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BRIEFING

Data Protection Act 1998: Disclosure of information following Durant -v- FSA

EXECUTIVE SUMMARY

1. The Court of Appeal judgment in the case of Durant v Financial Services Authority (2003 EWCA Civ 1746) has wide reaching implications in relation to Data Protection. Its effects include the reduction of the burden imposed by the Data Protection Act 1998 ("DPA") on Data Controllers. In particular, it reduces the requirements for disclosure of information and documents following a request.
2. The Court of Appeal considered four major issues: -
 - 2.1 Definition of Personal Data.
 - 2.2 Relevant Filing System.
 - 2.3 Redaction (the editing of documents to remove third parties' personal information); and
 - 2.4 The Court's discretion under Section 7(9) to compel the Data Controller to disclose documents.
3. The Court of Appeal's decision has taken a practical viewpoint in relation to the extent of disclosure required by the Data Controller in compliance with a Subject Access Request.
4. **The definition of Personal Data has been considerably narrowed, thus resulting in potentially less information/documents that have to be disclosed** following a Subject Access Request. However, this does not automatically mean less workload for the Data Controllers, as they will still have to go through the documents to sift out any documents which contain personal data under the new guidelines, but it may reduce the need for seeking third party permission to release third party personal data as the number of documents which may automatically have to be disclosed will be reduced.
5. **The definition of a Relevant Filing System has also been narrowed. This is solely in relation to manual filing systems. Unless the manual filing systems has an indexing system** allowing the Data Controller to be able to determine from the index whether a specific document or piece of information sought is contained in a specific file, **the system is not a Relevant Filing System, and thus outside the scope of the DPA.**

DEFINITION OF PERSONAL DATA

General Principle

6. The Court of Appeal declared that the right of the Data Subject to request copies of all personal information held by the Data Controller under S.7 DPA was not intended to allow "fishing expeditions" by the Data Subject. It viewed such "fishing expeditions" as potentially an abuse of process.
7. The Court held that S.7 was designed to allow the Data Subject to check whether the Data Controller's processing of the Data Subject's personal data had infringed the Data Subject's privacy unlawfully, and if so, to allow the Data Subject the right to rectify this under the other provisions contained in the DPA.
8. This view was reached after the Court of Appeal considered the intentions behind the European Legislation set out in the 1981 Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data" and the European Data Protection Directive 95/46, which was subsequently implemented into UK law by the DPA.
9. The Court of Appeal then refined the definition of personal data, which reduced, considerably, the scope of documents that were required to be disclosed following a Subject Access Request. They held that the *"mere mention of the data subject in a document held by a data controller does not necessarily amount to his personal data. Whether it does so in any particular instance depends on where it falls in a **continuum of relevance or proximity** to the data subject as distinct, say, from*

transactions of matters in which he may have been involved to a greater or lesser degree."

Guidelines

10. In order to implement this, the Court of Appeal set out the following guidelines: -

***"The first is where the information is biographical** in a significance sense, that is, going beyond the recording of the putative data subject's involvement in the matter or an event that has no personal connotations...*

***The second is one of focus.** The information should have the putative data subject as its focus rather than some other person with whom he may have been involved or some transactional event in which he may have figured or have had an interest. "*

11. **The Court of Appeal confirmed that the mere fact that a document or information contains the Data Subject's name in it does not automatically entitle the Data Subject to a copy of that document or information under the DPA.**
12. This has reduced the extent of disclosure of personal information, which previously had been viewed as requiring the disclosure of potentially all documents bearing the Data Subject's name or other personal information. Instead, **disclosure is now limited to documents and/or information containing personal information which have as its focus, the Data Subject**, i.e. are about the Data Subject, and are more than recording his/her involvement in

a matter or issue that he/she has no direct personal connection above their involvement.

13. Some answers to frequently asked questions are set out below, indicating, in relation to the scenarios listed, whether or not the documents would now be required to be disclosed following a request of the Data Subject, in light of the Durant decision, which may shed some light on the implementation of the above test.

Frequently Asked Questions

14.1 Q. Where the Data Subject, a Council Officer, has made a written or e-mailed request for information on behalf of a customer, is the request subject to disclosure following a Subject Access Request?

- A. Since the focus of the document is a customer rather than the Data Subject, there is no longer a requirement to disclose the document or the request.

If the customer made a Subject Access Request under S.7, the document would then have to be disclosed, as it names the customer and has a personal connotation, and is focused on the customer's request.

14.2 Q. Is a copy of the letter written by a Data Subject on behalf of a customer, relating to a query or problem faced by the customer, subject to disclosure following a Subject Access Request?

- A. This would no longer need to be disclosed, as it merely records the officer's involvement in the

matter which has no further personal connotation to him. Furthermore, the focus of the document is not the Data Subject, but rather the customer and his/her problem.

Again, as with Q14.1, the document would be subject to disclosure if the customer made a Subject Access Request.

14.3 Q. Is a letter addressed to the Data Subject, in response to the letter raised by the Data Subject on behalf of the customer, as set out in 14.2 above. Is the letter subject to disclosure following a SAR?

- A. This document would no longer need to be disclosed, as again it merely records the Data Subject's involvement in the matter to which there is no personal connection above his involvement in acting on behalf of the customer. In addition, the focus, or the reason for the document or data is not the Data Subject, but rather the customer and his/her problem or query.

14.4 Q. Is an e-mail addressed to a number of officers including the Data Subject, inviting him to a meeting, eligible for disclosure following a Subject Access Request by the Data Subject?

- A. As in questions 11.1 and 11.2 above, this merely records the Data Subject involvement in the matter, and does not have the Data Subject as its focus.

14.5 Q. Is an e-mail from one Council officer to another, commenting on the Data Subject's general

manner, subject to disclosure following a Subject Access Request?

- A.** This would have to be disclosed. Firstly it goes beyond a recording of the Data Subject's involvement in the matter. Secondly as the e-mail relates to the Data Subject as a person, it can be argued that the e-mail is focused on the Data Subject, rather than focusing on some specific event or matter which is not personally connected to the Data Subject.

14.6 Q. Is a copy of the Data Subject's employment file subject to disclosure following a Subject Access Request?

- A.** This would have to be disclosed, as the focus of the data in the file is the Data Subject.

14.7 Q. Is a copy of a complaint made against the Data Subject by a third party subject to disclosure following a Subject Access Request?

- A.** This may be potentially subject to disclosure, but there may need to be some editing to remove the third party's details, unless they have consented to have that disclosed to the Data Subject. This is because the complaint is highly relevant and is focused on the Data Subject. The complaint is connected to the Data Subject, in that the complaint relates to the Data Subject, and as such, is more than just a biographical record of his involvement in a matter. Nevertheless, the complaint and related documents may be subject to the non-

disclosure exemptions set out in S.29 DPA, and in particular, the non-exemptions relating to preventing or detecting crime and where legal proceedings have been commenced or are likely to arise.

- 15.** All the above questions would have been potentially subject to disclosure following a Subject Access Request, under the previous definition of personal data.

Relevant Filing System

16. The DPA, whilst most commonly associated with computer data, also applies to paper records, which are included in the definition of a "Relevant Filing System" as *"any set of information relating to individuals to the extent that, although the information is not processed by means given for that purpose, the set is structured, either by reference to individuals or by reference to criteria relating to individuals, in such a way that specific information relating to a particular individual is readily accessible."*

17. Under the above definition, any file that may contain information relating to the Data Subject would have to be searched in order to determine whether or not any data relating to the Data Subject was contained in it. The Court narrowed down the scope of disclosure by reducing the number of files that the Data Controller is required to inspect, but this time solely in respect of manual filing systems.

19. The Court held that an appropriate filing system for the purpose of DPA is limited to a system:

“1) In which the files forming part of it are structured and referenced in such a way as to clearly indicate at the outset of the search whether specific information capable of amounting to personal data of an individual requesting it under Section 7 is held within the system and, if so, in which file or files it is held; and

2) which has, as part of its own structure or referencing mechanism, a sufficiently sophisticated and detailed means of readily indicating whether and where in an Individual’s file or files specific criteria or information about the applicant can be readily located.”

19. In the Durant case, the paper files held by the FSA did not contain any indexing mechanisms to allow the Data Controller to determine the location of specific documents or personal information. The Data Controller was only able to locate specific documents by conducting a manual search of the contents of the file or files, despite the fact that some of the contents of some of the relevant files held by the FSA were in chronological order.

20. The Court determined that this did not amount to a relevant filing system for the purposes of the DPA. The Court stated that even ***"an ability of staff readily to identify and locate whole files, even those organised chronologically and/or by reference to his and others' names, is not enough"*** to amount to a relevant filing system," and is therefore outside the scope of the DPA.

21. The Court further stated that *"it is only to the extent that manual filing systems are broadly equivalent to computerised systems in ready accessibility to relevant information capable of constituting "personal" data that they are within the system of data protection. "*

Implications

22. In relation to the narrowing of the definition of relevant filing systems for paper systems, the most obvious is that Data Controllers will have a less arduous job searching for information relating to the Data Subject in compliance with a Subject Access Request, as they will only have to look in files which it is apparent have documents relating to the Data Subject will be contained, either by way of the file index for specific disclosure of a document, or the title of the file for a general request for all information relating to the Data Subject.

23. In relation to the management of a paper filing system, unless the files have an indexing system cataloguing all the documents contained in the file, which is constantly maintained, it will be extremely difficult for a Data Subject to argue that the Data Controller should have conducted a search of all the manual files to locate personal information. However advantageous an indexing system is, the cost in terms of time and manpower required in keeping the indexes updated would be excessive.

24. As the majority of documents are prepared on computer, it may be possible to keep copies of all documents on a server, so that should a request be made, a

computer search could be undertaken. As electronic documents do not fall under the less stringent approach adopted by the Court, a full electronic search of the server would have to be undertaken, and then the results would have to be sifted by the Data Controller to determine whether or not the documents could be disclosed, or whether or not permission from third parties should be sought prior to disclosure.

25. Should the results of the search indicate that the documents are too numerous, it may be possible to argue that it may require excessive effort to disclose copies of all the documents falling within the scope of the Subject Access Request. There is no definite test to determine whether or not excessive effort would be required. However, to successfully argue this, should a complaint be made either to the Information Commissioner or the Courts, a search must have been made and evidence of the search and its results must be retained. To try and avoid any criticism from the Information Commissioner in relation to whether or not excessive effort is required, it would be advisable to seek prior confirmation during the SAR process as to whether or not the size and number of documents eligible to be disclosed would require an excessive effort.
26. In addition to refusing to disclose documents or information on the grounds of excessive effort, Data Controllers are permitted to refuse a Subject Access Request where such a request is vexatious or is similar to any recently made Subject Access Request from the Data Subject. As with excessive effort, prior guidance

from the Chief Legal Officer is advisable before making a refusal.

Redaction

27. Redaction is the term given to the **editing of documents to remove information relating to a third party or which falls under the non-disclosure provisions of the DPA**, prior to disclosure to the Data Subject following a Subject Access Request.
28. The Court considered balancing the interests of the Data Subject allowing him access to his personal information against the interests of any of the third parties referred to in information by protecting their privacy, by way of editing or removing personal data pertaining to third parties ("**redaction**").
29. The Court addressed the two-stage process contained in Section 7(4) as dealt with in Sections 7(4) to (6): -

*"65. The first is to consider whether information about any other individual is **necessarily** part of the personal data that the data subject has requested. I stress the words "necessarily" for the same reason that I stress the word "cannot" in the opening words of Section 7(4), "Where a data controller **cannot** comply with the request without disclosing information about another individual who can be identified from the information". If such information about another is not necessarily part of the personal data sought, no question of Section 7(4) balancing arises at all. **The data controller, whose primary obligation is to provide***

information, not documents, can, if he chooses to provide that information in the form of a copy document, simply redact such third party information because it is not a necessary part of the data subject's personal data.

66. *The second stage, that of the Section 7(4) balance, only arises where the data controller considers that the third party information necessarily forms part of the personal data sought. ... It is difficult to think in the abstract of information identifying another person that any of the information about him which would be so bound up that the data subject has to qualify as his personal data, yet be immaterial or of little legitimate value to him. Much will depend, on one hand, on the criticality of the third party information forming part of the data subject's personal data to the legitimate protection of his privacy, and, on the other, to the existence otherwise of any obligation of confidence to the third party or any other sensitivity of the third party disclosure sought. ... In short, it all depends on the circumstances whether it would be reasonable to disclose to a data subject the name of another person figuring in his personal data, whether that person is a source, or a recipient or a likely recipient of that information, or has a part in the matter the subject of the personal data."*

30. The Court also confirmed that the balancing exercise only arises where the information relating to the third

party forms part of the personal data of the Data Subject and the "third party's information" should not normally be disclosed without the third party's consent. However this presumption may be rebutted if the Data Controller considers it reasonable in all the circumstances to disclose it without such consent, in accordance with S.7(6) DPA.

31. Normally, the Data Controller, or in Birmingham City Council's case, the Data Protection Officer, will endeavour to obtain the third party's consent to disclose the information pertaining to the third party. If the Data Controller is unable to obtain permission, then they will, where possible, err on the side of caution and delete the third party information.

The Court's discretion

32. Should for any reason, the Data Subject feel that the Data Controller has failed to comply with the Subject Access Request, they can either complain to the Information Commissioner, who will investigate the complaint, or issue a civil application to the Courts under S.7(9).

33. In light of the aims and objectives of the Civil Procedure Rules, the Data Subject should, if seeking immediate relief, seek an assessment from the Information Commissioner before considering making an application to the Courts.

34. An application to the Court should be viewed as a last resort, as the CPR takes the view that Court proceedings should only be contemplated as a last resort, and only after all alternative avenues have been exhausted.

35. Furthermore, should the Court feel that the application seeking disclosure under a SAR was made with a view to a fishing expedition, they may take the comments of the Court of Appeal, who stated that "fishing expeditions" are an abuse of process, to heart. To date, there has been no further guidance as to what steps, if any, the Court will take to stop "fishing expeditions".
36. Under S.7(9), the Court will attempt to determine whether or not the Data Controller has failed to comply with the Subject Access Request. In *Durant*, and will, in most cases, seek to inspect and examine the documents and manual files to which the Applicant seeks disclosure.
37. An application to the Court has a costs disadvantage in that the Data Subject will have to pay court fees to commence the claim, but should the Court find in favour of the Data Subject, the Court will order the Data Controller to comply with the request and, invariably, obtain order of costs against the local authority. In addition, the Data Subject will be entitled to seek compensation not just for any financial loss suffered but also for any distress caused by the breach of the DPA whether such claims have the potential to be pleaded as "personal injuries" will need to be closely watched!
38. The Court of Appeal was also asked to consider the Court's general discretion under Section 7(9) of the DPA to make an Order compelling the Data Controller to comply with the request for information where the Data Controller had previously failed to do so in breach of the DPA.
39. Whilst the Court held that this issue was redundant in respect of this particular case, by virtue of their findings on the previous three issues, they confirmed the previous case law, both domestic and from the European Court of Human Rights, which held that the Court's "*discretion is general and untrammelled*".

CONCLUSIONS

40. The Court of Appeal, in deciding this case, has taken a pragmatic approach to the issue of disclosure made in compliance with a subject access request, taking into account not just the interests of the Data Subject and any third parties, but also the resources of the Data Controller, utilised in dealing with the Subject Access Request.
41. The Court of Appeal has also attempted to level the playing field by reducing the range and scope of documents that the Data Controller is compelled to disclose, and by reducing the extent to which the Data Controller has to undertake a manual search. Furthermore, it has its stated unhappiness with attempts made by Data Subjects to use Subject Access Requests as a means of Pre-action discovery from third parties, claiming that such activity is an abuse of process.
42. As this case has only recently been published, there is little practical information in respect of any changes of approach likely to be taken or actually taken by the Information Commissioner, save for indicating that he has accepted the judgement and that he will be reviewing his

guidance, early this year, to take account of the implications of the Court's ruling.

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