98 For an overview of further cases on this topic in the dataset, see "Work Package 1: Results" in E.A. O'Loughlin, *Transparency and Judicial Review: An Empirical Study of the Duty of Candour: Supplementary Materials* (2024) 24, available at https://www.durham.ac.uk/media/durham-university/departments-/law-school/pdfs/Candour-Supplementary-Document.pdf.

99 *Camila Batmanghelidjh v Charity Commission for England and Wales* [2022] EWHC 3261 (Admin) [44-][47]; *The King (on the application of British Gas Trading Ltd) v Secretary of State for Energy Security and Net Zero* [2023] EWHC 737 (Admin) [145].

100 *British Union for the Abolition of Vivisection v Secretary of State for the Home Department* [2014] EWHC 43 (Admin) [55]; *R (Terra Services Limited) v National Crime Agency and others* [2019] EWHC 1933 (Admin) [17]. Cf. *R (National Association of Probation Officers) v Secretary of State for Justice* [2014] EWHC 4349 (Admin).

101 *R (Abdul Aziz Jalil) v Secretary of State for Justice* [2020] EWHC 1151 (Admin) [53].

102 *The King (on the application of Police Superintendents' Association) v The Police Remuneration Review Body* [2023] EWHC 1838 (Admin) [15],[18].

103 For an overview of further cases on this topic in the dataset, see "Work Package 1: Results" in E.A. O'Loughlin, T*ransparency and Judicial Review: An Empirical Study of the Duty of Candour: Supplementary Materials* (2024) 17-18, available at https://www.durham.ac.uk/media/durham-university/departments-/law-school/pdfs/Candour-Supplementary-Document.pdf.

104 *JM v Secretary of State for the Home Department* [2021] EWHC 2514 (Admin).

105 *Bokrosova v London Borough of Lambeth* [2015] EWHC 3386 (Admin) [41].

consider the significant documents.[106]

The courts will generally recognise where the late provision of evidence by defendant public authorities is not the fault of government lawyers,[107] and this underscores the importance of the continuing nature of the duty. For example, in *Saha*, a challenge to the cancellation of leave based on purportedly fraudulently obtained English Language proficiency tests, the provision of the applicant's certificate and a spreadsheet of relevant test scores were provided after the completion of the hearing days.[108] McCloskey J remarked that the Secretary of State's legal team had 'discharged their professional and ethical duties conscientiously given the obvious and persistent difficulties they were clearly experiencing vis-à-vis their client.'[109] The requirement to provide disclosure in a timely fashion also extends to claimants; as noted in *BG*:

'There have been cases which have settled at a late stage as a result of a respondent's late discovery of social media material which casts grave doubt on the age claimed by an applicant. In most cases of that nature, there will be no reasoned judgment recording the course of events; a short order will be agreed, recording that the proceedings are withdrawn by consent, with consideration of costs to follow.'[110]

There will be occasions where the late provision of evidence gives rise to a finding of a breach of the duty of candour. For instance, in *Kumar*, which concerned a challenge to the denial of access of a solicitor to the claimant when refused entry to the UK at an airport, the post-hearing provision of a key policy document on how to conduct immigration interviews led to a 'hastily-convened' subsequent hearing for which the defendant was ordered to pay costs 'because there was no good reason for the failure'.[111]

Timing of disclosure: practitioner experiences

Practitioner experiences of pre-action disclosure

Interviewees reported mixed experiences with receiving disclosure of documents at pre-action stage. Some reported that they rarely received disclosure of key documents prior to the grant of permission[112]:

'...in the ordinary non-urgent context, it's quite rare to get reasonable pre-action disclosure.' (Counsel 2 – claimant practice)

'in a review of central government decision-making, the critical documents are often the ministerial submissions... the information that was before the decisionmaker is broadly contained in those submissions. And so, that's a vital document for judicial review and that is very, very commonly withheld.' (Solicitor 1- claimant practice)

Others reported a mix of experiences, with core documents being received at pre-action stage, depending on the public authority defendant[113]:

'[local authorities and the police] won't give everything that we ask for, but they'll often give the sort of core decision documents at pre-action stage.' (Solicitor 1- claimant practice)

'...you might from the Secretary of State be able to get somebody's immigration records, the Home Office records, like their screening interviews and basic things like that. But when you're asking for wider disclosure about unpublished policies or.. internal... risk assessments, it's firstly at the pre-action stage it is, I would say, consistently my experience that there is a stock response that you receive.' (Counsel 3 – claimant practice)

Some participants shared a perception that the level of disclosure provided at pre-action stage varies depending on the nature of the challenge:

106 *JM v Secretary of State for the Home Department* [2021] EWHC 2514 (Admin) [9]-[10].
107 See, for example, *R (NB and others) v Secretary of State for the Home Department* [2021] EWHC 1489 (Admin) [18].
108 *R (on the application of Saha and Another) v Secretary of State for the Home Department (Secretary of State's duty of candour)* [2017] UKUT 00017(IAC) [6](f).
109 Ibid [50].
110 *R (on the Application of BG) v London Borough of Hackney* (Social Media; Candour; Disclosure) [2017] UKUT 338 (IAC) [54].
111 *R (Kumar) v Secretary of State for the Home Department* [2023] EWHC 1741 (Admin) [6].
112 Solicitor 1 – claimant practice; Counsel 1 – claimant practice.
113 Solicitor 9 – defendant practice; Counsel 4 – mixed practice.

'...the MiniSub that went up to the Minister... that's sort of treated as a relatively sensitive disclosure, and there may be less of a willingness to be throwing that around openly at really a pre-action protocol stage for a claim that might not get permission at all if that's not required. And so I think there are some of those departmental type sensitivities that can come into the decision making process.' (Counsel 4 – mixed practice)

'"mundane litigation"... which is never going to make the headlines... your advice on what candour requires relatively rarely gets pushback. But where ministers are closely interested...where SpAds[114] are closely interested, then you get much more pushback, much more insistence on wanting to understand precisely what is required and why providing anything more than the absolute bare minimum is required at any stage before absolutely necessary.' (Counsel 5 – defendant practice)

'where I have got it is when a challenge is really urgent, for example, removal challenges... The other area where I think disclosure happens sometimes is when it's an NGO challenge, for example, so when it's strategic from the outset...' (Counsel 1 – claimant practice)

'I have definitely done cases in which we have disclosed things with the pre-action correspondence... Because government were advised that we were going to have to disclose these, because they were directly relevant... sometimes it's better to have that stuff out front and centre, pre-action stage, so the claim is formulated by reference to those, rather than everyone changing tack as things go on.' (Counsel 5 – defendant practice)

Participants generally shared the view that what the duty of candour requires at pre-action stage will not be as extensive as what is required once permission has been granted:

'...at the pre-action stage and the pre-permission stage obviously there's a difference in law because the claimant has to make good their case... before you get to full disclosure... No one expects to or certainly we don't expect to get full disclosure at a pre-action stage. But there does seem to be a skew at the moment where we're not getting what you would expect' (Counsel 2 – claimant practice)

'I think governments generally would accept or accepts the advice that the duty applies to some degree at pre-action stage, sometimes pushback harder on that than others. In my experience, government definitely does not accept or work on the basis that applies to its full extent at the pre-action stage, and frankly that must be right.' (Counsel 5 – defendant practice)

There were, however, some distinctions amongst practitioners on the expectation of disclosure of documents by way of pre-action correspondence:

'when we're sending a letter before claim, that's when... we're expecting disclosure from them of the policy or the decision or the information that's been used to make a decision.' (Solicitor 4 – claimant practice)

'...it can arguably in most instances be satisfied by simply responding to the pre-action letter setting out in broad terms what has happened and either therefore how the claimant is wrong' (Solicitor 9 – defendant practice)

'...it may be that a party doesn't need anything more than what they've already clearly got to be able to proceed... But equally they may request further information at that stage and we view that on a merits basis. We will look and consider what's proportionate and what's required to narrow the issue sufficiently...' (GLD Solicitor 1)

'...it's not required to file any evidence at all until post-permission, and even then it's not a requirement to file evidence, it's a permissive thing. So, looked at from that perspective the procedure... doesn't even compel it.' (Solicitor 1 – claimant practice)

Interviewees with a defendant practice underlined the practical challenges of the ordinary 14 day timeline for responding to pre-action letters under the PAP procedure, and the impact this has with the level of engagement with the duty of candour one can reasonably achieve on that timeline. Government lawyers noted the complex coordination process triggered by receipt of a pre-action letter, requiring harmonisation between policy clients and advisory lawyers to immediately receive instructions and identify relevant information for consideration by government legal department, clients, and counsel.[115]

114 Special advisors support ministers in their work and are commonly referred to as "SpAds".
115 GLD solicitor 1, GLD Solicitor 2.

As one solicitor put it, '*one has limited time between the receipt of a pre-action letter to then respond to it.*'[116]

Several interviewees shared their perceptions on the benefits of engaging in disclosure of documents at pre-action stage:

'...it's better to try and disclose as much as we can at, say, the pre-action stage...because frankly realistically this person is probably going to issue their claim and therefore we're going to have to do it anyway so let's just get on with it and avoid the risk of being criticised in several months' time for disclosure failings.' (Solicitor 9 – defendant practice)

'I think the 20% of cases where they do come upfront tend to be those cases where... the lawyer on the other side is good and goes on the system, produces the assessment or the report that was subject to the decision and provides it all. And half the time when they do that, they realise there was a bit of an error and more assessments need to be done or more information needed to be gathered so new decisions need to be made...' (Solicitor 4 – claimant practice)

'it's in everyone's interest... the sooner you've got that disclosure, the sooner the merits assessment can be undertaken and it can often probably do away with some claims that are issued and then later have to be withdrawn or settled because documents come to light at a later stage. Which is not in claimant lawyers' interests because of the way that legal aid is set up and pre-permission costs risk... it really doesn't work in our favour to be issuing claims without having full sight of all the underlying information and evidence.' (Counsel 3 – claimant practice)

'...you've got to tackle it head on. And I think the reason for that is because if we can provide the documents early it can knock out some of their grounds.' (GLD Solicitor 3)

'...the rationale for disclosure...at the very least allow a much more carefully targeted claim and identification of the issues from the outset, rather than going through, you know, umpteen stages of repleading when things are dragged out later on.' (Counsel 5 – defendant practice)

Similarly, participants reported their perception of the negative impact that later disclosure can have on parties and proceedings:

'...rather than everything narrowing and... focusing as the litigation goes on, it can expand. ...that can be problematic because if you don't have a full disclosure before permission stage, for example, all of the arguments that might need to be made in order to secure permission may not necessarily have been made and so, you might be refused permission on the basis of the arguments that you weren't able to advance at the time.' (Solicitor 1 – claimant practice)

'I think probably more cases these days are pursuing Part 18 requests because they know that the duty isn't being complied with and that's taking up extra court time, it's delaying the progression of cases... The courts really don't like grounds being amended because then it puts the defendants back to them reamending their detailed grounds of defence. It can just be a vicious circle that goes on and on and on. It wastes a lot of time. It incurs a lot of additional expense on both sides.' (Counsel 3 – claimant practice)

Finding 4: a wide range of experiences were reported amongst practitioners on the provision of underlying documents prior to the grant of permission, and divergent perspectives on whether the duty of candour requires such disclosure. Early disclosure of documents has several benefits: it can lead to early resolution of cases, narrow the issues in dispute, and prevent the extension of proceedings via applications to amend grounds arising from late disclosure. There may be, however, practical limitations to the extent to which public authority defendants can provide early disclosure, including the volume of documents that may be required to be searched and considered.

116 Solicitor 9 – defendant practice.

The Duty of Candour in Practice

Approaches to the provision of disclosure

The duty of candour and alternate routes to information[117]

Outside of the context of judicial review, there are also other routes that operate to potentially secure information from public authorities. The Freedom of Information Act gives any person the right to make a request for information to a public authority, and to receive a written response.[118] Individuals also have the right under data protection legislation to ask for all the information an organisation (including government departments) holds about them by making a Subject Access Request (SAR). Some cases in the dataset make clear that the judicial review process – underpinned by the duty of candour – should not be used to secure information that could be obtained by way of other transparency frameworks such as the Freedom of Information Act 2000.[119] There are examples, however, which underline the problems with public authority respondents directing judicial review claimants to use alternate routes to information, such as by way of FOI request, rather than providing the information directly under as part of their duty of candour in judicial review proceedings. In *Plantaganet Alliance*, for example, the claimants secured limited and redacted disclosure from the public authority respondents via Freedom of Information requests, causing the court to order full disclosure in accordance with the duty.[120] Similarly, in *Babbage*, the Secretary of State for the Home Department had directed the claimant to submit requests for documents at pre-action stage to the Subject Access Request (SAR) unit, resulting in heavily redacted disclosure that was not resolved by operation of the duty of candour later on in proceedings.[121]

Practitioner experiences of alternate routes to information

Several practitioners reported that it was common to be re-directed to alternate avenues for securing information in correspondence, particularly at pre-action stage. Practitioners recounted experiences of this with local authorities and with central government departments:

'...when we're sending a letter before claim, that's when... we're expecting disclosure from them of the policy or the decision or the information that's been used to make a decision... you will get the other side automatically jumping on principles of freedom of information or sending us down a freedom of information route instead of actually providing the documents in this process.' (Solicitor 5 – mixed practice)

'...the three types of responses I've received, either no engagement at all, either disclosure or... not saying anything about the duty of candour specifically but saying, "You can make a SAR."' (Counsel 1 – claimant practice)

'...Home Office records, you know, like the screening interviews, you'll get those. Those usually I don't find are problematic. There might be a delay if you have to go through the subject access request, but you can get them...' (Counsel 3 – claimant practice)

'I've tended to find the best place to get hold of underlying material is with a subject access request – a shame it should have to be that way but it is.' (Counsel 7 – defendant practice)

'It's probably about 50% of the time. Yeah.' (Solicitor 4 -claimant practice)

A couple of respondents shared their perception that being directed to secure information via other routes was incorrect as a matter of law:

'...it's normally if I get an AoS with summary grounds of defence that isn't written by counsel, so where they haven't instructed out yet, and I in the usual way have made some requests for some disclosure of some sort they often respond saying, "You should get this by way of a SAR". I mean, it's just wrong, I think...' (Counsel 1 – claimant practice)

There is evidence in recent case law that caseworkers sometimes respond to PAP letters received by the Home

117 For a further breakdown of cases discussed in this section, see "Work Package 1: Results" in E.A. O'Loughlin, Transparency and Judicial Review: An Empirical Study of the Duty of Candour: Supplementary Materials (2024) 26, available at https://www.durham.ac.uk/media/durham-university/departments-/law-school/pdfs/Candour-Supplementary-Document.pdf.

118 Freedom of Information Act 2000, s1(1).The Environmental Information Regulations 2004 extend the right of access to environmental information to a wider range of public authorities, see EIR 2004, reg 2(2).

119 *R (Buav) v Secretary of State for the Home Department* [2012] EWHC 2696 (Admin) 3-4; *British Union for the Abolition of Vivisection v Secretary of State for the Home Department* [2014] EWHC 43 (Admin).

120 *R (Plantaganet Alliance Ltd) v Secretary of State for Justice and others* [2013] 1 Inquest LR 204 [35].

121 *R (Babbage) v Secretary of State for the Home Department* [2016] EWHC 148 (Admin). See also *R (Shirko Ismail) v Secretary of State for the Home Department* [2019] EWHC 3192 (Admin).

Office.[122] Though the Home Office Litigation Operations team does now work more closely with the Government Legal Department in drafting some PAP responses,[123] it appears to be the case that many PAP responses are still dealt with by caseworkers without legal training, and this might offer an explanation for the prevalence of the practice of re-directing claimants to seek information via FOI or SAR requests. Practitioners noted the practical challenges they face if directed to alternate routes:

'I think that…isn't really an answer because of the requirement to act promptly in judicial review proceedings and the delay that it takes to get your hands on those documents and that disclosure. That would often come after the point that you'd issued. Not least, I mean there's promptness and then…often my cases are very urgent.' (Counsel 3 – claimant practice)

The problem of requiring a potential claimant to seek information through alternate means was also raised in several submissions to IRAL. For example, the response of CMS Cameron McKenna Nabarro Olswang LLP noted that:

'Forcing a potential claimant to seek disclosure through Freedom of Information Act (FOIA) requests (which has a lengthy time-frame within which public bodies may respond – and thus may frustrate a claimant seeking to bring a claim promptly where key information can only be obtained through such requests) is unhelpful.'[124]

Finding 5: there is some evidence of public authorities directing claimants to seek information relevant to their claim by way of Subject Access Request or Freedom of Information Request in correspondence, rather than providing information or documents as part of their duty of candour. The timeliness of responses via this route has the potential to frustrate a claimant's capacity to bring a claim promptly and to narrow their grounds of challenge.

The volume of disclosure

In certain contexts, the underpinning documentary material shared between parties and to the court will be extensive, such as in compound challenges to government policy, where the court is required to make a finding of fact to understand and assess the lawfulness of government decision-making (as is often the case in human rights challenges), and in commercial judicial reviews where there will be a complex and wide evidence base underpinning regulatory decision-making. In a few cases in the dataset the court commented on the volume of disclosure that had been provided during the proceedings. In *Carroll*, the judge reported a 'really quite unnecessary amount of material put forward and there was also a degree of duplication.... There is a lot to be said for a core bundle'.[125] More recently, in *British Gas Trading Ltd*, which concerned the judicial review of the approval of the acquisition of Bulb Energy Ltd by Octopus Energy Ltd, Singh LJ remarked that:

'the comprehensiveness of the evidence on the Defendant's and Interested Parties' side would not have been out-of-place in a Commercial Court trial… without suggesting that such an enquiry is necessary or appropriate in a judicial review claim, we have been able to reach clear conclusions…'[126]

122 *The King (on the application of) THM and NHM (Minors, by their litigation friend, KHM) v Secretary of State for the Home Department* (Upper Tribunal (Immigration and asylum chamber), 2023-02-02, JR-2022-LON-001274 (UR) [10].

123 see Home Office, *The Home Office response to the Independent Chief Inspector of Borders and Immigration's report: An Inspection of the Home Office's Mechanisms for Learning from Immigration Litigation: April -July 2017* (2017) para.2.5.

124 Response from CMS Cameron McKenna Nabarro Olswang LLP (October 2020) 6. See also Kinglsey Napley LLP Submission to the Independent Review of Administrative Law (October 2020) 19, which noted that dealing with freedom of information and Subject Access Requests alongside judicial review 'is likely that this would complicate, not simplify, litigation'.

125 *R (Carroll) v South Somerset District Council* [2008] EWHC 104 (Admin) [156]-[157].

126 *The King (on the application of British Gas Trading Ltd) v Secretary of State for Energy Security and Net Zero* [2023] EWHC 737 (Admin) [20].

Earlier case law provides some practical suggestions on how to manage the volume of disclosure that might arise in a judicial review challenge. In *Carroll*, for example, it was suggested that providing relevant paragraphs rather than whole documents to the court was acceptable, so long as the relevant document is made available to the other side and is also brought along 'if there is a need to refer to it but do not burden the court with it unless it really is necessary to do so.'[127] Similarly, in *South Eastern Railway*, the court suggested that material that may become relevant but is not yet relevant 'should be made available for inspection by the other party... one copy should be available at court in case it is needed.'[128]

Volume of disclosure: practitioner experiences

Practitioners reported that it was common to receive large amounts of disclosure, usually after permission has been granted:

'...they do what we describe as a data dump. So, they dump on us loads of data and they say, "Well, there it is, in there. That's everything we've got to say". But there's lots of irrelevant stuff.' (Counsel 2 – claimant practice)

'It's more like burying you in disclosure but it's not necessarily got what you've even asked for...' (Solicitor 3 – claimant practice)

'I think that's probably 80% of the cases we deal with... they won't really reveal the information unless they see... that permission is granted. And then you get an avalanche of documents with long statements.' (Solicitor 4 – claimant practice)

'...you get what I would say is more wide-ranging disclosure than the duty of candour actually requires at great public expense.' (Solicitor 5 – mixed practice)

'...there is a practice...of some litigants, probably commercial litigants, over-disclosing and maybe over-requesting... and that can I lead to I think pretty hefty trial bundles that maybe aren't necessarily required by the duty of candour or actually, you know, aren't filled with the key documents that go to the decision under challenge.' (Solicitor 6 – mixed practice)

Moreover, disclosure is sometimes provided in an unmanageable format:

'...the ideal way for it to be disclosed would be for it to be properly indexed and identified, but often is just, "Here's everything, here's every email"... It's not cooperation to give... 3,000 pages of evidence to find the one page that is actually important, you know.... You'd often get duplicates.' (Counsel 2 – claimant practice)

'The level of material that is generated in the course of modern public authorities' decision making is often enormous, and one of the steps that is often not taken during disclosure is the sort of disaggregation of material, or the deduplication of material. I mean, we've all had as practitioners instances where you get a lever-arch file full of material and you discover that different stages of the same email chain appear in it 15 times.' (Counsel 6 – defendant practice)

One participant shared their view on best practice in correspondence that might be employed to prevent overloading the judicial review enterprise with documents:

'good practice... is people produce a list... an index list and say, "Look, we've got all these documents, highlight the ones you like and want and tell us, and tell us why you think it's relevant and we'll then consider that and respond," which is fair enough. That means we don't get a thousand pages. We might simply point to specific documents, that saves paper and saves time and resources. So... They could produce an... index list from their computer system that says, "We've got all these documents that exist on the system. Tell us what's relevant and why you want it".' (Solicitor 4 – claimant practice)

However, the capacity to produce lists, and the challenges with the form and volume of disclosure received is commonly complicated by the record-keeping systems that are used in departments.

127 *R (Carroll) v South Somerset District Council* [2008] EWHC 104 (Admin) [156]-[157].

128 *R (London South Eastern Railway Ltd and another).* v British Transport Police Authority [2009] EWHC 1255 (Admin) [13].

Record-keeping

The impact that poor record-keeping can have on compliance with the duty has been made evident in a number of judicial review cases.[129] For instance, there was no 'satisfactory institutional record' of changes made to child support rates of different categories of lone parents in *MD*, causing the Secretary of State for the Home Department to concede at full hearing stage that a difference in treatment was not justified and an error.[130]

In addition to the absence of a record of decision-making and its implications for the duty of candour, there is also a link between candour compliance and the quality of document management systems. Multiple submissions to IRAL drew a link between the quality of record-keeping in government departments and the impact this has on discharging the duty of candour. For instance, JUSTICE recommended that 'better record keeping systems and the use of technological solutions would make it significantly easier for Government to comply with its duty of candour'.[131] Interview participants drew a link between the challenges of receiving a 'data dump' from respondent departments, and the quality of platforms used for record-keeping:

'The Home Office...their records are such a mess... you get four billion pages and most of it's duplicative.' (Solicitor 3 – claimant practice)

'...particularly now that things are recorded electronically you can have electronic databases that have the same information again and again. There's a particular Home Office database called the CID database...it's an absolute nightmare to work... the dates are in really strange places... it seems to extract the same information repeated times so it's just awful. And rather than... trying to provide a structured document that will give you in chronological order the entries you want – I've seen Solicitors want to disclose to the other side just reams of this stuff which would just be a nightmare to try and sort through it.' (Counsel 7 – defendant practice)

'...in my experience, most public authorities irrespective of whether they are central government or local government level do not have the necessary document management systems to actually allow Lawyers to understand what's been going on and to then advise on what has to be disclosed, and that instead it's becoming more of a challenge if you've got this churn of Civil Servants.' (Solicitor 9 – defendant practice)

The need to address the quality of internal record management systems is recognised by the government itself. The Home Office, for instance, in response to the recommendations arising from the Public Accounts Committee report on the Windrush scandal, is migrating its case management system (CID) to a new system (Atlas). The completion date for migration has, however, been delayed seven times, with an initial promised date for completion of March 2020.[132]

While case law makes clear that it is not appropriate for public authorities to 'off-load a huge amount of documentation on the claimant and ask it, as it were, to find the "needle in the haystack"',[133] there is evidence that defendants do sometimes disclose voluminous amounts of documents on claimants, without contextualising or drawing to their attention the significance of the information provided to the issues under review. The practice is not aided by internal record-keeping systems which are difficult to navigate and often produce replicates. One participant noted that this practice can arise where government solicitors are more junior and 'panicking' in response to an 'aggressive' assertion by claimant solicitors that they might be breaching the duty of candour, but with 'reassurance' will commonly find the resource to turn the material into a 'single chronological entry'.[134]

129 *See R (on the application of HM) v Secretary of State for the Home Department* [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'.

130 *MD v Secretary of State for the Home Department* [2021] EWHC 1370 (Admin) [42]. For other cases on inadequate record-keeping, see "Work Package 1: Results" in E.A. O'Loughlin, Transparency and Judicial Review: An Empirical Study of the Duty of Candour: Supplementary Materials (2024) 25, available at https://www.durham.ac.uk/media/durham-university/departments-/law-school/pdfs/Candour-Supplementary-Document.pdf.

131 JUSTICE, 'The Independent Review of Administrative Law: Call for Evidence – Response' (October 2020) para 60. See also Public Law Project, 'Submission to the Independent Review of Administrative Law' (October 2020) 15; and ALBA 'The Independent Review of Administrative Law Call for Evidence: Response on behalf of the Constitutional and Administrative Law Bar Association' (October 2020) para 95.

132 Tevye Markson, 'Home Office replacement for 'defective' IT system delayed again' (June 2024) available at: https://www.civilserviceworld.com/professions/article/home-office-atlas-it-system-delay-windrush-cid

133 *R (on the application of Hoareau) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWHC 1509 (Admin) [20].

134 Counsel 7 – defendant practice.

Finding 6: there is a clear requirement that material should be shared between parties in a clear, contextualised and manageable format. Resource, time restraints, and the quality of IT systems place pressure on the capacity for parties, particularly public authorities, to organise disclosure appropriately.

Redactions

Public authority approaches to redacting material disclosed under their duty of candour have come under increasing scrutiny in recent years. It has already been noted that the provision of redacted material via information routes such as FOI requests or SAR can result in orders for unredacted disclosure in accordance with the duty of candour and disclosure.[135] A series of recent cases have also addressed the practice that has arisen across government of redacting the names of junior civil servants. These decisions have confirmed that the duty of candour in judicial review usually requires that the names of civil servants be disclosed in unredacted form. In *IAB*, the Court of Appeal unanimously confirmed that the principle of open justice and the duty of candour requires that the names of junior civil servants should not ordinarily or routinely be redacted from disclosable documents; redaction should only take place where necessary and requires an application to the Court seeking permission for the approach taken.[136] As Swift J outlined in the original interim judgment:

'ensuring that documents disclosed in litigation to explain a decision-making process are readily intelligible is an objective worth achieving for its own sake. It is notable that the Secretaries of State's proposal to deal with problems of intelligibility (both in this case, and generally) was to replace redacted names with a list of ciphers; an approach that would be laborious, prone to error, and even when error-free would only add a new layer of complexity to the task of understanding the narrative of the decision-making process from the documents disclosed.'[137]

Further, in *MTA*, Swift J rejected an approach of parties filing a consent order seeking permission from the Court to maintain the redactions of names of civil servants: 'it is not open to parties to judicial review claims to attempt to contract out of these obligations'.[138] In *Police Superintendents' Association*, Fordham J summarised where redactions may be used in his "Redaction" Principle: 'Documents need not be disclosed in their entirety but can be redacted…for public interest immunity, confidentiality, legal professional privilege or statutory restriction.'[139] Guidance on approaching redactions provided by Fordham J is now captured in *The Administrative Court Judicial Review Guide*.[140]

Project interviews mostly took place prior to the more recent case law clarifying when redactions will not be in accordance with the duty of candour. In *IAB*, Swift J asserted that redactions should be accompanied by sufficient explanation that 'affords the receiving party a sensible opportunity to decide whether to apply for disclosure of the document, unredacted.'[141] Several participants shared that it was common practice to receive disclosure that was heavily redacted without justification, particularly if it took the form of internal correspondence.[142] Some felt that there was a '*Wild West*' feel to practice and it was not clear what approach to redactions some judges will allow and other will not.[143] Some interviewees suggested that the range of approaches taken to redacting documents had clear implications for the costs incurred in responding to and providing disclosure, leading to significant correspondence between parties, particularly where insufficient explanation for the redactions is provided.[144]

135 See 'The duty of candour and alternate routes to information' above.
136 *R (IAB and others) v Secretary of State for the Home Department and Secretary of State for Levelling Up, Housing and Communities* [2024] EWCA Civ 66. See an overview of recent case law here: C Grierson and J Blunden, 'Court of Appeal confirms approach to redactions of names of junior civil servants' (Sharp Pritchard Blog, February 2024).
137 *The King on the application of IAB and Others v Secretary of State for the Home Department* [2023] EWHC 2930 (Admin) [19].
138 *MTA v Secretary of State for the Home Department and Ors* [2024] EWHC 553 (Admin). This decision has since been
139 *The King (on the application of Police Superintendents' Association) v The Police Remuneration Review Body* [2023] EWHC 1838 (Admin) [15].
140 Courts and Tribunals Judiciary, *The Administrative Court Judicial Review Guide 2024* (October 2024) para 15.5.
141 *The King on the application of IAB and Others v Secretary of State for the Home Department* [2023] EWHC 2930 (Admin) [43].
142 Solicitor 3 – claimant practice; Counsel 2- claimant practice; Counsel 1- claimant practice; Solicitor 4 – claimant practice.
143 Solicitor 9 – defendant practice.
144 Solicitor 4 – claimant practice; Counsel 4 – mixed practice; Solicitor 9 – defendant practice.

One participant felt that there was a need for clearer *'specific rules of court in the CPR on the basis for redactions in disclosure'*.[145]

> Finding 7: interviewees reported that it was common to receive redacted disclosure without sufficient explanation or justification from defendant public authorities. This has implications for the costs incurred in responding to and providing disclosure, leading to significant correspondence between parties to a judicial review, and occasionally has required court intervention, adding to court time and costs.

Enforcing the duty of candour and cooperation

Disclosure applications and requests for further information

While the duty of candour should ensure that all relevant information in a judicial review is before the court,[146] a party may nonetheless apply for an order for specific disclosure of specific documents or documents of a particular class,[147] or an order compelling another party to provide further information.[148] The prevailing view is that orders for the provision of information or disclosure of documents 'are rarely necessary in judicial review claims'.[149]

It is difficult to determine whether such applications are on the rise. There are sound reasons that such applications should remain the exception and not the norm, as further disclosure disputes give rise to bigger bundles, longer hearings, increased costs and delays.[150] Their use may nonetheless be required at times to secure the release of relevant documents and/or information. The Court has reminded parties of the importance of cooperation and proactivity between parties, to limit the impact that disputes over disclosure can have on the length and cost of judicial review proceedings.[151]

Many practitioners took the view that applications for specific disclosure remain uncommon in judicial review proceedings,[152] and are usually resolved by way of correspondence and negotiation.[153] A few noted that practical reasons caution against applying to the court for disclosure, given the costs that might mount up, and that an application might not be determined before a full judicial review hearing.[154] One participant noted that such factors have '*the sort of practical effect that it encourages parties to reach pragmatic outcomes…*'[155] Another said that applications for specific disclosure arose '*quite commonly*' in their experience, which they connected to their involvement in complex and document-heavy human rights challenges.[156]

A handful of interviewees shared the view that applications for specific disclosure, though still uncommon in judicial review proceedings, are on the rise157:

> *'…based on my experience I think that they are becoming more a feature of the judicial review litigation landscape. I think that claimants are more inclined to make them.'*
> (Solicitor 9 – defendant practice)

145 Solicitor 9 – defendant practice.
146 Courts and Tribunals Judiciary, *The Administrative Court Judicial Review Guide 2024* (October 2024) Para 7.6.1.
147 CPR 31.12(1).
148 CPR 18.1.
149 Courts and Tribunals Judiciary, *The Administrative Court Judicial Review Guide 2024* (October 2024) Para 7.6.3.
150 On this point, see E.A. O'Loughlin, 'Government's Duty of Candour: On the Move?' [2023] Oct Public Law 567, 581-582.
151 *R (Good Law Project Ltd) v Secretary of State for Health and Social Care* [2021] EWHC 2595 (TCC) [5].
152 Solicitor 1 – claimant practice; Solicitor 2 – claimant practice; Solicitor 6 – mixed practice; Counsel 5 -defendant practice; GLD Solicitor 1; GLD Solicitor 2.
153 Solicitor 1 – claimant practice; Counsel 1 – claimant practice; Solicitor 2 – claimant practice; Counsel 7 – defendant practice; Solicitor 8 – defendant practice; GLD Solicitor 1.
154 Solicitor 3 – claimant practice; Solicitor 4 - claimant practice; Counsel 5 – defendant practice.
155 Counsel 5 – defendant practice.
156 Counsel 6 – defendant practice.
157 Counsel 7 – defendant practice; GLD Solicitor 3.

Similarly, Part 18 applications for further information were not commonly seen or used by some participants.[158] A couple of interviewees felt that their use was increasing, noting that they are *'being deployed to enforce compliance with the duty of candour.'*[159] One interviewee noted the similar risks that run from the use of Part 18 applications, given the delays they incur to proceedings, and remarked that the Court is not in their view receptive to such applications: *'I don't think the court appreciates having to deal with like satellite litigation and you know, have separate hearings on that point.'*[160]

While applications to the court for orders for the provision of information might invite such risks, a couple of participants noted that making Part 18 preliminary requests for further information in correspondence with the opposing party might be a more appropriate mechanism for seeking disclosure than requests for specific disclosure, given that Practice Direction 18[161] outlines the appropriate process for such requests:

'...a sensibly targeted Part 18 request can be a more effective tool at sort of wrinkling out areas of apparent lack of clarity ... it's a provision of the rules which do apply, if you're the recipient of a Part 18 request, you need a good reason why you're refusing to comply voluntarily... it has to be signed with a statement of truth and so on... I think it can be a more useful and a much more targeted tactic...' (Counsel 5 – defendant practice)

'...in some ways it's a more appropriate mechanism... I think it is... I have seen that work very successfully...' (Counsel 7 – defendant practice)

Consequences

The dataset

In the dataset of judicial review cases, the following are instances of the Court imposing consequences upon parties for breaches of or issues of compliance with the duty of candour.

Consequences	
Drawing of adverse evidential inferences	13
Adverse costs order	12
Formal order for disclosure	10
Reputational damage	6
Allegations of deliberate concealment affecting the outcome of the litigation	5
Material subsequently produced may not be relied on without permission of the court	2
Referral of practitioners to appropriate professional body	2

This shows both the extent of tools available to the courts to impose consequences for failures in discharging the duty of candour, and the extent to which these tools are employed. There were 48[162] cases in which a discernible consequence results from issues with complying with the duty of candour. In contrast, there were 94 cases where a party is either found to have breached the duty or is on the receiving end of Court criticism for their approach to discharging the duty of candour. A direct consequence therefore arose in 51% of cases. The 5 cases in which there was an 'allegation of deliberate concealment affecting the outcome of litigation' all relate to the conduct of claimants.[163] There are also two *Hamid* hearings in which the court found systematic abuse by claimant solicitors of without notice injunctions to restrain imminent removal of clients which resulted in referrals to the Solicitors' Regulation Authority.[164]

158 Counsel 2 – claimant practice; Counsel 5 – defendant practice; GLD Solicitor 1.

159 Counsel 3 – claimant practice; Counsel 7 – defendant practice.

160 Counsel 3 – claimant practice.

161 CPR PD 18 – Further Information.

162 There are two cases in which two different forms of consequence were found. For more detail, see "Work Package 1: Results" in E.A. O'Loughlin, *Transparency and Judicial Review: An Empirical Study of the Duty of Candour: Supplementary Materials* (2024) 23, available at https://www.durham.ac.uk/media/durham-university/departments-/law-school/pdfs/Candour-Supplementary-Document.pdf.

163 *Khan v Secretary of State for the Home Department* [2013] EWHC 1294 (Admin); *R (Aafia Thebo) v Entry Clearance Officer Islamabad (Pakistan)* [2013] EWHC 146 (Admin); *R (LS) v London Borough of Brent*, JR/1050/2021; R *(Yabari) v Westminster City Council* [2023] EWHC 185 (Admin); Vision HR *Solutions Ltd v R & C Commissioners & Veqta Ltd* [2023] EWHC 1659 (Admin).

164 *In the matter of the conduct of Sandbrook Solicitors* [2015] EWHC 2473 (Admin); *R (Gopinath Sathivel) v Secretary of State for the Home Department* [2018] EWHC 913 (Admin).

Practitioner views on enforcement

Most interviewees felt that the courts' approach to enforcing consequences for issues of compliance with the duty of candour was appropriately balanced.[165] Several noted that the courts' approach could be characterised as cautious, but this was necessary, given that the duty of candour and cooperation is a duty to the court and therefore bites upon legal representatives' professional duties.[166] A participant who suggested that there was scope for the Court to '*make stronger comments*' on compliance with the duty observed that:

'…maybe the reason that that's not done is the sensitivities around…obtaining instructions, advising and that sort of dynamic between legal advisors and their clients…' (Solicitor 6 – mixed practice)

A few interviewees thought that the courts were 'cautious' when it came to moderating compliance with the duty of candour, that the '*court seems reluctant to get involved'*:[167]

'…you're given a witness statement and that is from somebody who then exhibits some documents that was asked for at the very beginning… I have to say, I don't think that the courts are sufficiently critical of the government department. I think that there is a lot of leeway given.' (Counsel 3 – claimant practice)

'I think actually there is scope for the courts to get a bit more stuck in on the duty.' (Counsel 5 – defendant practice)

One participant felt that there were insufficient enforcement mechanisms available to the courts, noting that *'when costs are used punitively… it can send a message to the government, but it is not a solution to compliance'*.[168] Another shared their view that more proactivity on the part of judges to intervene and make directions unprompted to provide information would be welcome.[169]

In terms of mechanisms for enhancing compliance with the duty between legal professionals and clients, a participant with experience working with government lawyers noted that in their view they were *'not sufficiently robust with those that they are advising in government on essentially what needs to happen to ensure compliance with the duty of candour.'*[170] Government lawyers shared insights into procedures for encouraging compliance, including by providing training to policy clients and to advisory lawyers, which they reported clients engage with and sometimes request.[171] The practice of writing to remind Home Office caseworkers of the duty of candour, what it requires, and the consequences that might arise if it is breached has also been employed before the Acknowledgement of Service is finalised. This internal change was noted to have had a positive impact.

> Finding 8: most interviewees thought the courts' approach to moderating and enforcing consequences for non-compliance with the duty of candour was appropriately balanced, considering that the duty engages lawyers' professional duties to the Court.

The duty of candour and cooperation: Reform

Perceptions on the current operation of the duty

Many participants felt that the duty of candour and cooperation in judicial review was operating broadly effectively:[172]

'my… overall view is that…it's working as intended and it's leading to.. clear judgments and clear substantive trials that I think are conducted…fairly and clearly.' (Solicitor 6 – mixed practice)

165 Counsel 4 – mixed practice; Solicitor 5 – mixed practice; Counsel 6 – defendant practice; Counsel 7 – defendant practice; Solicitor 9 – defendant practice; GLD Solicitor 3.
166 Counsel 4 – mixed practice; Solicitor 5 – mixed practice.
167 Solicitor 2 – claimant practice. Also Counsel 1 – claimant practice; Counsel 3 – claimant practice; Counsel 5 – defendant practice.
168 Counsel 3 – claimant practice.
169 Solicitor 4 – claimant practice.
170 Solicitor 9 – defendant practice.
171 GLD Solicitor 1; GLD Solicitor 2.
172 Counsel 1 – claimant practice; Counsel 6 – defendant practice; Counsel 7 – defendant practice; GLD Solicitor 1; GLD Solicitor 3.

'From what I've seen yes....I think it's often contested... but I think the right material ends up before the court, which is probably the ultimate test.' (Solicitor 8 – defendant practice)

Some reflected that while they considered that the duty of candour was fundamentally operating as intended, its operation could be improved.[173] Others remarked that while the duty generally functioned well, it naturally comes under pressure in certain circumstances, such as where the issue in dispute is highly politically sensitive or in challenges to the systemic operation of a policy.[174] Some noted that compliance or engagement with the duty varies depending on the public authority defendant to the dispute.[175] A few participants were keen to stress that the duty of candour works particularly well when compared to alternate models of disclosure:

'in my commercial half of my practice, we do battle with all sorts of different disclosure regimes, many of which are very expensive, very complicated, none of which have the same focus or emphasis on the collaborative duty between you as a lawyer and the court to get the right answer. And, you know, I'd always be concerned about something that sought to overly codify or concretise what falls to be disclosed in a particular case, that you might lose some element of that.' (Counsel 4- mixed practice)

'I mean, what's the alternative? Do we end up in CPR31 which will clog up the courts, and how will that serve the interests of the minority or indeed anyone?' (GLD Solicitor 1)

Only two participants adopted the clear view that the duty of candour is not operating well,[176] with one commenting:

'I think it's not, no. I mean it's sort of piecemeal really. So, an awful lot depends on the identity of the defendant, the willingness of the lawyers to really get to grips with the duty and the willingness in turn of the courts to... police it effectively.' (Solicitor 1 – claimant practice)

Views on reform

The prevailing view amongst interview participants was that the courts strike the right balance in their approach to enforcing the duty of candour, and that the duty broadly operates effectively to ensure that the relevant information and material needed to resolve issues justly and fairly is before the court.

However, interviewees proposed a range of changes that could be made to either enhance compliance with the duty or limit the extent to which the evidence base in judicial review is a matter of dispute.

Sanctions and compliance

Three interviewees suggested the addition of mechanisms that allow for sanctions to be imposed upon parties more easily. One participant recommended the requirement that public authority defendants '*have an acknowledgement that... there has been a discharge of the duty of candour*', and if a breach of the duty is later found this would allow for clear sanctions to be imposed.[177] This is similar to proposals that have been made that Form N462 – the form used by those served with a judicial review to tell the Administrative Court they have received a copy of an application for judicial review (Acknowledgement of Service) – should be amended requiring legal representatives and interested parties to certify compliance with the duty. Where evidence is disclosed later that could have been disclosed at pre-action stage, 'courts could in an appropriate case in the exercise of their discretion and judgment disallow the costs of Form N462 even though permission is refused.'[178] Other interviewees suggested either more liberal cost sanctions be employed by the Court where there is a successful pre-action disclosure application,[179] or the clearer outlining of '*automatic consequences*' in the Civil Procedure Rules.[180]

173 Solicitor 2 – claimant practice; Solicitor 9 – defendant practice.
174 Counsel 5 – defendant practice.
175 Counsel 2 – claimant practice; Solicitor 3 – claimant practice.
176 Counsel 3 – claimant practice.
177 Counsel 2 – claimant practice
178 M Fordham, M Chamberlain, I Steele & Z Al-Rikabi, *Streamlining Judicial Review in a Manner Consistent with the Rule of Law* (Bingham Centre Report 2014/01), Bingham Centre for the Rule of Law, BIICL, London, February 2014, para 4.3.
179 Solicitor 1 – claimant practice suggested that claimants should get all costs up to that point in the proceedings.
180 Counsel 3 – claimant practice.

Disclosure lists and statements

One participant suggested that the enhanced sharing of 'disclosure lists' by public authority defendants – in which the defendant outlines in correspondence a list of documents found in searches – might encourage cooperation between parties on the question of what falls to be disclosed, though they conceded that taking this extra step with regularity will add time to the exercise.[181] Another considered that '*the provision of disclosure statements ought to be a more commonplace requirement in judicial review*.'[182] Disclosure statements under CPR 31 outline a list of documents in the parties possession, the extent of searches made to locate relevant documents, and a certification that the drafter of the statement understands to the duty to disclose.[183] While in judicial review there is no obligation to provide disclosure lists and statements, the *TSOL Guidance* nonetheless recommends an internal record is kept when conducting searches and compiling disclosure that draws upon the CPR 31 standard disclosure provisions for guidance.[184] In addition to suggestions regarding the provision of disclosure lists and disclosure statements, one practitioner was of the view that *'anything that requires a search of emails to be exceptional and require… the… level of justification of cross examination*', with revisions of the *TSOL Guidance* to focus more on record-keeping quality and less upon searches.[185]

Pre-Action Protocol Reform

One participant suggested that the PAP procedure should be amended to require:

'a more precise definition of requests and responses in pre-action correspondence and I think that would be helpful… claimants should… produce a list of any specific requests of information and documents that they require, produce a numbered list giving reasons why each request is relevant to the issues raised by the proposed litigation. And then the defendants have to respond to that list systematically either explaining that they have provided the document or answered the request, or if they haven't, whether that, if it's a document, whether it exists and whether they hold it and why they're not providing it.' (Solicitor 1 – claimant practice)

Recognition of the duty of candour in the Civil Procedure Rules / Practice Direction

The most common suggestion amongst interviewees was that the duty of candour and cooperation should be more clearly recognised and outlined in the Civil Procedure Rules or in a dedicated Practice Direction. Some noted that this would have the benefit of drawing together relevant principles on the operation of the duty, which are currently across *'disparate sources'*, as well as providing an opportunity to clarify certain practical points.[186] Moreover, placing the duty on a firmer rule footing was said to possibly aid practitioners in explaining the importance and requirements of the duty to clients.[187]

It was suggested that such recognition could include:

- clarification on what stage of proceedings the duty of candour is engaged;[188]
- guidance on when redactions can be used, and their explanation/justification;[189]
- clarification on the relationship between the duty of candour and the duty to disclose;[190]
- guidance on proportionate requests for disclosure and information;[191]
- mandatory cost consequences for breaches of the duty not rectified within a particular timeframe.[192]

181 Solicitor 1 – claimant practice. Similar suggestions were made in the Equality and Human Rights Commission submission to IRAL: Equality and Human Rights Commission, 'Response to Call for Evidence: Judicial Review', Para 54.
182 Counsel 6 – defendant practice.
183 CPR 3.10; CPR PD 31A, paras 3 and 4.
184 Treasury Solicitor's Department, *Guidance on Discharging the Duty of Candour and Disclosure in Judicial Review Proceedings* (2010), paras 5 and 6.
185 Solicitor 5 – mixed practice.
186 Counsel 4 – mixed practice.
187 Counsel 5 – defendant practice.
188 Counsel 4 – mixed practice; Solicitor 9 – defendant practice; Solicitor 3 – claimant practice.
189 Counsel 4 – mixed practice; Solicitor 9 – defendant practice.
190 Solicitor 4 – claimant practice.
191 Solicitor 7 – defendant practice; Solicitor 9 – defendant practice.
192 Solicitor 3 – claimant practice.

- Several participants nonetheless shared their view that the duty of candour should not be "over-codified", citing the benefits of its inherent flexibility.[193] There was not support for a more formal disclosure regime[194]; one participant flagged the concern that in their view disclosure models – providing guidance for focused searches and limited disclosure depending on the requirements of the claim, as seen in the business and property courts – add costs and delays and would not suit public law litigation.[195] One participant was explicitly against enumerating the parameters of the duty in another source, as *'the discretion and flexibility that the judiciary retains in terms of how to respond to it in different levels of seriousness is useful'*.[196]

Reform options

A diverse subset of 6 interviewees participated in a focus group to discuss and share their views on the viability of a range of options for reform that have been suggested by academics, practitioners, and judges.

Options for clarification

Statutory footing

It has been suggested that placing the duty of candour and cooperation on a statutory footing could act as a measure for 'reinforcing the importance of the duty of candour'. [197]

Focus group participants did not support capturing the duty of candour owed in judicial review proceedings in statute, noting that primary legislation was not well suited, was unlikely to be effective,[198] and might act as a '*straightjacket*' on a duty that requires development and flexibility.[199]

Codification in Part 54, Civil Procedure Rules

Several submissions to IRAL suggested that the duty of candour should be codified or clarified in Part 54, Civil Procedure Rules.[200] Focus group participants were mostly supportive of this change. It was felt that greater clarity on the duty's requirements would be welcome. One participant noted that it offered the opportunity to clarify that the duty of candour applies at pre-action stage.[201] Some participants brought to attention the practical limits to enumeration of the duty in the CPR; a review of the current parameters of the duty and any potential changes required would need to be firmed up before attempts to clarify the rules.[202] It was noted that capturing the duty of candour in the CPR also offers an opportunity to underscore the requirement of explaining reasons for redactions in disclosed documents.[203]

Participants also discussed the extent to which a more CPR-centred approach to the duty of candour could address how principles of disclosure interact with the duty[204]:

'I think most judicial review proceedings really don't require that level of documentation and perhaps a more principled basis, for example, outlining at a very high level that this is about disclosing the documentation that went to the decision-making process... it's not always the case that it's only information about the decision. Sometimes documentation will be required, but not the same level of searching that is required in the Part 7 regime. I think that sort of codified clarification from the outset might have been helpful...' (Solicitor 6 – mixed practice)

Further, the duty should not be 'over-codified', in order to allow the court to maintain flexibility about the level of disclosure of required to meet the duty and its relation to

193 Counsel 5 -defendant practice.
194 Solicitor 1 – claimant practice.
195 Counsel 4 – mixed practice.
196 Solicitor 6 – mixed practice.
197 Public Law Project, 'Submission to the Independent Review of Administrative Law', page 13; 'Islington Law Centre (ILC) Immigration Team response to the Independent Review of Administrative Law', page 3.
198 Solicitor 6 – mixed practice.
199 GLD Solicitor 3; Counsel 6 – defendant practice.
200 see e.g. Bindmans LLP, 'Response to the Independent Review of Administrative Law Panel's Call for Evidence', para 35.
201 Solicitor 9 – defendant practice.
202 Counsel 6 – defendant practice.
203 Counsel 4 – mixed practice.
204 Counsel 2 – claimant practice.

the type of decision under challenge.[205] One participant was expressly sceptical of any attempt to codify the duty and the disclosure exercise required to meet the duty, noting that:

'...it's particularly unsuited to the exercise that's often required with the duty of candour because of the nature of the inquiry that's required. And just one example of that is keyword search and disclosure is often not appropriate or necessary in judicial review proceedings because you're not just giving the haystack of everything that might be relevant.' (Counsel 4 – mixed practice)

A couple of participants remarked that any codification of the duty in the CPR should outline the consequences for failing to comply with the duty of candour,[206] coupled with a residual discretion retained by the court to adopt more creative mechanisms:[207] '*I think having them set out there might well be one of the ways in which you trigger an institutional change in culture and practice*.'[208] Clarification in the CPR could also aid practitioners in explaining to policy clients the importance of the duty and of good document management systems to underpin compliance with the duty.[209]

Discrete reforms to encourage compliance

Specific directions procedure

Sir Ross Cranston and Sir Clive Lewis have proposed Practice Direction 54A be amended to provide a procedure for a party to apply to the court for specific directions after the lodging of detailed grounds of resistance. This process would address the 'small minority of cases' where there are disputed facts which the court must resolve, or where a specific issue may require disclosure of particular documents.[210] The proposal suggests the claimant be given 35 days upon receipt of the detailed grounds to consider whether to apply for specific directions, and other parties 21 days to respond.

The focus group members generally showed some hesitation at this proposal, noting that it would be more helpful for there to be an earlier assessment by judges as to whether a Case Management conference would be needed in proceedings to address disputed facts or questions regarding disclosure.[211] It was felt that '*permission stage really is sort of the best time to focus minds and have a direction from the courts*'.[212]

Certification of compliance

It has been suggested that Form N462 – the form used by those served with a judicial review to tell the Administrative Court they have received a copy of an application for judicial review (Acknowledgement of Service) – could be amended to require legal representatives of defendants and interested parties to certify compliance with the duty of candour. Where evidence is disclosed at this stage that could have been disclosed at pre-action stage, 'courts could in an appropriate case in the exercise of their discretion and judgment disallow the costs of Form N462 even though permission is refused.'[213] Claim Forms could also be amended to require certification by claimants or their representatives that 'they understand and have complied with their candour obligations'.[214]

Participants were ambivalent regarding these proposals. A couple considered that it may help to '*focus the mind*'.[215] Practical challenges were, however, flagged by the focus group participants. It might, for instance, delay the filing of an acknowledgement of service,[216] and there were also questions raised about the way in which the certification process would fit with the continuing nature of the duty:

205 Solicitor 6 – mixed practice.
206 Counsel 2 – claimant practice.
207 Such as, for example, the consequential judgment dealing with issues of candour in the judicial review of the practice of seizing the mobile phones of those arriving to the UK by small boat: *R (HM) v Secretary of State for the Home Department* [2022] EWHC 2729 (Admin).
208 Solicitor 6 – mixed practice.
209 Solicitor 9 – defendant practice.
210 Cranston and Lewis, 'Defendant's Duty of Candour and Disclosure in Judicial Review Proceedings: A Discussion Paper' (Lord Chief Justice of England and Wales, 2016), page 4.
211 Counsel 4 – mixed practice; Solicitor 6 – mixed practice; GLD Solicitor 3.
212 GLD Solicitor 3.
213 M Fordham, M Chamberlain, I Steele & Z Al-Rikabi, *Streamlining Judicial Review in a Manner Consistent with the Rule of Law* (Bingham Centre Report 2014/01), Bingham Centre for the Rule of Law, BIICL, London, February 2014, para 4.3.
214 Bindmans LLP, 'Response to the Independent Review of Administrative Law Panel's Call for Evidence', para 36.
215 Counsel 2 – claimant practice; GLD Solicitor 3.
216 Counsel 2 – claimant practice.

'I think the idea that there's an ongoing duty that's discharged in good faith sits in some tension from the idea of people being able to say slightly opportunistically oh, there's been a breach merely because you didn't spot this or weren't aware of it…'(Counsel 6 – defendant practice)

Disclosure statements/lists

The Equality and Human Rights Commission has suggested a requirement be introduced that parties must sign disclosure lists to confirm that they have complied with the duty.[217] Some focus group participants were supportive of the notion that defendant public authorities be required *'to a greater extent than is the case at the moment… to explain how it's gone about ensuring its compliance with the duty of candour',* and that might have the positive ramification of prompting changes within government towards documenting and recording decision-making processes.[218] For others disclosure lists and statements presented similar practical challenges to a mechanism for certifying compliance with the duty. Some were supportive of a *'generic statement'* that *'in good faith we have understood what is being made the subject of proceedings and we have looked conscientiously for that'*. [219] Once again, concern was raised about how such statements would interact with the fact that the duty of candour is a continuing duty.[220] One participant was wary of the use of specific lists and explanations of exact searches conducted, given that it might lead to an uptick in satellite disputes over the search exercise.[221] Another noted that such statements would perhaps need to be 'co-signed' with client departments.[222] One focus group member was firmly against the use of signed disclosure lists in judicial review proceedings:

'I think signing a disclosure list has totally missed the point of what the duty of candour is. That suggests I have complied with it by giving you these documents and the whole point is, no, you're looking at your response as a whole…maybe I couldn't give you these documents, but I have put all of this additional witness evidence in in order to satisfy the duty of candour.'(Counsel 4 – mixed practice)

Agreement of extensions to three-month time limit

The judicial review process could be amended to allow parties to 'agree an extension to the three month time limit between themselves', to allow the defendant sufficient time to produce evidence pursuant to the duty of candour at pre-action stage where more time is necessary.[223] This suggestion did not receive much dedicated attention in focus group discussions, but it was noted by one participant that such an approach was not likely to encourage or compliance with the duty of candour: *'the problem…at the moment is not that there is insufficient time to produce information pursuant to the duty, but rather that people don't want [to] and/or people just can't find the information in question to provide it.'*[224]

Pre-action Protocol reform

Recognition of the duty of candour at pre-action stage

The Equality and Human Rights Commission, amongst others, have suggested there should be 'stronger obligations' so that more information is provided by parties at pre-action stage.[225] Participants in the focus group were mostly of the view that the duty of candour does apply at pre-action stage, but what is required to meet the duty at PAP stage will not be as extensive once permission has been granted.[226] Further, the fact that the duty of candour also applies to claimants at PAP stage was flagged as an important aspect of the duty, given the implications of uncandid claims for court time and public authority resource.[227]

Guidance on the provision of documents at pre-action stage

It has been suggested that the Technology and Construction Court Guidance for Procurement Cases be drawn upon, which outlines the 'limited categories of

217 Equality and Human Rights Commission, 'Response to Call for Evidence: Judicial Review', para 54.
218 Solicitor 9 – defendant practice.
219 Counsel 6 – defendant practice.
220 Counsel 2 – claimant practice.
221 Solicitor 6 – mixed practice.
222 GLD Solicitor 3.
223 'Baker McKenzie response to the call for evidence produced by the Independent Review of Administrative Law Panel', para 3.36.
224 Solicitor 9 – defendant practice.
225 Equality and Human Rights Commission, 'Response to Call for Evidence: Judicial Review', Para 28. See also Irwin Mitchell, 'Submission by Irwin Mitchell to the Independent Review of Administrative Law', page 7.
226 Counsel 4 – mixed practice.
227 Solicitor 6 – mixed practice.

documents' which should be provided by an authority at an early stage.[228] The Pre-Action Protocols Working Group of the Civil Justice Council (CJC) has recommended in a Draft General Pre-Action Protocol that, before the start of court proceedings:

'claimant's and defendant's letters must disclose and attach any key documents. A document is a key document if a party intends to rely on it to support their claim or defence, or if it is necessary to enable the other party to understand the claim or defence.'[229]

It is recommended that the general principles in the General PAP also apply to the specific protocols, including the Pre-Action Protocol for Judicial Review. The Working Group also suggests that the court may impose costs sanctions for failure to comply with the proposed General Protocol and specific protocols.[230]

Generally, focus group participants did not support the revision of the judicial review PAP to outline the provision of documents at pre-action stage. While recognition of the application of the duty at pre-action stage was mostly welcome, there was a feeling that sometimes the provision of documents may not be appropriate or possible at pre-action stage, both by claimants and defendants, such as where proceedings are urgent:

'I think a robust recognition that it applies at pre-action stage, but that will be fact sensitive depending on the context of the case... as long as the solicitor has asked the relevant questions for the defendant and is asserting what's right...in the pre-action response to PAP, that may well be sufficient '. (Counsel 2 – claimant practice)

'I'm really anti any suggestion that you have to give what we might call initial disclosure or key documents because documents can be very sensitive. It may just not be appropriate to give physical disclosure of documents at the outset and the duty of candour is about information full and complete and accurate. It's not necessarily, and particularly not at the very initial stages, about actually handing over a whole bunch of what might be quite sensitive documents to putative claimants.' (Counsel 4 – mixed practice)

Reforming the scope of the duty

Protecting "frank advice" from disclosure

Some Government departments, in their submissions to the Independent Review of Administrative Law, suggested that "frank advice" in submissions to Ministers should be protected from disclosure in litigation, to encourage candour between officials and Ministers.[231] This could mirror exemptions in the Freedom of Information Act 2000, such as sections 35 and 36, which may allow for information related to the development or formulation of policy to be exempt from disclosure under the Act.[232]

Focus group participants did not support these suggestions: '*the notion that officials should be dissuaded from performing their proper function of advising ministers because it could be disclosed is...a deeply dysfunctional one.*'[233] Drawing upon the FOI exemptions was noted to be wholly inapt, given that the Freedom of Information Act operates as a general transparency regime, whereas judicial review operates as a constitutional safeguard against unlawfulness.[234]

Other suggestions have been made to clarify the reach of the duty of candour and its extension to internal policy debates. For instance, Linklaters LLP submitted that it could be clarified that the duty 'does not necessarily require the disclosure of internal debates within the Civil Service or internal political debates... in most cases, all that should be needed is the disclosure of the full papers prepared for the relevant decision-maker', subject to a residual power of the courts to order the production of other material in 'unusual circumstances'.[235] Focus group participants shared that in their view this position mirrored the current application of the duty: mostly the focus will be upon material put before the relevant Minister, which will not necessarily include frank

228 Chris Jackson, 'Response to Call for Evidence: Independent Review of Administrative Law', para 2.14.
229 Annex 2 Draft General Pre-Action Protocol (Practice Direction) and Joint Stocktake Template, Para 4.8.
230 Ibid, para 5.10.
231 'Summary of government responses to the Independent Review of Administrative Law', para 43.
232 See 'Summary of government responses to the Independent Review of Administrative Law', para 43; and Richard Ekins, 'Submission to the Independent Review of Administrative Law', para 51.
233 Counsel 6 – defendant practice.
234 Counsel 6 – defendant practice.
235 Linklaters LLP, 'Independent Review of Administrative Law: Call for Evidence', page 10.

discussion that has occurred at a lower level.[236] There will nonetheless be times where internal debates are relevant, particularly where it is required to understand or make out a ground of failure to take account of relevant considerations.[237] A couple of participants remarked that there remains an open question about whether internal debates amongst cabinet ministers fall to be disclosed or whether there are *'legitimate public policy goals'* inviting the courts to be mindful not to undermine collective cabinet responsibility. [238]

Limiting documentary material

It has been suggested that limits on the volume of documentary material placed before a reviewing court be introduced, 'coupled with an exception for complex cases which warrant greater material'.[239] The level of documentary material provided in judicial review could be limited through the existence of a 'presumption against disclosure', inserted into Practice Direction 54A, affirming that disclosure may only be ordered where there are 'compelling grounds for doing so'.[240]

Focus group participants resisted proposals to limit documentary materials in judicial review, emphasising that the correct level of documentary material in any judicial review is dictated by what is required for the court to dispose of the issues before it.[241]

Non-extension to unidentified grounds

The Society of Labour Lawyers submitted to IRAL their view that the duty of candour should not extend beyond the provision of information relevant to the claimant's grounds of challenge: 'a duty of candour in relation to as yet unidentified grounds of challenge would be excessively onerous.'[242]

Focus group participants were of the view that the principle that the duty of candour extends to unidentified grounds of challenge is an important aspect of the duty of candour, as public authorities usually hold most of the information potentially relevant to a judicial review claim.

Finding 9: There is evidence of a demand for clarification of the duty of candour and cooperation in judicial review. Public law practitioners in this study considered that the duty should be more clearly recognised and outlined in the Civil Procedure Rules. The Civil Justice Council should consider the formation of a working group to test and consult upon proposals for the development and incorporation of guidance on discharging the duty of candour into the Civil Procedure Rules. Consideration should be given to providing:

clarification on what stage of proceedings the duty of candour is engaged;

guidance on when redactions can be used, and their explanation/justification;

clarification on the relationship between the duty of candour and the duty to disclose, including guidance on the practice of providing 'gists' of material;

- an outline of potential consequences for breaches of the duty, subject to the retention of residual judicial discretion to utilise their case management powers as required;

Further elucidation of the duty should not be overly prescriptive, to allow the court to maintain flexibility about the level of information and disclosure required to meet the duty taking account of the nature of the issue under review.

236 Counsel 4 – mixed practice.
237 Counsel 2 – claimant practice.
238 Solicitor 9 – defendant practice.
239 Jason Varuhas, 'Submission to the Independent Review of Administrative Law', para 58.
240 Jason Varuhas, 'Submission to the Independent Review of Administrative Law', para 58.
241 Counsel 4 – mixed practice; Counsel 2 – claimant practice; Counsel 6 – defendant practice.
242 Society of Labour Lawyers, 'Independent Review of Administrative Law: Response from the Society of Labour Lawyers' (October 2020) para 167.

Conclusion

The duty of candour and cooperation is an essential principle, ensuring that parties to a judicial review, and the reviewing court, have all the information required to understand the decision under review and to determine its lawfulness. This research has interrogated how the duty of candour and cooperation in judicial review is operating in practice. This report has presented:

- information on the law on the duty via a systematic study of **322** cases mention the duty of candour in judicial review;
- qualitative information capturing public law practitioners' perceptions on how the duty of candour is operating in practice;
- and scrutiny of myriad reform suggestions that have been made, to test their benefits, risks, and credibility.

The evidence shows that the duty of candour and cooperation is a vital component of judicial review, allowing for tailored and flexible approaches to develop to provide the required evidence base for the court to assess the lawfulness of public decision-making, often at speed. The duty of candour is, however, under pressure in several ways. Multiple points of contestation exist on aspects of the duty, such as obfuscation over the question of when the duty is engaged, and the extent to which disclosure of documents is required to satisfy the duty. This gives rise to varied approaches in practice that are likely to prevent its smooth operation. Giving effect to the duty in practice is also commonly hampered by resource constraints and the quality of IT systems currently in place to record decision-making.

There is evidence of a demand for clarification of the duty of candour and cooperation in judicial review. Public law practitioners in this study considered that the duty should be more clearly recognised and outlined in the Civil Procedure Rules. **The Civil Justice Council should consider the formation of a working group to test and consult upon proposals for the development and incorporation of guidance on discharging the duty of candour into the Civil Procedure Rules**. Consideration should be given to providing:

- clarification on what stage of proceedings the duty of candour is engaged;
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