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How Public is Public Law? The Current State of Open Access to Administrative Court Judgments

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1. Judicial review judgments possess multi-layered value. They provide a reasoned record of the outcome for parties to the dispute, they facilitate transparency around the exercise of judicial power, they inform potential litigants of how their potential claim might fare, they structure the operation of government, and, as a whole, they provide an important part of an evidence base that allows the system of judicial review itself to be understood and evaluated.
2. Who can access which judicial review judgments therefore matters a great deal in various ways. Access to judgments can shape legal advice given to private and public parties. It can also influence and shape how cases are litigated and how judgments are crafted. Similarly, the availability of judgments can shape the cases that researchers draw upon for their work and thus the broader understanding of public law.
3. There are now multiple sources for free, public access to court judgment publications, of which The British and Irish Legal Information Institute (BAILII) is the largest. Although in April 2022 the Ministry of Justice contract for law reporting moved from BAILII to the National Archives, this new platform is still in the early stages of development,¹ with the government stating its intention that judgments published across sites such as BAILII will 'migrate' onto this platform as the coverage expands.² At present, BAILII remains at the forefront of free, public access court judgment publication.
4. While BAILII provides free access for the public to a significant number of judicial review judgments through its website, the BAILII database is not comprehensive. If one needs access to judgments not included on the BAILII database, the only way

¹Ministry of Justice and HM Courts & Tribunals Service, 'Court judgments made accessible to all at The National Archives' (19 April 2022) < www.gov.uk/government/news/court-judgments-made-accessible-to-all-at-the-national-archives > accessed 24 April 2022.

²Ministry of Justice and HM Courts & Tribunals Service, 'Boost for open justice as court judgments get new home' (16 June 2021) < www.gov.uk/government/news/boost-for-open-justice-as-court-judgments-get-new-home > accessed 3 March 2022.

to secure access is by paying a subscription fee to a commercial provider, such as vLex Justis, Lexis Library, WestlawUK, and ICLR Online.³ Given the multi-layered value of judicial review judgments, this position raises an important question: what exactly is the extent of the gap between freely accessible judicial review judgments on BAILII and those where commercial subscription is required?

5. To answer this question, we examined a sample of Administrative Court judgments from 1 January 2015 to 31 December 2020. We started with a dataset of 5,408 unique judgments provided to us by vLex Justis. In 2018, an analysis of case law coverage between various commercial and open-access providers found that vLex Justis was the most comprehensive dataset available by reference to the courts within the scope of that study.⁴ The dataset was built by vLex Justis to serve its legal research platforms. The judgments in its collection were compiled from data supply contracts with the relevant court transcription agencies and judgments circulated by the courts themselves. In order to test whether a given judgment in our dataset was available on BAILII, we took the neutral citation assigned to the judgment⁵ and used it to construct the link to the corresponding judgment on BAILII.⁶ We wrote code that visited the constructed BAILII link and checked the resulting webpage for the presence of a message BAILII uses to tell its users that the judgment they are looking for was not found. Instances where that message was detected were counted as instances where BAILII did not have the judgment. To verify our results, we then checked the relevant years on BAILII and compared the neutral citations listed against those in the dataset provided by vLex Justis.
6. Our analysis found that, of the 5,408 unique judgments given during the period covered by our dataset, only 55% (3,001) are available to the public on BAILII. The remaining 45% (2,407) are presumed to be available only via subscriber-access platforms. Our findings are presented in full at Table 1 and Figure 1 below. It is clear that there is a significant gap between the number of Administrative Court judgments that are freely available and those which can only be found behind a paywall.
7. It is not possible to definitively state why certain judgments make their way to BAILII while others do not. However, we conjecture that most of the judgments that are *only* available on vLex Justis (or the other commercial platforms) were given *ex tempore*. That is, where, in the interests of expediency, judges aim to give judgment immediately after argument has come to an end, particularly where the factual and legal matrices of the case are sufficiently straightforward. In practice, several steps occur when a judgment is given *ex tempore*. First, the judge literally speaks the judgment

³Coverage also varies between the various commercial platforms. For example, *R (Judson) v Amber Valley BC* [2020] EWHC 517 (QB) is available on LexisLibrary, but is not available on WestlawUK, vLex Justis, ICLR Online or BAILII.

⁴Carrefax, 'Part 3: Open Access to English Case Law (the Raw Data)' (6 September 2018) <<https://carrefax.com/articles-blog/2018/9/5/part-3-open-access-to-english-case-law-the-raw-data>> accessed 4 August 2022.

⁵For example [2020] EWHC 3076 (Admin).

⁶For example <<https://www.bailii.org/ew/cases/EWHC/Admin/2020/3076.html>> accessed 11 August 2022.

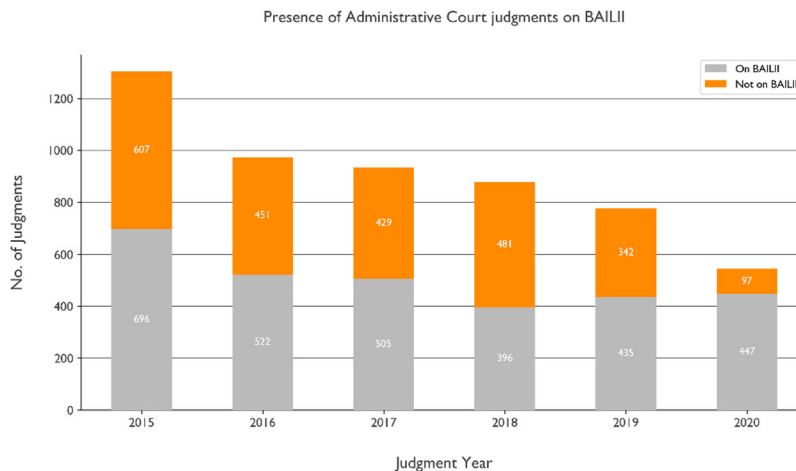
Table 1. Judicial review judgments available on BAILII.^a

Year	Total number of judgments on vLex	Total number of judgments on BAILII	Number of judgments on vLex and BAILII	Number of judgments only available on vLex	Number of judgments only available on BAILII	% of judgments on vLex and BAILII	% of judgments only available on vLex
2015	1,303	711	696	607	16	53	47
2016	973	530	522	451	12	53	46
2017	934	541	505	429	19	55	45
2018	877	430	396	481	10	45	55
2019	777	464	435	342	16	55	45
2020	544	494	447	97	10	83	17

^aThe percentage of judgments on BAILII and vLex was calculated by dividing the number of judgments only available on vLex and BAILII by the total number of judgments on vLex. For example, for 2015 $(696 \div 1,303) \times 100 = 53.4$.

aloud, formulating it in her mind as she goes, and recording equipment in the court will record the judgment as audio. Sometimes, when there is advance warning, a stenographer employed by the transcription agency is brought into court to transcribe the judgment in real time.

8. Either way, the resulting transcripts then need to be purchased from the transcription agency. This is expensive and extremely cumbersome to do on a case-by-case basis. To deal with this, the commercial legal publishers agree annual contracts with the transcription agencies, which are private companies, for the bulk delivery of new judgment transcripts as they become available. BAILII simply does not have the spending power to obtain the transcript of *ex tempore* judgments in the same fashion. Crucially, there is currently no infrastructure in place to enable HM Courts & Tribunals Service to acquire the resulting transcripts from the appointed transcription agencies even though the contracts with these agencies are paid for from public funds.
9. Accordingly, BAILII's coverage generally appears to be limited to judgments that were originally handed down. Handed-down judgments take the form of Word documents

**Figure 1.** Judicial review judgments available on BAILII.

that are emailed to the parties (and, most of the time, to BAILII and other legal publishers) by the court clerk at the listed hand down time. BAILII receives the handed-down judgment as an attachment, which it then proceeds to convert from a Word document to HTML for publication on its website.

10. It is important to caution against any suggestion that *ex tempore* judgments are somehow inherently less important or otherwise matter less. For instance, our analysis revealed that several *ex tempore* judgments involved public interest cases brought against central government by NGOs (e.g. *R ClientEarth v Secretary of State for Environment, Food and Rural Affairs*⁷) and high profile challenges relating to the UK's withdrawal from the EU (e.g. *R Elizabeth Webster v Secretary of State for Exiting the European Union*⁸). Moreover, while some judgments may be recognised immediately as important, it is not always apparent, particularly given the multi-layered value of judgments, which judgments may be deemed valuable at some future point. For instance, a string of seemingly simple decisions may be used to build important arguments and judgments decades later or support the provision of advice on a complex matter. Similarly, it is impossible to tell which judgments may be important for future research – cases that may seem routine may make up an important dataset in the future.
11. Ultimately, access to judicial review judgments is something in which everyone has a stake, but public lawyers, whether in research or practice, should be paying close attention to this issue. It is yet unclear whether, or to what extent, the launch of the National Archives new *Find Case Law* service will improve the accessibility of Administrative Court judgments. The government has suggested that the 'expertise and guidance' of the National Archives will support the development of 'the infrastructure necessary to expand coverage beyond legally significant court and tribunal judgments in the future.'⁹ It is hoped this aspiration becomes a reality: this transition ought to be viewed as an opportunity to progress from the current, unsatisfactory, position and not entrench it.

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⁷[2015] EWHC 496 (Admin).

⁸[2018] EWHC 1543 (Admin), [2019] 1 CMLR 8.

⁹Ministry of Justice and HM Courts & Tribunals Service, 'Boost for open justice as court judgments get new home' (16 June 2021) <www.gov.uk/government/news/boost-for-open-justice-as-court-judgments-get-new-home> accessed 3 March 2022.