BCLP. Client Intelligent

Insights

PUBLIC DOMAIN DOCUMENTS PILOT - PUBLIC ACCESS TO YOUR ENGLISH COURT DOCUMENTS IS EXTENDED

Jan 14, 2026

SUMMARY

As the Courts re-open, practitioners and clients alike need to consider the impact of new Practice Direction 51ZH which came into effect in the Commercial Court and Financial List of the Business & Property Courts on 1 January 2026. Known as the "Access to Public Documents Pilot", the new rules aim to build on the principle of open justice to give easier access to Court documents that enter the public domain as a result of the pre-existing principles of open justice applicable to documents relied on at open hearings.

It will sit on top of existing Court filing procedures to bolster the public facing Court files, changing the default position from one where, currently, non-parties must apply for public documents, to one where such documents are openly provided to the public through the public Court file.We consider here the new rules which the Pilot introduces and its likely impact.

APPLICABILITY OF THE PILOT

The Pilot will apply for a period of 2 years. It will apply to documents that enter the public domain, via a public (and not private) hearing, from 1 January 2026 onward (being those that non-parties are entitled to apply for currently under CPR rule 5.4B and C):

(a) skeleton arguments;

(b) written opening submissions;

(c) written closing submissions;

(d) other written submissions provided to a judge and relied upon in the hearing;

(e) witness statements and affidavits –

(i) including those relied upon as evidence in chief at trial and those relied upon at a public hearing of an application;

(ii) not including documents appended or annexed to the witness statement or affidavit;

(f) expert reports, including –

(i) those adduced as evidence in chief at trial and those relied upon at a public hearing of an application;

(ii) annexes and appendices to expert reports;

(g) any other document or documents critical to the understanding of the hearing ordered by the judge at the hearing to be a Public Domain Document;

(h) any documents agreed by the parties to be Public Domain Documents.

Once these documents have been relied on for or referred to at a public hearing, they will now need to be re-filed within specified timeframes to the public facing CE-file Court filing system.

Should a party wish to deviate from this default premise, they will need to apply for a "Filing Modification Order" or "FMO". A FMO could allow parties to file public documents with appropriate redactions for confidentiality or for no public filing at all..

Non-parties will also be able to apply for an FMO if they have a confidentiality interest to protect – for example if they are named in a document that is a public domain document.

OPEN JUSTICE IN THE COURTS OF ENGLAND AND WALES

"Open justice" refers to the principle that the justice system should operate publicly, in order to preserve public confidence in the system, ensure its accountability, consistency and transparency, and further the rule of law.

The Guidance note published by HMCTS in advance of PD 51ZH coming into force expressly states that the intention is to reflect the judgment of *Cape Intermediate Holdings Ltd v Dring [2019] UKSC 38*. In that case, the Supreme Court considered the Court's jurisdiction to order access to non-parties to Court documents under the general principle of open justice.

In doing so, the Court considered CPR 5.4C which allows non parties to apply for certain documents. The Court found that in addition to CPR r. 5.4C, the Court retains inherent jurisdiction to consider what provision of documents is appropriate on the facts in support of open justice.

In giving this judgment, Lady Hale urged for consideration of how current process and systems relating to the accessibility of documents further the interests of open justice:

"*We would urge the bodies responsible for framing the court rules in each part of the United Kingdom to give consideration to the questions of principle and practice raised by this case. About the importance and universality of the principles of open justice there can be no argument. But we are conscious that these issues were raised in unusual circumstances, after the end of the trial, but where clean copies of the documents were still available. We have heard no argument on the extent of any continuing obligation of the parties to co-operate with the court in furthering the open justice principle once the proceedings are over. This and the other practical questions touched on above are more suitable for resolution through a consultative process in which all interests are represented than through the prism of an individual case*."

Practice Direction 51ZH effectively creates such a "*continuing obligation of the parties to co-operate with the court in furthering the open justice principle".*

THE IMPACT

Do the changes change the risk profile of litigation for litigants when it comes to protecting their confidential information? At the moment, the answer appears to be both yes and no.

Certainly, the Pilot will make it much easier for the media to access information. While currently the media are permitted to apply to obtain the same information, the onus of doing so (including the costs of bringing such an application) will have insulated some litigants in practical terms up until now. Easy and free access to information is, therefore, a real change to the reality of how information is accessed through the Courts. No doubt the way in which clients are advised as to confidentiality considerations that come with litigation will change.

However, equally, the principle of open justice is at the bedrock of the legal system and always has been. It's important to stress that the Pilot impacts the practicalities around how Court document are accessed, but represents no substantive or principled change. Litigation has always carried with it a need to balance commercial sensitivity with the principle of open justice, and that balance will continue, albeit now with some new considerations to weigh in the mix.

Perhaps the most controversial element of PD 51ZH is the inclusion, as a public domain document, of "any other document or documents critical to the understanding of the hearing". It remains to be seen whether this express reference to the Court's discretion, which does exist already under *Cape v Dring* encourages Courts to take a more bespoke view of what is appropriate on a case by case basis, or whether it is retained for exceptional or unusual circumstances.

On balance, will the Pilot change how litigants approach litigation?

1. It will be interesting to see whether more access to Court documents motivates potential Claimants to engage further in pre-action correspondence before bringing a claim. Equally, will the threat of access to documents via upcoming hearings in the course of litigation causes parties to take stock and seek resolution in advance? If so on occasion, then no doubt the Pilot

will have produced a collateral benefit in motivating parties to act pragmatically and seek timely resolution of their dispute.

2. Parties may be more likely to seek to set up confidentiality rings at the outset of proceedings to agree how to protect sensitive information by way of redaction. Such arrangements are already commonplace in, for example, competition litigation where there is often a particular commercial sensitivity to the very information that is the subject of the litigation. However, Courts are conscious that such arrangements should go no further than is necessary to protect legitimate confidentiality interests. Parties can expect that the Court will continue to want clear and compelling reasons as to why confidentiality arrangements agreed by consent are appropriate in the circumstances.

3. At present, it remains to be seen how the Court will approach applications for an FMO, and whether guidance will be provided through case law to clarify the indicia of when an FMO may or may not be appropriate. One would imagine that the more that can be agreed between parties in advance of any hearing (whether through confidentiality rings, or specific arrangements for certain documents or hearings), the better. However, time will tell whether this is an area with scope for contention in hard fought litigation, and the costs implications of the same.

4. All that said, the principles of open justive underpinning the Pilot and the intention that non-parties be able at the very least to understand what is being said in Court (where there is increasing reliance on judges' pre-reading and the reading out of extracts documents in court) suggests that the Courts may well be reluctant to approve confidentiality rings and FMOs except in exceptional circumstances.

RELATED CAPABILITIES

- Business & Commercial Disputes

MEET THE TEAM

Andrew Street

Partner, London

andrew.street@bclplaw.com
+44 (0) 20 3400 3658

Emily Watts

Associate, London

emily.watts@bclplaw.com
+44 (0) 20 3400 4109
