



Courts and Tribunals Judiciary

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

Newcastle Business & Property Courts Forum

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Mr Justice Nicklin:

Chair of the Judiciary's Transparency & Open Justice Board

Introduction

1. 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.
2. 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.
3. 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 risks becoming an illusion rather than a reality.
4. 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.

The Board's approach

5. 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.

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6. A central moment in the Board's work was the publication of the Key Objectives in July 2025.¹ 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.
7. The Board's public engagement response² – published with the Key Objectives – makes two points that matter for today.
 - (1) 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.
 - (2) 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.
8. The Key Objectives also express open justice in four components: Open Courts, Open Reporting, Open Decisions, and Open Documents.
9. My focus today is the fourth: Open Documents, and in particular access to the documents that are integral to understanding civil proceedings.

Why documents matter in civil justice

10. 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.
11. 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.
12. Against that background, it is striking that the Civil Procedure Rules do not require the routine filing with the court of key written materials, such as skeleton arguments, written submissions, witness statements, and expert reports. Unless the court directs otherwise, it remains a matter for the parties whether such documents are lodged on the court file at all. As a result, it may be no more than a matter of chance whether the court retains copies of materials central to the proceedings.³

¹ <https://www.judiciary.uk/wp-content/uploads/2025/07/TOJ-Board-Key-Objectives.pdf>

² <https://www.judiciary.uk/wp-content/uploads/2025/07/TOJ-Board-Response-to-Public-Engagement-on-the-Key-Objectives.pdf>

³ *Hayden -v- Associated Newspapers Ltd* [2022] EWHC 2693 (KB) [33].

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13. Equally, those documents do not fall within the categories to which a non-party is entitled to access as of right under CPR 5.4C(1). If not provided voluntarily, access requires a specific application. That position is difficult to reconcile with the centrality of those materials to modern civil litigation.
14. As I have observed judicially, skeleton arguments and trial witness statements are now among the most important documents in any case: without access to them, a hearing – or any transcript – may reveal only a fraction of the argument actually advanced.⁴
15. Implementation of the Key Objectives is intended to address that gap, by ensuring that materials central to the court’s decision are both retained and accessible in practice.
16. Access to those core documents matters because the Supreme Court⁵ has recognised that the second principal purpose of open justice – beyond holding judges and their decisions 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.
17. That point is not abstract. It reflects the lived experience described by practitioners, journalists, academics and court observers; and it explains why access to court documents repeatedly emerges as a point of friction in modern accounts of open justice. The difficulty has not been deliberately engineered. It has arisen incrementally, often invisibly, as the civil process has evolved towards greater reliance on written materials and more efficient case management. In that sense, the risk to open justice is not the product of principled resistance, but of everyday practice: what the Lady Chief Justice has aptly described as the “*careless – sometimes inadvertent – failure to protect its ideals*”.⁶
18. The Board’s position – embodied in the Key Objectives and articulated 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.
19. So, the issue is not whether documents matter. The issue is how to ensure that the legal entitlement to open justice is actively secured in a civil world in which the documents are fundamental to the proceedings and their understanding.

⁴ *Hayden -v- Associated Newspapers Ltd* [32]. See also *SmithKline Beecham Biologicals SA -v- Connaught Laboratories Inc* [1999] 4 All ER 498, 511–512 (Lord Bingham CJ); *Moss -v- Upper Tribunal* [2024] 4 WLR 99 [20] (Coulson LJ)

⁵ *Cape Intermediate Holdings Ltd -v- Dring* [2020] AC 629 [43]

⁶ Speech to the Society of Editors Annual Conference (30 April 2024) announcing the establishment of the Transparency & Open Justice Board: <https://www.judiciary.uk/keynote-speech-by-the-lady-chief-justice-at-the-society-of-editors-25th-anniversary-conference/>

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20. In most cases, the process of litigation necessarily involves the public exposure of material which parties or witnesses would prefer to keep private. That is not a competing interest to be balanced in the ordinary way, but a consequence of the administration of justice in public: it is the “*price to be paid*” for open justice.
21. The real question is how to give practical effect to open justice in a way that is faithful to its principled limits, recognising that derogations – whether on grounds of confidentiality, privacy or otherwise – are exceptional, and require clear justification.⁷
22. There is, moreover, a further dimension to the same problem. As justice is increasingly delivered through paper determinations, online case management and remote hearings, traditional proxies for openness – physical courtrooms, public galleries and routine media attendance – may no longer provide an effective guarantee of transparency.
23. The risk identified earlier is therefore not confined to documents. Unless openness is actively considered and protected in the design and operation of modern Court processes, there is a real risk that open justice is incrementally eroded by procedural convenience rather than curtailed by principled decision-making.
24. As commentators have observed, open justice is most vulnerable not to overt restriction but to gradual erosion through the practical operation of modern procedures.⁸

Open justice: structure and limits

25. The modern starting point is well known. The imperative to provide documents on open justice grounds is at its strongest where access is integral to a proper understanding of proceedings held in open court. In ***R (Guardian News and Media Ltd) -v- City of Westminster Magistrates’ Court***⁹, the Court of Appeal described open justice as fundamental to the rule of law. Where documents have been placed before a judge and referred to in the course of proceedings, the default position is that access should be permitted, particularly where sought for a proper journalistic purpose. Any departure requires justification: the court must carry out a fact-specific evaluation, considering the extent to which disclosure will advance the purposes of open justice and whether there is a sufficiently strong countervailing reason to

⁷ ***Scott -v- Scott [1913] AC 417, 437–438*** (Viscount Haldane LC) (derogations only where “*by nothing short of the exclusion of the public can justice be done*”); ***Khuja -v- Times Newspapers Ltd [2019] AC 161***, [34(2)] (Lord Sumption JSC) (“*the collateral impact ... is part of the price to be paid for open justice*”).

⁸ Sue Prince, “*Fine words butter no parsnips’: can the principle of open justice survive the introduction of an online court?*” CJK (2019) 38(1) 111-125. Prince argues that as justice is increasingly delivered through digital, paper-based and online processes, traditional mechanisms of openness centred on physical courtrooms and public attendance risk becoming ineffective, requiring the principle of open justice to be consciously re-imagined for a modern justice system. HHJ Nigel Bird, “*Open justice in an online post-reform world: a constant and most watchful respect*” (2017) CJK 36(1) 23. Judge Bird warns that open justice is most vulnerable not to overt restriction but to gradual erosion through procedural convenience and digitisation, emphasising the need for active judicial vigilance to ensure that transparency is preserved as court and tribunal processes evolve.

⁹ **[2013] QB 618**

withhold access. The exercise is not evenly balanced. The starting point is a clear presumption in favour of openness, to which substantial weight must be given.¹⁰

26. Beyond supporting the immediate understanding of proceedings, the open justice imperative may require documents to be provided even after the proceedings are at an end. That can be an extension of the need to support a proper understanding of the proceedings, but it can embrace wider interests. 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.
27. Crucially, **Dring** identifies the principal purposes of open justice: (1) public scrutiny of the way courts decide cases; and (2) to enable the public to understand how the justice system works and why decisions are taken – particularly in modern civil litigation, where written material is often central to the court’s reasoning.
28. **Dring** also makes clear that, save where rules confer a right¹¹, there is no automatic entitlement to access. The applicant must explain why access is sought and how it would advance the purposes of open justice. The court then undertakes a fact-specific evaluation: whether, and to what extent, disclosure would serve those purposes, and whether there is sufficient justification to refuse or limit access.
29. That evaluative exercise requires the court to take account of countervailing considerations. Confidentiality – particularly trade secrets and commercial confidentiality – is among the most obvious. Practical considerations and proportionality may also be relevant, including the burdens of providing material, especially after proceedings have concluded. But these factors do not stand on an equal footing with open justice: they justify withholding or limiting access only where they are sufficiently strong to outweigh the public interest in openness.
30. Because this is a Business & Property Courts audience, it is important to anticipate a concern that sometimes underlies scepticism: “*Is open justice becoming a lever to obtain material for purposes unconnected with understanding what the court did?*”
31. The answer is that open justice has clear limits. Those limits were emphasised in **Dring** and, more recently and in clear terms, by the Court of Appeal in **X and Y -v- BBC**.¹²
32. In **X and Y**, the Court of Appeal stressed that the principle is directed to scrutiny of the work of courts and tribunals and the judges who sit in them. It does not extend to

¹⁰ **Tickle -v- BBC [2025] Fam 105** [49]: “*the scales do not start evenly balanced*” and that a “*very substantial weight*” attaches to open justice.

¹¹ It should be remembered that the consequence of implementation of the Key Objectives is likely to broaden the categories of document to which a non-party is entitled under CPR 5.4C(1).

¹² **[2025] 1 WLR 5201**

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giving third parties access to material for reasons unconnected with examining that judicial work.

33. That is a general proposition, not confined to the family jurisdiction. It is a reminder that open justice is not a general-purpose disclosure regime; it is a constitutional principle serving defined purposes.
34. But it is important to be precise about what that limitation does – and does not – do. The point made in *X and Y* goes to the scope of the *Dring* jurisdiction: cases in which a non-party seeks access to documents outside any entitlement conferred by the rules. If the purpose relied upon does not advance open justice, that discretionary jurisdiction is not engaged.
35. It does not follow that similar arguments can be used to resist disclosure where access is required to understand ongoing proceedings, or where a right of access is conferred by the CPR. In those situations, open justice operates differently: not as a threshold to be satisfied, but as a principle that underpins and informs the rights that already exist. Properly understood, those limits do not weaken open justice. They preserve its focus.

Why scepticism persists

36. If the law is clear in principle, why does professional scepticism persist – particularly in civil and commercial litigation?
37. The Board's engagement response identifies the themes that recur.

(a) Confidentiality

38. The first concerns confidentiality and commercial sensitivity.
39. The Board's position reflects the established legal approach but expresses it in practical terms: confidentiality will rarely, on its own, justify a departure from open justice – save where the proceedings exist to vindicate that confidentiality, because otherwise the court's process would destroy the very thing the proceedings are designed to protect.
40. At the same time, the Board recognises – consistently with *Dring* – that trade secrets and genuinely confidential commercial material may justify restrictions. The discipline is a familiar one: the burden lies on the party seeking the derogation; the evidence must be clear and cogent; and any restriction must go no further than is strictly necessary.

(b) Settlement (and ‘chilling’ effects)

41. Concerns about settlement and ‘chilling’ effects are often expressed in broad terms. The Board treats those concerns seriously, but makes two points clearly. First, the administration of justice in England and Wales is founded on open justice, and that foundation is not negotiable within the existing system. Parties cannot opt for private justice while using the public courts. Any fundamental recalibration would be for Parliament, not the Board.
42. Second, timing may matter. There may be good reasons why material becomes publicly accessible only once it has been relied upon in a public hearing, including concerns about reporting detached from cross-examination and the integrity of proceedings.
43. The response, therefore, is not to deny the concern, but to manage it: by careful control of when material enters the public domain, and how necessary protections are applied.

(c) Proportionality and burden

44. The third theme is proportionality and burden.
45. The concern is practical: will greater access generate satellite disputes, impose additional burdens, or require courts and parties to assume administrative responsibilities that distract from the conduct of the litigation?
46. The authorities already provide the answer. In *Dring*, the Supreme Court recognised that practicalities matter: applications are best made when material is readily available and the judge is in active control; the burden of compliance may be relevant; and the benefit to open justice may not always justify the cost. Digitisation, however, has the potential significantly to reduce those burdens.
47. It is against that background that I turn to a development of particular importance for this audience: a system-level response to the problem of access to documents, rather than a reliance on case-by-case applications.

The ‘Public Domain Documents’ pilot

48. In July last year, the then Mrs Justice Cockerill, now the Deputy Head of Civil Justice, gave a talk on a proposed reform in the Commercial Court which directly addresses the practical gap I have described.¹³

¹³ 25 July 2025 speech to the London Solicitors Litigation Association, “*How do we achieve a transparent justice system*” – <https://www.lawgazette.co.uk/news-focus/in-depth-open-justice-commercial-court-documents-go-public/5124074.article>

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49. The Public Domain Documents Pilot commenced on 1 January 2026. It is supported by CPR PD51ZH. The essence of the approach is captured in one simple idea: if documents have entered the public domain by being used or referred to in open court, then access should be delivered through the digital infrastructure that already exists – CE-File – without requiring separate applications or imposing burdens on court staff. The Practice Direction defines those documents and imposes a time-limited obligation to file them so that they can be accessed through the public CE-File portal.
50. The pilot adopts the terminology of ‘Public Domain Documents’, aligned to what are often described as ‘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. It does not attempt to capture every document referred to during a hearing. In particular, documents drawn from trial bundles but only referred to in passing – for example in submissions or cross-examination – are not within its scope, reflecting the practical burden that would be involved in extracting and filing them individually.
51. 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 public hearing, using specified designations.
52. One practical issue has already emerged. In at least two instances this year, journalists were told by solicitors to obtain material from CE-File, or that documents need not be provided directly to them. It was made clear – whether through the court or otherwise – that the pilot does not displace existing routes of access, including the provision of material at hearings, and the issue was resolved.
53. This is not a blunt instrument. The pilot contains a set of safeguards. 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.
54. The stated aims respond directly to the concerns I have outlined:
 - 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.
55. There is a further, practical dimension to this. If open justice is to be meaningful in a digital environment, listing information must sit alongside the documents to which it

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relates. Observers need not only access to material, but the ability to identify when and where it matters. As new digital systems are developed over the coming years, it should be assumed that enabling this kind of integrated access – linking listings, documents and hearings – will form part of the intended design.

56. 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. Nevertheless, the destination is clearly signalled in the Key Objectives.
57. 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*, I noted that the CPR do not require the filing on CE-File of skeleton arguments or witness statements relied upon at trial, creating a practical gap. I said in terms that the availability of skeleton arguments and witness statements deployed in open court is essential to any meaningful concept of open justice.¹⁴
58. So, the Public Domain Documents 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.

The Key Objectives in practice

59. Seen in that light, open documents is not an optional ‘nice-to-have’. It is integral to a modern and intelligible justice system. Open justice is not a ‘bolt-on’ or an adjunct to procedure; it must be designed into the system itself.
60. The Board’s engagement response identifies the practical objective: an observer should be able to relate what the judge decided to the evidence and argument before the court, including witness statements used in place of oral testimony.
61. It also identifies a structural gap. CPR 5.4C(1) provides access as of right only to a limited category of documents, omitting what are often the most important materials – skeleton arguments, witness statements, and expert reports relied upon in public.
62. The Commercial Court pilot illustrates how that gap can be addressed: not by restating principle, but by designing procedures that make access practical, proportionate, and routine.

A comparative perspective: PACER

63. 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

¹⁴ see footnote 4 above

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management and enabling public users to access dockets and filed documents (subject to a fee structure).¹⁵

64. 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.
65. The question for England and Wales is not whether to replicate PACER, but how to design our own digital justice system so that open justice is operational rather than theoretical.

Conclusion

66. Let me end where I began. Open justice is a constitutional principle with two central purposes: the scrutiny of judicial decision-making and public understanding of how justice operates. In modern civil justice, both depend upon access to the written materials that constitute much of the proceeding.
67. At the same time, open justice has limits. It is concerned with the work of courts and judges; it is not a general route to information for unrelated purposes; and it must accommodate legitimate countervailing interests, including commercial confidentiality and the practical proportionality of disclosure.
68. The Board's Key Objectives provide a route map. They point towards a system in which courts 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.
69. The Commercial Court's Public Domain Documents pilot is a practical step in that direction: using existing digital infrastructure, building in safeguards, and reducing the friction that currently drives scepticism.
70. If we do that, open justice will not simply be preserved—it will be made real in the way modern civil justice is actually conducted.

¹⁵ *Open Justice: Fit for purpose* (4 June 2025, Courts & Tribunals Observers Network) www.judiciary.uk/speech-by-mr-justice-nicklin-open-justice-fit-for-purpose