

# Getting hold of documents for planning and environmental public law litigation: disclosure and using the EIR



Alex Shattock



# This talk

- EIR
- Duty of candour
- Specific disclosure in JR



# EIR requests to assist JR proceedings

- Some public bodies are very helpful and open with disclosure: others less so
- EIRs can be useful for drawing out internal guidance that could form the basis of a JR
- Also good for statistics the media will be interested in e.g. regarding enforcement/ regulation
- Compared to duty of candour, no relevance test
- Compared to duty of candour, no restrictions on subsequent use
- Burden is on the authority to justify non-disclosure
- EIR team in a big government department often not coordinated with the litigation team, so you can get some helpful answers....



# Tips for a good EIR/FOIA request

- Be as specific as you can
- Ask “in the alternative” questions to try and capture all possible outcomes: otherwise public body might give you a literal but unhelpful answer
- But: delicate balance between covering all bases and asking for information that will take too long to compile
- Consider a time limit to reduce effort on their part e.g. only information covering the past 1/2 years
- Consider splitting the request between different persons/groups if you are seeking a lot of information
- Remind the public body of their duties to assist you
- And don't be afraid to appeal...



# However...

- EIRs/FOIs not the best tool for a time sensitive judicial review
- Decisions under the planning acts must be challenged within 6 weeks
- JRs must in any event be brought promptly, and in some cases promptness will be judged with reference to the six week period: *Finn-Kelcey v Milton Keynes BC* [2009] Env. L.R. 17 (though query how relevant this case is now that JRs have been brought within the six week period: see *Packham v SST* [2020] EWCA Civ 1004, [45])
- If authority is expecting a JR they may seek to extend the response period from 20 days (EIR reg 5(2)) by another 20 days (EIR Reg 7(1)):
- And, a refusal will mean any JR will likely be out of time following an internal review (EIR reg 11) and a subsequent successful appeal



# Disclosure under the duty of candour

- In prospective and current JR proceedings, Defendants are subject to the duty of candour (DoC)
- Hence CPR PD54A provides “disclosure not required unless the court orders otherwise”
- So in theory if they hold documents that will help your JR, they should give them to you once they become aware of the prospective JR
- ....



# ***R (Police Superintendent's Association) v Police Remuneration Review Body [2023] EWHC 1838 (Admin)***

- A useful decision as puts all the DoC authorities in one place. Emphasises the following:
- Full and fair disclosure of all relevant material including identifying relevant documents
- Candid disclosure is required of (a) those materials reasonably required for the court to arrive at an accurate decision (b) full and accurate explanations of all the facts relevant to the issue that the court must and (c) a true and comprehensive account of the way in which relevant decisions in the case were arrived at
- Candid disclosure must not be selective but must include the unwelcome along with the helpful



# ***R (Police Superintendent's Association) v Police Remuneration Review Body [2023] EWHC 1838 (Admin)***

- Documents should usually be produced, not gisted or a secondary account given, since the document is the best evidence of what it says
- Documents can be redacted
- DoC applies at permission stage principle, although duty more extensive once permission granted
- The duty of candour 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





## ***R (Police Superintendent's Association) v Police Remuneration Review Body*** [2023] EWHC 1838 (Admin)

- Though note- arguably different approach taken by Sir Duncan Ouseley to planning statutory reviews in *Friends of the Earth v SSLUHC* [2023] EWHC 3255 (KB), in refusing disclosure of ministerial submission on the Cumbria coal mine: his point was all the information is summarised in the Inspector's decision so no need to see the additional advice to the SoS.
- Application made to Court of Appeal which may look at this issue in more detail



# Tips for getting disclosure under the duty of candour

- Ask for information early i.e. at pre-action letter stage
- Remind authority that the DoC applies at the pre-action stage: cite *Police Superintendent's Association*
- Be very clear your information request is under the DoC and NOT under EIR
- Be focused in the request
- Renew your request after permission granted
- Consider a Part 18 request for further information
- And if all else fails, you can apply for specific disclosure...





**TWEED**



# *Tweed v Parades Commission* [2007] 1 AC 650

- Leading case on specific disclosure under JR
- If D refuses to disclose you can apply for specific disclosure
- Specific disclosure reasonably rare given DoC, but can be successful
- The test is whether in the given case, disclosure appears to be necessary in order to resolve the matter fairly and justly- and no “fishing expeditions” for additional grounds of challenge (NB: “fishing expedition” point often misused- only applies to new grounds of challenge)
- Key thing is you need to link what you are asking for to the grounds pleaded/ defence advance



## *And finally*





- Note that ongoing litigation may be used to justify refusing EIR requests outside of that litigation: EIR reg 12(5)(b)
- However, hard to see why this exception should apply to otherwise EIRable information on the basis of ongoing JR proceedings
- facts in JR are uncontroversial, often already in the public domain
- Position may be different for information specific to the JR i.e. W/Ss
- Position may be different for an ongoing regulatory investigation- but a long investigation should not be used as a blanket reason to disclose generic information



# Thank you

180 Fleet Street  
London  
EC4A 2HG

clerks@landmarkchambers.co.uk  
www.landmarkchambers.co.uk  
**+44 (0)20 7430 1221**

 Landmark Chambers  
 @Landmark\_LC  
 Landmark.Chambers  
 Landmark Chambers

---

© Copyright Landmark Chambers 2024

Disclaimer: The contents of this presentation do not constitute legal advice and should not be relied upon as a substitute for legal counsel.

