



JUSTICE

**Reform of Judicial Review: Request for further views
on the provision of financial information to other
parties**

JUSTICE response

August 2016

**For further information contact:
Rachel Jones, Lawyer Civil Justice**

email: rjones@justice.org.uk tel: 020 7762 6414

JUSTICE, 59 Carter Lane, London EC4V 5AQ tel: 020 7329 5100
fax: 020 7329 5055 email: admin@justice.org.uk website: www.justice.org.uk

A) Introduction

1. Established in 1957, JUSTICE is an independent, all-party law reform and human rights organisation working to strengthen the justice system – administrative, civil and criminal – in the United Kingdom. JUSTICE believes that access to justice forms the foundation upon which our legal system and the rule of law rests.
2. In July 2015, the Government opened a consultation: *Reform of Judicial Review: proposals for the provision and use of financial information* (Cm 9117) on rules of court that will govern the financial information to be disclosed by judicial review claimants and applicants for cost capping orders pursuant to sections 85 and 88(5) of the Criminal Justice and Courts Act 2015 (“CJCA”). JUSTICE and the Public Law Project provided a Joint Response¹ on 15 September 2015 and a longer Report in conjunction with the Bingham Centre for the Rule of Law in October 2015.² The Government published its Response to the consultation on 7 July 2016.³ In Part B, the Government invites further views on the provision to other parties of financial information disclosed by the claimant.
3. In its initial consultation the Government proposed that the claimant’s financial information would only be provided to the court. The Government now proposes in its Response to consultation that both the financial declaration and any more detailed financial information be served on the defendant and any interested parties at the same time as the claim form. Non-parties e.g. members of the public could apply to the court to access these documents.⁴ It has invited further views on this proposal. JUSTICE appreciates the opportunity to respond.

B) BACKGROUND

4. Section 85(1) CJCA amends section 31(3) of the Senior Courts Act 1981 to provide that no application for judicial review will be granted permission unless the claimant has sufficient interest *and* has “provided the court with any information about the

¹ The full initial response by JUSTICE and the Public Law Project can be viewed [here](#) (hereinafter, “Joint Response”).

² *Judicial Review and the Rule of Law: An Introduction to the Criminal Justice and Courts Act 2015, Part 4*, Bingham Centre for the Rule of Law, JUSTICE and the Public Law Project, London, October 2015. The full report can be viewed [here](#) (hereinafter, “Oct 2015 Report”).

³ The full consultation response is available [here](#) (hereinafter, “Government Response”).

⁴ Government Response, para 90.

financing of the application that is specified in rules of court for the purposes of this paragraph”.

5. Section 86 CJA requires the court to have regard to the financial information provided under section 85 in “determining by whom and to what extent costs of and incidental to judicial review proceedings are to be paid.”⁵
6. New Rules detailing the precise financial information that will be required of claimants under section 85 have not yet been made. In its Response to consultation the Government proposes that if the claimant intends to meet some or all of any potential liabilities from sources other than personal resources or legal aid, and where the aggregate amount of all contributions and likely contributions from one contributor exceeds or is likely to exceed £3000, it must provide the name and address of the contributor and the aggregate amount of those contributions. The Government argues that the £3000 threshold is “sufficiently significant for most people that there will be an expectation in many cases that those contributing in excess of this amount will be involved in the running of the claim.”⁶ It proposes that disclosure will be by way of the claimant selecting from a multiple choice list and (if applicable) providing name(s) and address(es). This will be supported by a statement of truth.
7. The rationale behind sections 85 and 86 was to increase the information available to the courts to enable them to use their existing powers to make third party costs orders, as we explained in our Joint Response.⁷ Ministers made the limited nature of their purpose clear during the passage of the Bill:

“[T]o ensure that when a weak claim is brought, those who control and fund it should not be able to hide from proper costs liability.”⁸

8. Though the Government’s aim may be legitimate, the disclosure requirements interfere with fundamental rights to access the court, protected by the common law and by Article 6 ECHR, and with the right to respect for private life, protected by Article 8 ECHR. As we previously explained:

⁵ Section 86(1) CJA, para 16 of Joint Response.

⁶ Government Response, para 36.

⁷ Oct 2015 Report, para 2.29-2.30.

⁸ HL Deb, 30 July 2014, Col 161 (Lord Faulks QC).

- a) “We consider the provision of personal financial information as a condition for accessing the judicial review court... to constitute an interference with Article 8(1), and must therefore be shown to be proportionate”.⁹
- b) “The requirement to disclose personal financial information in order to secure access to the court has been expressly recognised by the Court of Appeal as having a chilling effect on claimants’ willingness to bring judicial review proceedings, precisely because it is so invasive of privacy”.¹⁰
9. We reiterate our concern that the Government’s proposals do not provide legal certainty and are not narrowly tailored, both crucial if an interference with rights is to be justified:

*“In so far as these measures can be applied consistently with the common law and the ECHR, they must be limited to such disclosure as might realistically inform the court’s assessment of costs.”*¹¹

10. Requiring individual claimants to speculate about “likely” contributions is too vague and onerous: at most claimants should be required to disclose a direct commitment to support a particular claim.¹² Further, JUSTICE does not share the Government’s view that the mere contribution of more than £3000, by itself, equates to the kind of involvement needed to potentially make a third party liable for costs, because pure philanthropy is not generally enough to justify a third party costs order. Rather, the claimant should only be made to disclose funders who are either driving or controlling the litigation, or who stand to benefit from a potential remedy.¹³

⁹ Joint Response, para 22.

¹⁰ *R(Garner) v Elmbridge Borough Council and another*. Joint Response, para 26.

¹¹ Oct 2015 Report, para 2.30.

¹² Joint Response, para 45.

¹³ Joint Response, para 40.

C) CONSULTATION QUESTIONS

Consultation question 1

(A) Do you agree with the proposal to serve the financial declaration and any more detailed financial information on the defendant and interested parties at the same time as the claim form?

11. The Government points to “equality of arms” as its rationale for disclosing the financial information provided by the claimant to other parties alongside service of the claim form.¹⁴ However, the special context of judicial review must be borne in mind: a challenge to the lawfulness of the conduct of a public body. In such claims, the defendant is in the more powerful position, not least because they have all the information needed to decide whether permission ought to be granted. This informational asymmetry disadvantages claimants from the start.
12. In ordinary civil claims, by analogy,¹⁵ we note that claimants are not required to provide costs budgets until after they have seen the defence, reflecting the difficulty of estimating costs at the very outset of litigation.¹⁶ Moreover, standard disclosure normally takes place after the defence has already been filed.¹⁷
13. There can be no good reason to require judicial review claimants to disclose their financial situation to other parties at the very outset of the claim. It is certainly irrelevant to other parties’ positions on whether permission ought to be granted, and there would appear to be no reason for the court to review the information before it is needed,¹⁸ i.e. when it is considering making a costs order. The position in civil claims is worth consideration; JUSTICE draws attention to three specific points:
- a) While costs budgets and disclosable documents have to be considered at an early stage in civil litigation, it is very difficult to see what legitimate purpose is served by the proposed early disclosure of financial information by judicial review claimants. Early disclosure and the sharing of costs estimates in civil claims is designed to encourage consideration of costs and early settlement, if possible. The same incentives do not exist in judicial

¹⁴ Government Response, para 21.

¹⁵ Judicial review claims have their own rules about disclosure distinct from those that govern ordinary civil litigation in Part 31 CPR.

¹⁶ Oct 2015 report, para 55; Rule 3.13 CPR.

¹⁷ White Book 31.5.2.

¹⁸ Joint Response, para 60.

review claims, where the outcome sought does not generally relate to a financial settlement but to the rectification of public law wrongs.

- b) The Government's proposed requirement to disclose financial risks is one-sided, applying only to the claimant. Although any responsible public authority will be bound to consider the impact of litigation on the public purse, there is no court-supervised check on this responsibility allied to the disclosure provisions in the CJCA.¹⁹
- c) Due to the informational asymmetry referred to above, the costs of the claim may be very difficult for the claimant to estimate initially. Given the shifting picture of costs throughout the life of the judicial review, the information provided at the time the claim form is served will serve little purpose to the respondent, other than to inform its litigation strategy. Accordingly, JUSTICE is very troubled by the obvious potential for knowledge about the claimant's financial information to be used by the defendant to its litigation advantage. Active case management would be required by the court to guard against this possibility.

14. Comparisons with other types of litigation must take into account the relatively weak position of individual claimants challenging public authorities, the special role of judicial review in holding them to account, and the public interest in meritorious claims being brought. Far from ensuring equality of arms, insisting that the claimant disclose its financial position – including all details of third party funding and likely third party funding – to other parties at the very outset would place judicial review claimants at even greater disadvantage.

(B) Might there be exceptional circumstances when the court should be able to direct that some or all of this information is not served on the defendants and other parties?

15. We have previously warned that the mechanics of enforced disclosure will have a direct bearing on its lawfulness, that disclosure should be limited in so far as is possible²⁰ and that claimants should be required to disclose private financial

¹⁹ See further 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, available [here](#), especially Chapter 6: Costs.

²⁰ Joint Response, para 62.

information only exceptionally. This proposal flips this on its head by suggesting that such information could be withheld only exceptionally. Subject to our general objections to disclosure to other parties, JUSTICE disagrees with the assumption that only in rare circumstances would a court dispense with service of financial information on other parties.

16. Civil claims provide an instructive comparator. Under CPR rule 31.5(2) the court can dispense with, or limit, standard disclosure. The court also enjoys a broad discretion to make “any other order in relation to disclosure that the court considers appropriate.”²¹ Importantly, a party may object to inspection of documents²² or disclosure of a third party’s confidential information²³ if this would lead to an unjustified infringement of the right to respect for private life. Indiscriminate disclosure of financial information of the claimant or a third party funder could constitute just such an unnecessary interference with rights. It is difficult to justify lesser protections in public law claims, which serve a clear constitutional purpose of ensuring accountability of public decision makers.

17. JUSTICE would also contrast these proposals with applications for pre-action disclosure in ordinary civil claims. In such cases the court must decide (*inter alia*) if disclosure is “desirable”.²⁴ Even if the jurisdictional requirements are met the court can in its discretion refuse to order pre-action disclosure; it considers all the facts, including the burdens that compliance with the order would impose.²⁵ *OCS Group Ltd v Wells*²⁶ indicated that pre-action disclosure of private, personal information will not be “desirable” at a point where the precise shape of the claim is not clear and there is a risk disclosure will later prove to have been embarrassing yet of no significant value to resolving proceedings.

18. Drawing an analogy with the proposed pre-permission disclosure of a judicial review claimant’s financial information to other parties, the Government proposals

²¹ CPR r31.5(7)(f).

²² White Book 31.3.36.1, *Webster v Ridgeway Foundation School Governors* [2009] EWHC 1140 (QB).

²³ White Book 31.3.36 and cases cited therein.

²⁴ Rule 31.16(3) contains various jurisdictional requirements, including that pre-action disclosure must be “desirable” in order to dispose fairly of the anticipated proceedings, assist the dispute to be resolved without proceedings, or save costs (r31.16(3)(d)). “Desirable” is a two-stage test: if the jurisdictional tests are met then, at the second stage, the court decides in its discretion whether pre-action disclosure is desirable on all the facts of the case (*Black v Sumitomo Corp.* [2002] 1 WLR 1562, para 81).

²⁵ *Ibid*, *Black v Sumitomo*.

²⁶ [2009] 1 WLR 195. This case concerned medical records in a personal injury case, but arguably disclosure of personal financial information at a point before it is of any value raises very similar concerns.

would involve the disclosure of irrelevant but sensitive information. Details of the claimant's finances are clearly of no value at the point of resisting an application for permission, and impose needless costs on the claimant. Judged by this or any similar metric, pre-permission disclosure of a judicial review claimant's private financial information (and that of any third party funders) to other parties is clearly undesirable as well as unnecessary.

19. In their current form, the Government's proposals give insufficient weight to the protection of private information, and in JUSTICE's view are far too broad and ill-defined. They would, if implemented, be subject to challenge.

Consultation question 2

Are there any alternative approaches available as to the stage in the proceedings when the financial information is provided to defendants and interested parties?

20. Yes. To avoid any interference with the rights of claimants and third party funders, disclosure should only be required when it is *necessary*. The limited purpose of the Parliamentary changes in section 85 CJCA is to assist the court in deciding whether to make a costs order against a third party, so it is only necessary for the court to consider such information (and any representations by other parties) at the stage of considering whether to make a costs order.

21. As we have previously explained, it is especially important that the financial information does not influence the court's consideration of the claim beyond its consideration of any third party costs order. In our Joint Response with the Public Law Project, we recommended that:

"In practice, this may mean that the material is provided to the registry at the outset of an application, and disclosed to the trial judge in updated form only when costs are to be attributed."²⁷

22. The same approach should apply to other parties to the judicial review: the financial declaration and more detailed information should only be provided to the defendant and interested parties if and when an application for a costs order is made, and if necessary to assist the court in coming to a decision.

²⁷ Joint Response, para 62.

23. There are good pragmatic reasons to support this approach. First, it is only by their conduct during the litigation that the Court will be able to assess whether a third party costs order would be appropriate. Based on existing law on third party costs orders, it is unlikely that a respondent will be in a position to seek such an order without knowledge of the conduct of the claimant and third parties in the case. Secondly, the scope of the claimant's reliance on third party funding and the role of those third parties in the litigation will only be clear at the time when a costs order is being considered, after disclosure is complete and the scope of the issues in the claim is clear. Requiring multiple disclosures is objectionable in principle, and will impose unnecessary, unjustifiable and disproportionate burdens on both claimants and the court.

Consultation question 3

Do you agree that it is appropriate not to allow this information to be provided to the general public under CPR 5.4C(1) and to leave any decision on this to the discretion of a judge on application?

24. Given the privacy interests involved, the circumstances in which personal financial information could be disclosed to members of the public should be circumscribed. JUSTICE agrees that Rule 5.4C(1) should not apply, so a rule or practice direction must make different provision for financial information disclosed in judicial review proceedings, under Rule 5.4D(3). The applicant non-party should have to show a countervailing public or private interest sufficient to justify the interference with private life attendant on further disclosure.

Consultation question 4

We would welcome views on our assessment of the impacts of the further proposals set out in Part B on equality or the family test. We would particularly welcome any evidence or data to support those views.

25. JUSTICE is concerned that the impact assessment for these proposals is limited, with insufficient analysis of the Government's justification for the measures. The chilling effect on groups, including those protected by the Equality Act 2010 and the general equality duty, has not yet, in our view, been fully considered.