GUIDANCE ON DISCHARGING THE DUTY OF CANDOUR

and

DISCLOSURE IN JUDICIAL REVIEW PROCEEDINGS

Treasury Solicitor's Department
One Kemble Street
London
WC2B 4TS

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INTRODUCTION

What this guidance is for

This is practical guidance addressed to departments and litigation case handlers intended to help you to discharge your duty as a public servant to assist the court with full and accurate explanations of all the facts relevant to the issue the court must decide.

This guidance applies to judicial review (JR) proceedings and sets out the law and standards applicable:

(a) in discharging the duty of candour (see paragraph 1.2 below), and

(b) in giving disclosure under CPR Part 31 in those rare instances where it is ordered in JR proceedings, or is appropriate in the proceedings because resolution of disputed issues of fact is central to the outcome of the proceedings (for example, where the claim is that there has been a breach of the substantive obligation under ECHR Article 2 or Article 3) (see paragraph 1.4).

This guidance does not apply to other forms of civil proceedings, although the principles set out here may have generic relevance to Standard Disclosure under Part 31 CPR in such cases, Norwich Pharmacal orders, applications for specific discovery and to inquests and inquiries.

This guidance does not apply to criminal cases. Nor is it concerned with requests for information under the Data Protection Act 1998, the Freedom of Information Act 2000 or the Environmental information Regulations 2004.

The guidance recognises that in cases involving very large volumes of disclosure or a number of Government Departments and Agencies, particularly when sensitive material is involved, issues may arise in relation to questions of the proportionality of searches to be carried out and the time needed in order to give full disclosure. The guidance attempts to give practical advice as to how these difficulties may be handled so that the duty to the court is fully discharged.

For further help or guidance on disclosure speak to your departmental legal adviser or contact the Treasury Solicitor.

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The duty of candour

A public authority's objective must not be to win the litigation at all costs but to assist the court in reaching the correct result and thereby to improve standards in public administration

The point was explained by Lord Donaldson MR in *R v Lancashire County Council ex p. Huddleston*[1] when he said this:

> *"This development [i.e. the remedy of judicial review and the evolution of a specialist administrative or public law court] has created a new relationship between the courts and those who derive their authority from public law, one of partnership based on a common aim, namely the maintenance of the highest standards of public administration … The analogy is not exact, but just as the judges of the inferior courts when challenged on the exercise of their jurisdiction traditionally explain fully what they have done and why they have done it, but are not partisan in their own defence, so should be the public authorities. It is not discreditable to get it wrong. What is discreditable is a reluctance to explain fully what has occurred and why… Certainly it is for the applicant to satisfy the court of his entitlement to judicial review and it is for the respondent to resist his application, if it considers it to be unjustified. But it 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"* (emphasis added).
>
> This is the approach that should be applied in response to all applications for judicial review, and is required in order to satisfy the requirement of the duty of candour, the obligation upon all public authorities who are parties to applications for judicial review. The duty of candour in judicial review applies from the outset and applies to all information relevant to the issues in the case, not just documents.

Golden Rules for conducting a disclosure exercise

- The litigation case-handler must have overall responsibility for the disclosure exercise
- Take steps to preserve all potentially relevant documents as soon as proceedings are likely
- Start early. At the outset formulate, record and implement a strategy for conducting the disclosure exercise based on an understanding of the issues in the case and knowledge of the systems for record-keeping
- Maintain a record of what has been seen and by whom and the decisions taken
- A document which is disclosable must be disclosed even if it is embarrassing or damaging to a party's case
- Before giving inspection look at the output of the disclosure exercise in the same way as the claimant will look at it - look to see what is there and what is not there
- Devote sufficient resources from the outset to ensure that the process can be, and is, conducted on time and properly

[1] *R v Lancashire County Council ex p. Huddleston* [1986] 2 All ER 941

1 The obligations that are applicable

1.1. Values

- As a civil servant you must act in accordance with the core values of the Civil Service: integrity, honesty, objectivity and impartiality[2].
- Information must be handled as openly as possible within the legal framework, in compliance with the law and upholding the administration of justice.
- The facts and relevant issues must be set out truthfully based on a rigorous analysis of the evidence.
- Errors must be corrected as soon as possible.
- Inconvenient facts or relevant considerations must not be ignored.
- Always act in a way that is professional including, in the case of lawyers, taking into account the duty held to the Court.

1.2. Duty of candour in judicial review

The Practice Direction to CPR Part 54 states (at §12) that “disclosure is not required unless the court orders otherwise”. What this means is that CPR Part 31 (which sets out the rules applicable on standard disclosure) will not ordinarily apply on an application for judicial review.

However, all public authorities who are respondents to applications for judicial review are subject to what is known as a duty of **candour**. The effect of this duty is to require the public authority, when presenting its evidence in response to the application for judicial review to set out fully and fairly all matters that are relevant to the decision that is under challenge, or are otherwise relevant to any issue arising in the proceedings.

- The duty of candour gives rise to a weighty responsibility. The obligation of candour is the reason why the rules as to standard disclosure do not apply to applications for judicial review as a matter of course. When responding to an application for judicial review public authorities must be open and honest in disclosing the facts and information needed for the fair determination of the issue[3]. The duty extends to documents/information which will assist the claimant's case and/or give rise to additional (and otherwise unknown) grounds of challenge[4].
- The Court in *Al Sweady* and in reliance on Laws J in *Quark Fishing* described it as "a very high duty on central government to assist the court with full and accurate explanations of all the facts relevant to the issue that the court must decide."
- The duty is information-based and not restricted to documents.
- The duty of candour applies as soon as the department is aware that someone is likely to test a decision or action affecting them. It applies to every stage of the proceedings including letters of

[2] Civil Service Code 2008
[3] *Secretary of State for Commonwealth Affairs v Quark Fishing Ltd* [2002] EWCA Civ1409
[4] *R v Barnsley Metropolitan Borough Council ex p. Hook* [1976] 1 WLR 1052

response under the pre-action protocol, summary grounds of resistance, detailed grounds of resistance witness statements and counsel's written and oral submissions.

- It is particularly important when evidence is being prepared. When evidence is served in response to an application for judicial review, what is required is that that evidence read as a whole (i.e. the witness statement and the documents served in support of it) must be such as to meet the obligation of candour.
- The duty of candour continues to apply throughout the proceedings. For example, if after the service of evidence, further relevant information comes to light, that information must be disclosed to the other parties to the proceedings and put before the Court at the earliest possible opportunity.
- When preparing evidence in response to a claim for judicial review, one issue that frequently arises concerns the extent to which the duty of candour can be satisfied by providing a full and fair explanation of all relevant matters in a witness statement, and the extent to which such evidence must be supported by exhibiting relevant documents. Usually a mix of explanation by way of witness statement, and exhibiting key documents will be appropriate.
- Where the case raises issues under the Human Rights Act this issue must be addressed by reference to the speeches of the House of Lords in *Tweed v Parades Commission for Northern Ireland* [5]. In that case, the House of Lords emphasised that the relevant question is whether disclosure appears to be necessary in order to resolve the matter fairly and justly. Although the House of Lords stated that orders for disclosure were likely to remain exceptional rather than normal, it is clear that in cases where a court is required to consider whether the actions of a public body were proportionate, and where there were documents which were directly material to that issue of proportionality, it will more often be necessary to disclose those documents by exhibiting them to relevant witness statements.

1.3. Solicitor's duty

- In the case of *Al Sweady*[6] the Divisional Court highlighted two disclosure obligations imposed on solicitors in litigation:
  a) The duty to make sure that the client is fully aware of the duty to ensure that proper disclosure is given;
  b) The duty to go through the documents disclosed by the client to make sure, as far as possible, that no documents have been omitted from the client's list[7].
- Note that in the context of applications for judicial review, disclosure by list (i.e., in accordance with the provisions of CPR

[5] *Tweed v Parades Commission for Northern Ireland* [2007] 1 AC 950
[6] *R (on the application of Al Sweady and others) v The Secretary of State for Defence* [2009] EWHC 2387 (Admin)
[7] *Woods v Martins Bank* [1959] 1 Q.B. 55

Part 31) is not usually required. However, if the evidence that is served is to comply with the duty of candour, it will be necessary for the solicitor with conduct of the case to have undertaken an exercise equivalent to the exercise that is described in the next bullet point in order to satisfy himself that the evidence served meets the requirements of the duty of candour. Thus the basic approach described in the next bullet point should closely inform the approach that is taken to the preparation of witness evidence in response to all applications for judicial review.

- The solicitor's duty on disclosure (for example, under CPR 31) was summarised by the Court of Appeal in *Hedrich v Standard Bank London Ltd*[8] drawing on Chapter 14 of the third edition of Matthews and Malek on Disclosure. The main points are:

  a) A solicitor's duty is to investigate the position carefully and to ensure so far as is possible that full and proper disclosure of all relevant documents is made (*Myers v Elman [1940]* AC 282).

  b) The solicitor's duty extends to explaining to his client the existence and precise scope of the disclosure obligation and the need to preserve documents.

  c) The solicitor has an overall responsibility of careful investigation and supervision in the disclosure process and he cannot simply leave this task to his client. The best way to fulfil this duty is to take possession of all the original documents as early as possible. The client should not be allowed to decide relevance – or even potential relevance – for himself, so either the client must send all the files to the solicitor or the solicitor must visit the client to review the files or take the relevant documents into his possession. It is then for the solicitor to decide which documents are relevant and disclosable.

  d) Once the documents have been produced by the client, the solicitor should carefully go through the documents disclosed to make sure, so far as is possible, that no documents subject to the disclosure obligation are omitted from the list.... A solicitor must not necessarily be satisfied by the statement of his client that he has no documents or no more documents than he chooses to disclose. If he has reasonable grounds for suspecting that there are others, then he must investigate the matter further, but he need not go beyond taking reasonable steps to ascertain the truth. He is not the ultimate judge and if he has decided on reasonable grounds to believe his client, criticism cannot be directed at him.

  e) If a solicitor is or becomes aware that the list of documents or any verifying affidavit or statement of truth is inadequate and omits relevant documents or is wrong or misleading, he is under a duty to put the matter right at the earliest opportunity and should not wait until a further order of the court. His duty is to notify his client that he must inform the

[8] [2008] EWCA Civ 905

other side of the omitted documents, and if this course is not assented to he must cease to act for the client. If the client is not prepared to give full disclosure, then the solicitor's duty to the court is to withdraw from the case.

1.4. Duty of disclosure

The duty of **disclosure** contained in CPR31 applies to documents. CPR 31 does not apply to claims for judicial review unless the Court orders otherwise (CPR, PD54A, para 12.1).

In *Al Sweady*[9] the court emphasised that the case-handler has a duty to ensure that proper disclosure is given where there is to be cross-examination or in any case where the court makes findings of fact. The court made it plain that any infringements of the three basic human rights (Articles 2, 3 and 5) would be subject to intense scrutiny and that in such a case the duty of disclosure is "even more acute".

In that exceptional category of judicial review involving inquiry into issues of fact, where disclosure has to be given, it is suggested that the best practice is to do so in accordance with the principles set out in CPR31:

- the parties are required to help the court further the overriding objective which is to deal with cases justly. Dealing with a case justly includes dealing with the case in ways which are proportionate. CPR3, 1(2)(c)
- parties are required to disclose only the documents which:
    - they rely upon
    - adversely affect their own, or another party's, case
    - support another party's case
- document means anything in which information of any description is recorded. It will include, for example, not only letters and emails, but drafts, calendars, manuscript and post-it notes, voicemails, computer disks, documents stored on servers and back-up systems and documents that have been deleted and blogs
- disclosure is required if a party has or at any time has had a document so that the existence of destroyed or lost documents or documents which have been passed on must be disclosed
- parties are required to undertake a reasonable search for disclosable documents. See further Section 4.

1.5. What approach should be taken in any specific case?

In the vast majority of applications for judicial review what is required is compliance with the duty of candour. As explained above, compliance with this obligation is onerous. To ensure compliance with this obligation a solicitor will need to have full knowledge of all relevant documents, and have full

[9] *R (on the application of Al Sweady and others) v The Secretary of State for Defence* [EWHC] 2387(Admin)

instructions from his client on all matters material to the decision that is under challenge.

In some instances, even if an order for disclosure has not been made by the court, an exercise that has all the elements of a CPR 31 disclosure exercise will be required. Situations where such an exercise is likely to be appropriate will be those where complex issues of disputed fact are central to the claim that has been made. Examples of such situations may be where the claim alleges breach of the substantive obligations arising under ECHR Articles 2 or 3. These are only examples. The circumstances of each claim should be assessed in order to determine the approach that is appropriate. If in doubt, ask. Bear in mind that the primary practical difference between complying with the duty of candour and a CPR 31 disclosure exercise is that in the latter, disclosure is by list, and (save where legal professional privilege or public interest immunity is asserted) inspection of all documents on the list occurs.

What is described in the remainder of this document is the key steps in a CPR 31 disclosure exercise in a complex case. However, the principles that underlie this guidance should be principles that guide your actions in all cases. Even in the majority of judicial review claims where such disclosure is displaced by the duty of candour, careful consideration of what is set out below will help ensure that the evidence and documents served fully discharge the duty of candour. In all cases carefully consider what is necessary and proportionate to ensure that the court is fully informed on all relevant issues. Sometimes this may mean that what is required may take longer than the usual period permitted for the service of evidence in a judicial review claim. If it appears that this may be the situation in a specific case, seek directions from the court so that a sensible and robust timetable can be set.

1.6. Consequences of failure

Failure properly to discharge the duty of candour or to disclose a relevant document can have serious consequences, including:

- the material if subsequently produced may not be relied on without permission of the court;
- a formal order for disclosure;
- the drawing of adverse evidential inferences;
- an adverse costs order;
- proceedings for contempt of court;
- reputational damage;
- allegations of deliberate concealment affecting the outcome of the litigation.

2 Roles and responsibilities

It is useful to think of disclosure as a project which requires a project manager of appropriate seniority and experience as a single directing mind to co-ordinate effort and deal with queries. This is particularly important with multi-agency, multi-department litigation. In all cases the litigation case-handler

should be fully involved. This is particularly important where sensitive issues are considered, for example relating to national security or foreign relations (and in such cases the case-handler may need an appropriate security clearance for that purpose).

2.1 It is the role of the TSol case-handler to:

- have overall responsibility for the disclosure exercise. The case-handler decides which documents are relevant and disclosable. They owe a duty to the court to ensure the exercise is properly conducted and to make sure so far as is possible that no relevant documents have been omitted;
- agree with the defendant department(s) and non-party departments ("NPDs") who may hold relevant material what the process should be;
- ensure the defendant department(s) and NPDs understand the nature and extent of their obligation to disclose as well as the need to preserve documents and to ensure that in a department knowledge of the obligation is passed on to everyone who may be affected by it;
- ensure the defendant department(s) and NPDs understand that the duty to disclose is a continuing one;
- ensure the defendant department(s) and NPDs understand the consequences of failure to comply;
- ensure a record is kept of all searches made, all decisions made about extent of searches, about disclosability of documents and arrangements for inspection;
- arrange for the collation and review of all relevant and potentially relevant material, prepare the list of documents and in situations where there is material that is covered by legal professional privilege, public interest immunity, or engages national security concerns, arrange for redaction as necessary and appropriate;
- act as central point for receipt of queries in the litigation;
- keep defendant department(s) and NPDs informed on issues affecting disclosure as the case develops;
- ensure that departmental parties and NPDs are aware that claims may be made to withhold disclosure or inspection of a document on the grounds of public interest immunity, specific statutory provisions and legal professional privilege. Where appropriate they should be informed of the principles which apply and advised to bring to the attention of the case-holder any documents which they believe may fall into any of these categories (CPR 31.19);
- instruct counsel, arrange conferences and prepare and circulate notes of conferences approved by counsel. The location of conferences should be in counsel's chambers unless special arrangements are unavoidable;
- be able to explain to the court how the disclosure exercise has been carried out and that it is reasonable and proportionate, taking

into account the issues in the case (and in general the matters referred to in CPR Part 1).

2.2 It is the role of the defendant department(s) to:

- nominate a single contact point, usually a departmental lawyer, to liaise with the case-handler and ensure that the department's views are represented in discussions concerning the litigation and its handling;
- suspend document destruction policies where necessary to ensure that potentially relevant and relevant documents are preserved;
- provide the case-handler with details of how the department records, handles and stores information that might be of relevance to the issues in the case;
- appoint a person of suitable seniority and experience of the organisation, who may or may not be a lawyer but, who understands the obligation of disclosure and duty of candour to supervise
    - identifying potentially relevant documents/information and their location
    - identifying NPDs who may also hold documents
    - collating bundles of documents for review
    - identifying relevant individuals who are likely to recollect relevant documents/information
    - explaining searches made and not made for reasons of proportionality (including of NPDs)
    - claims for public interest immunity or privilege
    - keeping the case-handler informed of documents/information found, the time that searches will take and on-going reviews
    - liaison with those who handle FOIA/DPA requests in the department as appropriate.

2.3 It is the role of counsel to:

- give advice on disclosure when instructed by the case-handler to do so. Instructions focusing on this important topic should be properly recorded so that it is absolutely clear what counsel is being asked to advise on and an audit trail is maintained. Notes of conferences prepared by the case-holder should always be approved by counsel;
- at the outset of a case, and as it develops, to advise on the issues in the litigation and the nature and extent of the search to be carried out including parameters of searches, search terms and questions of proportionality;
- assist in the review of the documents for relevance, issues of privilege, public interest immunity and redaction. The overall responsibility for the review for relevance rests with the case-

handler but he may instruct counsel to undertake the review for resource reasons. The independence of a counsel-conducted review can reassure the court and the department;

- carry out the first cut for relevance in big cases when junior barristers may be used in essentially a paralegal capacity;
- in big cases with a heavy volume of documents to act as a disclosure junior so that an encyclopaedic knowledge of the documents resides in one individual;
- identify relevant requests under the Freedom of Information Act and the responses to them together with any documents disclosed pursuant to such requests.

2.4 It is the role of <u>other departments that are not defendants (i.e. NPDs) but which may hold relevant material</u> to:

- assist and co-operate with departments that are defendants under the overall supervision of the case-handler;
- apply such of the principles set out in paragraph 2.2 above ("role of the defendant Department(s)") as are applicable in the circumstances of the case.

2.5 Documents / information held by other departments

- Civil claims are normally deemed to be brought against "the Crown" even if only one of the main departments is named as defendant. In principle the courts can order disclosure of any government papers in such cases because they ultimately belong to the Crown.
- The principal duty of disclosure is on the parties to the litigation. Where one department is named as a party (the lead department, "LD"), the question whether they should ask NPDs if they have relevant documents/information will depend on what is being impugned and the nature of the challenge. If the LD does not believe that any other department has potentially relevant documents/ information they should record this with their reasons and need not instigate government-wide searches. Similarly they should record why the departments they have approached are likely to have relevant documents/information.
- Where NPDs hold potentially relevant documents/information it is believed that whether the defendant is the Crown or not, the NPD is subject to analogous disclosure obligations under public law. Accordingly the LD has an obligation to seek potentially disclosable documents/information and the NPD has an obligation to co-operate with such requests.

2.6 Procedure between departments

- LD puts NPD on notice at the earliest practical point that they believe that NPD has potentially disclosable documents/information and requests them to search for and retain all relevant documents/ information.

- Search carried out by NPD under legal supervision to a brief supplied by the case-handler indicating the issues in the proceedings (with copies of the pleadings), the types of document/ information and who may hold them.
- Meeting may be required to discuss the main issues including matters such as security clearances for access to the material.
- Case-handler/counsel should inspect the documents/information and then produce an initial list for disclosure for agreement by the NPD.
- Case-handler must keep NPD updated on all significant developments concerning the documents/information.
- NPD must inform LD and the case-handler if further documents/information are created or found.
- NPD should inform LD of any relevant requests under FOI or DPA, the responses to those requests and the information disclosed in response to them.

2.7 Communication

The key to success is good communication. Clearance should always be sought from other departments (and where appropriate foreign governments too) before disclosing their material. Departments should approach foreign governments through the Foreign and Commonwealth Office unless they have their own direct contacts when they should consider keeping the FCO informed. In those cases where departments are frequently required to disclose documents belonging to another department it may be desirable for the procedure to be covered by a protocol so that in every case there is:

- a list of potentially relevant material held
- a list of material handed over
- a list of potentially relevant material not handed over with a statement of reasons for not disclosing
- timescales are laid down
- a grade of decision maker is stipulated
- there is a procedure for settling disputes.

2.8 Disputes

The mechanism for settling disputes between and amongst departments will depend upon the nature of the difference of view. In the absence of a protocol and if the issue relates to policy or operations, for example whether to claim Public Interest Immunity, the first stage is likely to be an inter-departmental discussion followed, in the absence of agreement, by the involvement of the Cabinet Office. If the dispute relates to a legal issue it will usually involve the departmental lawyers jointly instructing counsel to advise and if this does not resolve the matter, an approach to the Attorney General.

3 The Search

The sufficiency of the search (and particularly the original search) is all-important. The case-handler should be proactive in agreeing what search is to be made and how it will be conducted. It will normally be carried out by, or under the control of, the appointed person in the defendant department(s) in consultation with the departmental lawyer as the search needs to be conducted by someone familiar with the departmental record-keeping systems and who knows what they are looking for and where to find it. But the case-handler must supply an element of independent supervision by someone whose own conduct is not under scrutiny.

To be successful a search needs to be thorough and transparent. How this is achieved will depend upon the scale of the disclosure exercise (based in part on an assessment of where relevant documents may be found and the issues in the case) and the familiarity of those who hold the documents with their obligations. Departments that are unused to litigation and that primarily hold documents created by others will need most help from the case-handler who should be proactive in offering advice and assistance.

Parties should (prior to the first Case Management Conference) discuss any issues that may arise regarding searches for and presentation of documents and keep these matters under collective review. Failure to keep the other party informed exposes a party to the risk that the court may require the exercise of searching to be done a second time.

3.1 Pre-search conference

- The case-handler should arrange a pre-search conference attended by counsel, the departmental lawyer and persons sufficiently senior and knowledgeable from the defendant department(s) and NPDs who hold documents/information and the case-handler.
- The conference should discuss the issues raised by the claim, identify how the department records, handles and stores documents/information that might be of relevance to the issues in the case, then determine the searches to be undertaken, including search terms, and record the decisions taken.
- It is important to make sufficiently full searches to ensure that all statements made in pre-action correspondence are full and accurate and can be sustained and that statements made in Summary Grounds are full and accurate. This is likely to involve, even at this stage, sufficient searches at least in the more obvious locations for documents/information to ensure the accuracy of any positive assertions made. The more important the assertion to the issues in the action, the more may be required in terms of assurance of (and thus searches to ensure) accuracy.
- Where one department is a defendant the question whether they should ask other departments if they have relevant documents/information will depend on what is being impugned and the nature of the challenge.

3.2 Proportionality – reasonableness of the search

- Judgements about where and in what way to conduct searches will be made on a case by case basis. The limiting factors are relevance and proportionality. It may be more or less difficult and time consuming to search in a particular location or way. There may be more or less prospect of any such search producing relevant material. Applying this approach, it may not be necessary to search, for example, each and every potential location; but it is necessary properly to consider doing so. If it is decided not to search any potential location, the reason for that decision should be recorded. (See also, below at paragraph 5 as to record-keeping generally.)
- It would be appropriate to apply the test set out in CPR 31.7 to the question of what is a reasonable search which will be determined on a case by case basis. It should be the subject of detailed consideration at the outset (see Section 3.1 above). Factors relevant in deciding the reasonableness of a search include the following:
    - the number of 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.
- Decisions taken on proportionality should be taken by the defendant department in conjunction with the case-handler and where necessary with the benefit of advice from counsel, recorded and included in the Disclosure Statement.
- Once the size of the task has been determined the appropriate resources required to carry it out should be identified and deployed consistent with meeting the court deadline for disclosure.
- Where documents are held by the NPD there will be consultation between the defendant department and the NPD applying the same principles.

3.3 Method

At the pre-search conference mentioned above having considered the issues raised by the claim and agreed the nature of the obligation to disclose, attention should be focused on identifying the material to be disclosed under three headings, Preservation, Planning and Collection.

- Preservation

  Time may be of the essence. Destruction policies for relevant documents should be suspended. This may extend from automatic deletions of emails after a fixed period of time to more formal destruction under Public Records policies. It is important to ensure that potentially relevant documents are preserved based on a full understanding of the systems and what is technically

possible. To do this it will be necessary to identify potentially relevant material, prioritise important material and should identify all those who need to be informed and provide for how the material is to be kept and whether any restrictions on access are necessary.

- Planning

  A plan (the "Collection Plan") should be agreed, covering what searches are to be carried out, how and by whom. Remember that material may be held elsewhere, such as by other departments, contractors, consultants and former employees or at overseas missions.

- Collection

  The collection plan will:

  - describe the extent of the search;
  - describe the search parameters, dependent on the issues in the case, used to identify relevant material such as key words, themes (conceptual), date range, names (including aliases and misspellings);
  - state where, by whom and in what form the material to be
  - searched is held;
  - provide for who is to collect it;
  - provide for how it is to be handled;
  - provide for the form of the material (originals or copies) and where originals are to be held.

4 Review of the documentation

Once the documents have been collected they are reviewed for three successive purposes: (1) to determine whether they are relevant and disclosable (as to which see CPR Rule 31.6 and paragraph 1.4 above) and if so (2) to determine whether they are privileged and therefore can be withheld from inspection or (3) whether a claim for public interest immunity should be made for them. The tests to be applied and the practice to follow are set out below.

4.1 Legal professional privilege

There are two heads of legal privilege. One applies whether or not litigation is contemplated or pending. It is called "advice privilege" and covers confidential communications between lawyer and client connected with giving or obtaining legal advice. The other applies to confidential communications made, after litigation is commenced or contemplated between a lawyer and his client, a lawyer and his non-professional agent or a lawyer and a third party for the sole or dominant purpose of such litigation. It is known as "Litigation privilege".

4.2 Public Interest Immunity

The test as to when public interest immunity may be asserted was considered by the House of Lords in *Ex Parte Wiley*.[10] See also the statement of the Attorney General to the House of Commons on 11 July 1997. If the material is relevant and disclosable does it attract public interest immunity because the disclosure of its contents would cause serious harm or real damage to the public interest? If so, is the public interest in disclosure for the purposes of doing justice in the proceedings outweighed by the public interest in non-disclosure? If the balance is against disclosure the decision-maker, a Minister, will put a certificate to the court explaining the reasons for asserting public interest immunity. In a judgement dealing separately with PII the Court in *Al Sweady*[11] stressed the obligation on the Minister to ensure the accuracy of the PII certificate. Because PII can only ever apply where disclosure of material would cause serious harm or real damage to the public interest, it is essential that the department asserting the claim has taken reasonable steps to satisfy itself that the material in question is not already in the public domain and that the claim is consistent with any other claim for PII that may have been made. See also paragraph 2.7 above in relation to seeking clearance from other departments and foreign governments.

4.3 Redaction

The withholding of parts of documents involves a process known as "redaction". It is not the norm and arises for consideration only when dealing with matters such as legal professional privilege, PII, national security, international relations or other similar concerns. Redaction requires a word by word, line by line, examination of sensitive material by subject experts or lawyers and is an extremely time-consuming but important task. Redaction should always be reversible, so as to leave the original document unmodified. The process of redaction is a process of removal. Its purpose is to extract material that the department is not prepared to disclose because it is privileged, or subject to a PII claim, or to statutory constraints on disclosure, or because it is irrelevant but sensitive. The material extracted should be only the material for which a right or duty to withhold can be maintained.

- Do not withhold altogether where you can redact
- Do not redact where you can disclose
- Redaction should only be performed on a copy of the original
- Redaction should not destroy the meaning of the document; if it does consideration should be given to withholding the whole document
- The document's format and layout should, so far as is possible, be reproduced in the redacted version

[10] *R v Chief Constable of the West Midlands, Ex P Wiley* [1995] 1 A.C. 274, HL
[11] *R (on the application of Al Sweady and others) v The Secretary of State for Defence* [2009] EWHC 1687 (Admin)

- As with the rest of the disclosure exercise a record should be kept of the actions taken in relation to a document, the reasons for them and those involved in taking them
- Be careful how you cover up redacted text. It may be possible to uncover the material you have sought to protect
- A redaction exercise will involve the department and the case-holder. It may also be necessary to involve an IT expert
- It is the duty of the case-holder to inspect the whole document and to ensure that the redaction has been carried out appropriately and properly.

4.4 Practice

Whilst the search for potentially relevant documents and their review prior to disclosure and inspection are two discrete parts of the disclosure exercise, the amount of work required in the review can be reduced and costs saved if the issues mentioned below are considered at the initial pre-search conference.

4.5 The review can be organised in a variety of ways but will probably involve three stages:

a) a first cut to weed out obviously irrelevant documents but to leave in anything that might possibly be relevant;

b) a refined review by the case-handler/junior barristers with detailed knowledge of the issues in the particular case to review for relevance and disclosability, missing documents, privilege and potential public interest immunity and other statutory bars to disclosure;

c) a review for privilege and public interest immunity by subject matter experts. .

In multi-department litigation there will be a continuous need to cross-check for consistency the approaches taken by other departments to relevance, legal professional privilege and PII.

It is essential that the case-handler retains overall control of and manages the review process. The department(s) and NPDs do not decide relevance. It is for the case-handler to decide which documents are relevant and disclosable. The case-handler is under a duty to go through the documents to make sure as far as possible that no relevant documents have been omitted. This means being astute to follow up "the copy trail" – obtaining the files of persons to whom the documents were copied (even though the copies themselves are no longer disclosable unless marked) because such files often contain other relevant documents (see Matthews and Malek: Disclosure, para 14.09).

4.6 The necessity for counsel to be involved in the disclosure exercise varies. In big cases the ultimate responsibility may be assumed by leading counsel who will set the test they wish junior counsel/the case-

handler to apply and who will themselves review the material following a review by junior counsel. Where the volume of material is extremely large the initial review may be carried out by a junior team of paralegals acting under the direction of the case-handler.

4.7 The case-handler will need to agree with the defendant department(s):

- in relation to the reviewers (whether junior counsel or paralegal):
  - where they will review the documents, i.e. local to the documents or centrally located
  - the numbers of reviewers and the qualities needed (including persons with expertise in the subject matter and IT)
  - their roles
  - the allocation of responsibilities
  - how to ensure co-ordination and consistency, for example
  - with a logging protocol
  - how to instruct, manage and control them
  - do solicitors and counsel, including paralegals, need to be security vetted?
- in relation to the review:
  - the test the reviewers are to apply
  - where are documents held and can they be removed from the location (where they are not to be reviewed in situ)
  - the arrangements for storage and transport of documents
  - are there constraints upon the communication of information between parties and within teams?
  - material may need to be reclassified/declassified
  - how documents will be copied, collated and referenced
  - in what form will they be reviewed (e.g. pdf)
  - will the review be in stages
  - how the process will be managed and the quality assured
  - how issues of redaction and privilege will be dealt with
  - how queries will be addressed.

4.8 Technology

- Consideration should be given at the pre-search conference to whether electronic litigation support tools could be of assistance in identifying potentially reviewable material, document review and assessment of the case using electronic analysis.
- Proprietary document review databases are widely available and documents can be scanned on site by mobile

contractors with costs comparing favourably with those allowed for photocopying.

- However, security and resource considerations will need to be taken into account in determining whether such tools have a role to play in any particular case.

4.9 Sensitive material

The practical consequences of handling, reviewing, and clearing disclosure of potentially sensitive material are often the main reasons for problems in complying with the disclosure obligation timeously. Additionally, the process of reviewing documents for PII purposes may be protracted, especially where significant quantities of documents are involved. It is good practice therefore to get ahead of the timetable where possible and so avoid having to conduct searches and reviews in the pressurised and tightly timetabled environment of ongoing (and possibly expedited) proceedings.

4.10 Consideration should be given to entering into data exchange agreements with the claimants and agreeing on data return/destruction to apply at the end of the case.

5 Record

- A record, kept by the case-handler,detailing how the search was conducted is essential in every case so that the disclosure process can be explained to the court. An inability to explain how a muddle has arisen can be worse than the muddle itself, particularly as the other party may seek to put a sinister interpretation on any failure to give disclosure timeously or at all. If disclosure proves not to be sufficient, the court is more likely to accept the position than if proper consideration has not been given to these issues.
- The case-handler should ensure that a record is kept of the potentially relevant locations of documents, the searches carried out, why searches have not been made more widely and the logic of the decisions taken with regard to proportionality. It is helpful anyway to have such a record because it is often necessary, as a case develops, to go back and re-examine a decision or document.
- Pressure of time should not be used as an excuse to fail to keep a record. This is when it is likely to have most value.
- The record made under this section will feed into a disclosure statement.
- The keeping of such a record aids continuity when there need to be changes in staff or counsel.
- The case-handler should themselves keep a log, or ensure that one is kept by the defendant department, of what has been seen, by whom and when. This will include all documents provided to counsel which should be indexed for this purpose.

- The record is a living document and so will include, for example, additions to search parameters which will in turn be reflected in the Disclosure Statement.

6 Disclosure statement

6.1 In judicial review cases there is no obligation to provide a disclosure statement but in these, as well as other types of proceedings in which disclosure may have to be given, the case-handler should prepare and retain a statement recording:

- all searches made
- all decisions (by lawyers and clients) about the extent of searches
- all decisions made about the disclosability of documents
- all decisions about all actions taken in relation to the preparation of documents for inspection.

In multi-department litigation each body should keep its own internal record in this form.

6.2 It may be helpful in preparing the statement to adapt the format set out in CPR 31 which provides that a list of documents must include a Disclosure Statement setting out the extent of the search that has been made to locate documents and certifying that the maker of the statement understands the duty to disclose documents and that to the best of his knowledge he has carried out that duty. The duty of disclosure continues until the proceedings are concluded. The more is learned of the other party's case the more disclosure is likely to be required. Subject to issues of privilege, public interest immunity and statutory constraints on disclosure, documents which come into the possession of a party or are created during the proceedings may also need to be disclosed and covered in the disclosure statement.

6.3 Where there has been no search for a category or class of document on the grounds that to do so would be disproportionate, this must be explained in the disclosure statement which should identify the class or category of document and the reasons why the search would be unreasonable (see Section 3.3 above).

7 Production and inspection

In cases where an order for disclosure has been made, disclosure should be given in accordance with the requirements of CPR 31. This includes disclosure by list.

A person to whom disclosure of a document has been given has, subject to exceptions (CPR, r. 31.3), an automatic right to inspect it. The burden is on

the party wishing to inspect to give written notice of his intention to do so (CPR, r.31.15(a)). In practice the arrangements for inspection will be agreed between the parties and the court will only become involved if there is a lack of co-operation or a party is unreasonable.

In some other claims for judicial review, in particular those in which complex issues of fact are central issues in the case, even if an order for disclosure has not been made it would be prudent to give disclosure by list.

8 Disclosure of electronic documents

8.1 Where electronic data is concerned the court will expect the case-handler to have agreed with or to have informed the other side, to the extent that the information is not sensitive, of:

- the operation of computer and storage systems and the sources and media from which documents are available
- the keyword, conceptual and other searches that will and will not be undertaken (CPR Pt 31 PD).

8.2 Electronic documents may be contained on a database or storage media (disks, drives, tapes), servers. Metadata also counts as documents as do deleted files or records if they can be recovered.

8.3 Be aware that some electronic methods of concealing text are reversible and check whether documents have been prepared using track changes and make sure that the version disclosed is clean although in some cases it may be necessary to disclose every version. If in doubt provide hard copies for inspection.

8.4 The volume of electronic material available drives up the burden and cost of review and it is important to keep in mind the over-arching principle of proportionality. The volume is also driven up by the presence of irrelevant material. It may be possible to use technology in each of the phases namely identification, collection and processing and pre-review searches carried out to achieve reductions in volume.

9 FOI/Data Protection

- Different rules and tests apply to the provision of information under the Data Protection Act 1998 and the Freedom of Information Act 2000 and the Environmental Information Regulations 2004.
- Parties sometimes see this legislation as a useful way to obtain information relevant to a prospective claim. When considering disclosure in civil litigation regard therefore should be had as to

whether material has already been disclosed in response to requests under this legislation.

- It is also important not to lose sight of other rights and duties under this and other legislation such as the Regulation of Investigatory Powers Act 2000, the Security Service Act 1989 and the Intelligence Services Act 1994 both to give and, equally important, withhold access when deciding what to disclose.

10 Disclosure by other parties

The duty on other non-HMG parties in the litigation to give disclosure is not linked to the Crown's obligation to give disclosure. However, this should not prevent requests to other parties to clarify the claim and to provide disclosure.

11 Difficult cases

11.1 Compliance with the standards set out in this guidance may in practice not be straightforward, for example in cases involving numerous Departments, where documents are stored at large numbers of sites or on multiple databases/systems, or where large numbers of potentially sensitive documents need to be reviewed for PII purposes. Departments keep their records in different ways and not all departments have a central registry thus necessitating discrete searches within the one organisation. The resources and expertise available to departments to deal with these issues are not unlimited.

11.2 It is not for the court to approve the disclosure statement setting out how the disclosure obligations are being met (Section 8 above). However it may be sensible to inform the court of what is involved in searching and of any difficulties experienced (including the effect on national security and other important aspects of the public interest), particularly where these may affect the timing of the exercise or the arrangements for the hearing, including the handling of closed material.

11.3 It may also be possible to give disclosure in stages. If this is appropriate the disclosure statement should reflect the decisions taken and the reasons therefor and be updated as further disclosure is given.

11.4 If it appears that a disclosure exercise is unlikely to be completed on time an application for an extension should be made to the court before the expiration of the time originally permitted. An explanation of the reasons for the delay should be given. Be honest about what it has been possible to do and the steps which have been taken with a view to compliance with this guidance. If mistakes are made, e.g. documents missed on the first search, or explanations are required to make sense of what has or has not been disclosed, inform the court and the other party at the earliest possible moment.

Treasury Solicitor
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