

Open Justice and the Missing Dimension: Access to Documents in Civil Proceedings

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1. Introduction

Thank you very much for the invitation to speak today. I am here in my capacity as Chair of the Judiciary's Transparency & Open Justice Board.

I want to begin with a proposition that is now familiar, but which is worth repeating in a forum such as this: open justice is not a slogan; it is a constitutional constraint. It explains why courts exist as public institutions, how they must operate, and why departures from openness must be justified rather than assumed.

Today, however, I do not want to deliver a general lecture on the constitutional foundations of open justice. I want to talk about something more specific and more practical: access to documents—because in modern civil justice, if open justice does not follow the documents, it becomes formal rather than real.

The Business & Property Courts are an ideal place to focus this question. Your work is sophisticated, high-value, and often fast-moving. It is also, self-evidently, document-dense. If transparency fails here, it is likely to fail everywhere.

2. The Transparency & Open Justice Board — the 'route map'

The Transparency & Open Justice Board was established to embed open justice across courts and tribunals as a matter of daily practice and not occasional aspiration.

A central moment in the Board's work was the publication of the Key Objectives in July 2025. Those Key Objectives are intended to operate as a route map: high-level outcomes to guide work, identify where changes can and should be made, and measure the outcomes of change programmes.

The Board's public engagement response makes two points that matter for today.

First, the Key Objectives are high-level principles across all jurisdictions; they are not a 'one-size-fits-all' code, and doing justice must always come first. The degree of openness achievable will vary with the nature of the work.

Second, the Board deliberately chose the verb 'promote' open justice. That is an active duty, and it need not be onerous: it may be as simple as ensuring observers can hear, follow, and access the written material being relied upon.

The Key Objectives also express open justice in four components: Open Courts, Open Reporting, Open Decisions, and Open Documents.

My focus today is the fourth: Open Documents, and in particular access to the documents that are integral to understanding civil proceedings.

3. Why documents have become the stress-point of civil open justice

The difficulty is not hard to state. In the early twentieth century, if you attended a trial—civil or criminal—you could broadly follow what the judge or jury was hearing: witnesses gave evidence orally; documents were read aloud; submissions were made orally.

In the civil courts today, the position is materially different. Much of the evidence is introduced through written witness statements; much argument is conducted through written skeletons and submissions; and judges pre-read large amounts of material. Documents are often not read aloud, and oral argument may proceed at speed by reference to written texts.

This matters because the Supreme Court has expressly recognised that the second principal purpose of open justice—beyond holding judges to account—is to enable the public to understand how the justice system works and why decisions are taken; and that in modern practice it may be 'difficult, if not impossible' to know what is going on without access to the written material.

That point is not abstract. It is the lived reality described by practitioners, journalists, academics and court observers; and it is one reason why access to court documents emerges repeatedly as a barrier in modern accounts of open justice.

The Board's position—stated in its engagement response—is that in proceedings held in open court, save where strictly necessary to derogate, evidence relied upon must be available to the public, whether by being communicated in public proceedings and/or by access to witness statements, documents, or transcripts.

So, the issue is not whether documents matter. The issue is how to ensure that the legal entitlement to open justice is operationalised in a civil world in which the documents are the proceeding, in a way that remains faithful to the limits of open justice and to countervailing interests such as confidentiality.

4. The law's architecture: Guardian, Dring, and the limits clarified in X and Y v BBC

(a) Guardian: the default and the proportionality exercise

The modern starting point is well-known. In *Guardian News and Media v City of Westminster Magistrates' Court*, the Court of Appeal articulated open justice as vital to the rule of law. It held that where documents have been placed before a judge and referred to in the course of proceedings, the default position should be that access is permitted on open justice grounds, and that a fact-specific proportionality exercise is required, evaluating the value of disclosure in advancing open justice against any risk of harm to legitimate interests of others.

(b) Dring: confirmation, purposes, and the balancing framework

In *Dring*, the Supreme Court affirmed that the constitutional principle of open justice applies to all courts and tribunals exercising judicial power; and, unless inconsistent with statute or rules, there is an inherent jurisdiction to determine what open justice requires in terms of access to documents or information placed before the court.

Crucially, *Dring* identifies the two principal purposes of open justice: (1) public scrutiny of the way courts decide cases; and (2) enabling the public to understand how the justice system

works and why decisions are taken—particularly in modern civil cases where written material is central.

Dring also makes clear that, save where rules give a right, the applicant has no right to access; the applicant must explain why access is sought and how it would advance open justice. The court must then carry out a fact-specific balancing exercise, considering both the value to open justice and the risk of harm to legitimate interests.

That balancing exercise expressly includes confidentiality: Dring lists the protection of trade secrets and commercial confidentiality among the most obvious countervailing interests. It also emphasises practicalities and proportionality, including the burdens of providing material—especially after proceedings have concluded—though noting that digitisation may make access easier.

(c) X and Y v BBC: the limits—open justice is about scrutinising courts

Because this is a Business & Property Courts audience, it is important to anticipate a concern that sometimes sits beneath scepticism: ‘Is open justice becoming a lever to obtain material for purposes unconnected with understanding what the court did?’

The answer is that open justice has limits, and those limits have been emphasised clearly.

In X and Y v BBC, the Court of Appeal stressed that open justice is directed to scrutiny of the work of courts and tribunals and the judges who sit in them, and it does not extend to affording third parties access to information for reasons unconnected with examining that judicial work.

The case is in the family context, but the proposition is not family-specific. It is a general reminder that open justice is not a general-purpose disclosure regime; it is a constitutional principle with particular purposes.

5. The practical gap: why scepticism persists (confidentiality, settlement, proportionality)

If the law is clear in principle, why does professional scepticism persist—particularly in civil and commercial litigation?

The Board's engagement response identifies the themes that recur.

(a) Confidentiality and commercial sensitivity

The Board's position is plain: confidentiality is not usually sufficient on its own to justify derogations from open justice, save where proceedings exist to vindicate that confidentiality—because otherwise the court's process would destroy what is sought to be protected.

Equally, the Board acknowledges (consistently with *Dring*) that the most obvious justifications for withholding material include trade secrets and commercial confidentiality, and that the burden lies on the person seeking the derogation, supported by clear and cogent evidence, with restrictions being no more than strictly necessary.

That is the correct discipline: open justice is the default; derogations must be necessary and proportionate.

(b) Settlement dynamics and 'chilling' effects

Concerns about settlement and chilling effects are often asserted in broad terms. The Board's response treats these concerns seriously but emphasises that the administration of justice in England and Wales is firmly based on open justice principles and they are not negotiable; parties cannot choose private justice within the public system, and if a recalibration were sought on 'chilling' grounds it would be for Parliament, not the Board.

Importantly, the Board also recognises that timing may matter: there may be good reasons why evidence becomes publicly available only once it has been relied upon at a public hearing,

including concerns about reporting detached from cross-examination and the integrity of proceedings.

So, the answer is not denial of the concern, but structured mitigation: careful attention to when materials enter the public domain, and how necessary protections are applied.

(c) Proportionality and burden

Professional scepticism is often, at base, a proportionality anxiety: ‘Will this create satellite disputes, impose burdens, or require courts or parties to become document-bureaucrats?’

Dring itself addresses the point: practicalities and proportionality matter, applications are preferably made when materials are readily available and the judge is in day-to-day control, and the burdens placed on parties or the court may be out of proportion to the benefit to open justice—again with the recognition that digitisation may make access easier.

The Board also recognises resource concerns but notes that digitisation can reduce burden and that it is undesirable for access to depend on party cooperation; ultimately, the court must retain control.

That is the context in which I now turn to a development that is particularly important for this audience: a system design response to the problem of access to documents, rather than an ad hoc application-driven response.

6. The Commercial Court ‘Public Domain Documents’ pilot: a practical design response

Earlier this year, Mrs Justice Cockerill gave a talk focusing on a proposed reform in the Commercial Court which directly addresses the practical gap I have described.

The essence of the approach is captured in one simple idea: if the documents have entered the public domain through use in open court, then access should be delivered through the digital infrastructure that already exists—CE-File—without requiring separate applications and without imposing burdens on court staff.

The pilot adopts the terminology of ‘Public Domain Documents’, aligned to what are often called ‘Dring documents’: skeleton arguments and written submissions relied upon, witness statements used as evidence-in-chief, expert reports relied upon, and certain defined additional categories—while deliberately not attempting to capture every document referred to in argument.

The key operational mechanism is a filing obligation: unless the court orders otherwise, parties must file those Public Domain Documents on CE-File within a defined filing period after a hearing in public, using specified designations.

This is not a blunt instrument. The pilot (as explained by Mrs Justice Cockerill) contains a set of safeguards—‘twists and olives’—including: it applies only to open court hearings; it does not apply to litigants in person; it does not apply to documents already protected by confidentiality or anonymisation orders; and there is scope for a Filing Modification Order, including potentially retrospectively at the request of a non-party.

The stated aims are directly responsive to the scepticism I have described:

- Simple access via public-facing CE-File;
- No extra work for court staff because parties file into the correct public domain category;
- Cheaper and quicker because it avoids Part 23 applications as the default route; and
- Risk-managed, because filing is party-driven with the possibility of redaction or disapplication by order.

The pilot is also expressly described as proof of concept, initially in the Commercial Court, intended to be evaluated, with longer-term roll-out dependent on success.

This reflects a broader principle that appears in my own judicial reasoning: open justice cannot be left to happenstance in a world of digital files. In *Hayden v HMCTS*, I noted that the CPR do not require the filing of skeleton arguments or trial witness statements on CE-File; that this

creates a practical gap; and I stated in terms that the availability of skeleton arguments and witness statements deployed in open court is essential to any meaningful concept of open justice.

So, the Commercial Court pilot can be seen as a practical route to achieving what both Dring and that analysis identify: ensuring that, in a document-driven civil process, observers can actually understand the proceeding and connect it to the decision.

7. How this connects to the Key Objectives

If one takes the Key Objectives seriously, open documents is not an optional ‘nice-to-have’. It is a core element of a modern, intelligible justice system.

The Board’s engagement response explains the intended default: the public should have access not only to submissions and arguments but also to documents—especially witness statements used in place of oral testimony—so that an observer can relate what the judge decided to the evidence and argument before the court.

It also identifies a present structural deficiency: CPR 5.4C(1) grants ‘as of right’ access only to a restricted category (orders, judgments, statements of case), omitting what the Board describes as the clearest omissions—skeleton arguments, witness statements and expert reports relied upon in public.

The Commercial Court pilot is therefore a model of how a Key Objective becomes an implementable deliverable: not by abstract restatement of principle, but by procedural architecture that is proportionate, risk-managed, and compatible with professional realities.

8. Comparative perspective: PACER and what it illustrates

In earlier speeches I have spoken about the US federal system’s PACER platform as a world-leading model of public access to court electronic records, integrated with case management and enabling public users to access dockets and filed documents (subject to a fee structure).

I do not raise PACER today to suggest transplantation of a foreign model. I raise it to illustrate a simple point: when the system is designed on the assumption that public access to core court documents is normal, transparency becomes routine rather than exceptional.

The question in England and Wales is not whether we adopt PACER, but how we design our own digital justice system so that open justice is operational rather than theoretical.

9. Conclusion

Let me end where I began.

Open justice is a constitutional principle with two central purposes: scrutiny of judicial decision-making, and public understanding of how justice operates. In modern civil justice, both purposes depend upon access to the written materials that constitute much of the proceeding.

At the same time, open justice is not limitless: it is concerned with the work of courts and judges; it does not exist to provide an all-purpose route to information for unrelated ends; and it must be balanced against legitimate countervailing interests, including commercial confidentiality and the practical proportionality of disclosure.

The Board's Key Objectives, published in July 2025, were designed as a route map, not a manifesto. They point us towards a culture in which courts and tribunals actively promote open justice, and in which access to core documents becomes an ordinary feature of public proceedings—subject always to strictly necessary and proportionate derogations.

The Commercial Court's Public Domain Documents pilot—so clearly explained by Mrs Justice Cockerill—is a practical demonstration of that approach: using existing digital infrastructure, building in safeguards, and aiming to reduce the friction and opacity that currently drives scepticism.

If we get this right, we will have done something important: we will have ensured that civil justice remains not only open in form, but intelligible in substance. And that, in the end, is what open justice requires.

Thank you.

Supporting references (for publication)

1. Transparency and Open Justice Board, Response to Public Engagement on the TOJ Board's Key Objectives (published with the Key Objectives, July 2025), §§7–8 (high-level principles; no one-size-fits-all; doing justice first).
2. TOJ Board Response to Public Engagement, §12.1 (new Key Objective to 'promote' open justice; reflecting Dring).
3. Dring (on behalf of the Asbestos Victims Support Groups Forum UK) v Cape Intermediate Holdings Ltd [2019] UKSC 38; [2020] AC 629, §§41–47 (inherent jurisdiction; two purposes; balancing; confidentiality; proportionality; timing; digitisation).
4. R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court [2012] EWCA Civ 420; [2013] QB 618 (default position; proportionality exercise; open justice rationale).
5. X and Y v BBC [2025] EWCA Civ 824; [2025] 1 WLR 5201, esp. paras 20–28 (limits of open justice; must advance scrutiny/understanding of courts; not a general access principle for unrelated investigation).
6. TOJ Board Response to Public Engagement, §§16.2–16.2.9 (Board's summary of Dring; default position; confidentiality not usually sufficient alone; derogations; burden).
7. TOJ Board Response to Public Engagement, §§16.16–16.16.3 (chilling effect; open justice not negotiable; private dispute resolution elsewhere; Parliament point).
8. Mrs Justice Cockerill DBE, 'Transparency and Open Justice: Where we are, and what to expect...' (slides and notes on the Commercial Court Public Domain Documents pilot, July 2025).
9. Hayden v HMCTS [2022] EWHC 2693 (KB), esp. §§32–36 (skeletons/witness statements essential to meaningful open justice; CE-File filing gap; policy implications).
10. Mr Justice Nicklin, 'Open Justice: Fit for Purpose' (Courts & Tribunals Observers' Network, 4 June 2025), §§48–61 (access to documents; PACER; CE-File and public-facing access).