

Introduction

In the case of *Durant v Financial Services Authority*ⁱ the English Court of Appeal considered four important issues of law concerning the right of access to personal data.

To the extent that the judgment provides clarity on these issues and reiterates the fundamental link between data protection and privacy rights it is welcomed.

Although the judgment refers to the UK Data Protection Act 1998, it is of relevance to the IOM Data Protection Act 2002.

This document is aimed in particular at specialist data protection officers and professional advisers.

The Data Protection Supervisor acknowledges the receipt of advice from Pinsent Masons in compiling this guide.

This advice note concentrates on the two most important issues considered by the Court, namely:

1. What makes “data” “personal” within the meaning of “personal data”?

and

2. What is meant by a “relevant filing system”?

1. What makes “data” “personal” within the meaning of “personal data”?

The Data Protection Act applies only to the processing of ‘personal data’. Therefore a clear understanding of what is meant by this term is essential for compliance with its provisions.

The Court of Appeal stated that,

“Whether [information retrieved from a computer search against an individual’s name or unique identifier is personal data within the Act] in any particular instance depends on where it falls in a continuum of relevance or proximity to the data subject.”

The Court identified two notions that may assist in determining where information falls:

The first, “on a continuum of relevance or proximity to the data subject”

“whether the information is biographical in a significant sense; that is, going beyond the recording of [the individual’s] involvement in a matter or an event which has no personal connotations...”

The second notion concerns “focus”.

"The information should have the [individual] as its focus rather than some other person with whom he may have been involved or some transaction or event in which he may have figured or have had an interest..."

"In short, it is information that affects [a person's] privacy, whether in his personal or family life, business or professional capacity".

The Court then gave some examples of data, which are personal data,

"A recent example is that considered by the European Court [in a particular case] in which the Court held ...that "personal data" covered the name of a person or identification of him by some other means, for instance, by giving his telephone number or information regarding his working conditions or hobbies"

The concept of privacy is therefore relevant to the decision as to whether particular data are personal data in any case of doubt.

The following comments of Lord Justice Auld indicate some practical implications of the Court of Appeal's interpretation of 'personal data':

- *"not all information retrieved from a computer search against an individual's name or unique identifier is personal data";*
- *"[section 7 of the Act] is not an automatic key to any information, readily accessible or not, of matters in which [the party making the request for information] may be named or involved"; (Section 5 in the IOM)*
- *"the mere fact that a document is retrievable by reference to [the applicant for information's] name does not entitle him to a copy of it under the Act".*

In considering whether material extracted on a search against a name is "personal data," information that is not sufficiently "relevant or proximate" will not be "personal data". If it has as its focus something other than the individual it will not be 'personal data'.

For example:

If an estate agent carries out a search against the name of a potential purchaser and extracts information on a number of houses which the client has viewed but the information extracted focuses on the properties (e.g. structural surveys), the information about the houses will not necessarily be personal data about the potential purchaser.

However, if a property was valued in order to determine the assets of a particular individual then the information is likely to be personal data about that individual.

In general terms, where information is being used to make a decision affecting the individual, it is expected to be linked to the individual in such a way that its relevance and proximity is clear. In such cases the information will be personal data about that individual.

Some key points to note are:

- *Name or direct identification of an individual such as telephone number will be personal data about that individual;*
- *If this directly identifying information is used as the "key" against which to search for other data not all material returned in association with the primary "key" will be personal data merely because it is retrieved on a search made against that "key";*
- *Any intentions of the data controller in relation to the data subject which have been recorded will be personal data even if these intentions are not as proximate as other material as they are specifically included in the definition of personal data;*
- *Data falling within the sensitive categories which is about the data subject will be regarded as relevant to him and will be personal data even if this information is not as proximate as other information;*
- *The question of whether other material retrieved or held against the identifying "key" will be personal data will be determined by the relevance of the material to the data subject and the proximity between the material and the data subject;*
- *Information, which is clearly relevant and proximate will be personal data. Where other data have been retrieved and there is uncertainty or dispute as to whether material is sufficiently relevant or proximate to qualify as personal data about the data subject the main consideration should be the purpose of the Directive which is the protection of individual privacy;*
- *The reason the data controller recorded the material or his intentions to use it are not relevant in determining whether data are personal data – the data itself must be considered;*
- *The potential future use of the material by the data controller is not relevant save insofar as it goes to the questions of proximity or relevance;*
- *The usefulness of the material to the data subject in litigation is not a relevant consideration in determining whether information constitutes personal data about him.*

2. What is meant by a "relevant filing system"?

In the context of manual filing systems it is important to understand what is meant by a "relevant filing system"ⁱⁱ.

The Act applies not only to "personal data" held on computer but also to manual data, provided the manual data is organised into a "relevant filing system".

"Accessible Records", that is, certain Health, Housing and Education records are "data" regardless of how they are held.

In the Durant case, the Court of Appeal took the view that the Act is intended to cover manual files

"only if they are of sufficient sophistication to provide the same or similar ready accessibility as a computerised filing system".

Any manual filing system "which, for example, requires the searcher to leaf through files to see what and whether information qualifying as personal data of the person who has made the request [for access to his personal data] is to be found there, would bear no resemblance to a computerised search." It would not, therefore, qualify as a "relevant filing system".

The Durant judgment concluded that a 'relevant filing system' for the purposes of the Act, is limited to a system:

1. in which the files forming part of it are structured or 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 (section 5 of the IOM Act) 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 file or files specific criteria or information about the applicant can be readily located"

The judgment includes some helpful statements as to the effect of this interpretation as follows:

- " the protection given by the legislation is for the privacy of personal data, not documents";
- "if the [Act] statutory scheme [created by the data protection legislation for the handling of manual personal data] is to have any sensible and practical effect, it can only be in the context of filing systems that enable identification of relevant information ...,through clear referencing mechanisms within any filing system potentially containing personal data ...";
- "to qualify [as a relevant filing system] under ...the Act ...requires ...a file to which [a] search [for personal data] leads to be so structured and/or indexed as to enable easy location within it or any sub-files of specific information about the data subject that he has requested"; and
- "... it is only to the extent that manual filing systems are broadly equivalent to computerised systems in ready accessibility to ...personal data that they are within the system of data protection";

It follows that when a subject access request is received for information held in manual form (other than accessible records), the right of access will only apply if the filing system is structured as a 'relevant filing system'. That is, the filing system is structured in such a way that the person undertaking the search knows that there is a system in place, which permits:

- the retrieval of a file or files in the name of an individual; and that the file or files will contain the category of personal data requested; or
- the retrieval of specific information, about a specific individual from a topic file which is subdivided in alphabetical order of individuals' names or a named file which is subdivided into topic headings.
- the retrieval of specific information, about a specific individual via an index.

Examples:

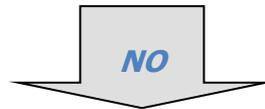
1. A set of legal files containing files divided into sections for legal aid, pleadings, orders, correspondence by year, instructions to counsel, counsel's advice, **will not be a relevant filing system** when the divisions or referencing do not assist a searcher to retrieve specific information about a particular individual without the need to leaf through the file contents.
2. A filing system containing files about individuals, or topics about individuals, where the content of each file is structured purely in chronological order **will not be a relevant filing system** as the files are not sufficiently structured, indexed, divided or referenced to allow the retrieval of personal data without leafing through the file.
3. Personnel files and other manual files using individuals' names or unique identifiers as the file names, which are subdivided or indexed to allow retrieval of personal data without a manual search (such as, sickness, absence, contact details etc.), **are likely to be held in a 'relevant filing system'** for the purposes of the Act.
4. Any manual files that are referenced by means of an electronic indexing system or stored in an electronic document management system that includes an indexing capability **will be in a relevant filing system** if personal data are used as the access key.

RELEVANT FILING SYSTEMS – QUICK GUIDE

1. Does your manual filing system contain information about individuals?



Go to Q2



**You do not have a
'relevant filing system'**

2. Does the filing system use the names of individuals (or another unique identifier) as the file name?



Go to Q4



Go to Q3

3. Does the filing system use criteria relating to individuals (e.g. sickness absence, pensions, or qualifications) as the file name?



Go to Q4



**You do not have a 'relevant filing
system'**

4. Is the information in your files held solely in chronological order?



**You do not have a 'relevant filing
system'**



Go to Q5

5. Is the content of your files indexed or subdivided to allow direct access to specific information about the individual?



**You are likely to have a
'relevant filing system'**



**You do not have a
'relevant filing system'**

Frequently Asked Questions and Answers - Relevant Filing Systems

Q1

All the information I have on file is held in chronological order with no other indexing or sub-division, how does the Act impact on me?

A1

The information you hold in manual form is not held in a 'relevant filing system' and is therefore not 'personal data'. Don't forget, however, that if you hold information on computer, such as the electronic versions of manual documents held on manual files, such information is likely to be covered by the Act.

Q2

Is there any rule of thumb I can apply to establish whether I have a relevant filing system?

A2

Yes, you can apply the "temp test". If you employed a temporary administrative assistant (a temp), would they be able to extract specific information about an individual without any particular knowledge of your type of work or the documents you hold?

The "temp test" assumes that the temp in question is reasonably competent, requiring only a reasonable induction or explanation or an operating manual on the particular filing system in question for them to be able to use it.

The temp test would not apply if any in-depth knowledge is required of your customs and practices, your type of work, the documents you hold or any unusual features of your system, before a temp is, as a matter of practice, capable of operating the system. In such cases the system would not be a relevant filing system.

Example: John Smith is your employee. He requests details of the leave he has taken in the last six months. You have a collection of personnel files.

- a. A file entitled "Leave" containing alphabetical dividers.
 - the temp would have no difficulty in finding the leave record of John Smith behind the "S" divider. **This is a relevant filing system.**
- b. A file entitled "John Smith" which is sub-divided into categories such as "contact details", "sickness", "pension", and "leave".
 - the temp would have no difficulty in finding the leave record of John Smith. **This is a relevant filing system.**
- c. A file entitled "John Smith" in a system that only contains the leave record of employees, with leave recorded on standard forms filed in date order within the respective files for each employee.
 - the temp would have no difficulty in finding the record of John Smith's leave taken. **This is a relevant filing system.**

- d. A file entitled "John Smith" but there is no sub-division of its contents, documents are randomly dropped into the file or are filed in chronological order regardless of the subject matter,
 - the temp would have to leaf through the file contents to obtain the information required.**This is not a relevant filing system.**

- e. A file entitled "John Smith" with subdividers that classify the contents of the file in a vague or ambiguous way, (such as "correspondence", "comments" and "miscellaneous").
 - the temp would have to leaf through the file contents to obtain the information required because it is not clear from the structure of the file, or from any operating manual where the relevant information will be held.

This is not a relevant filing system.

This remains the case even if established members of staff know through experience how the system works, for example that, leave details are recorded on the back page of a report that is filed in the "miscellaneous" section.

ⁱ Michael John Durant v Financial Services Authority [2003] EWCA Civ 1746, Court of Appeal (Civil Division) decision of Lord Justices Auld, Mummery and Buxton dated 8th December 2003. A full text of the judgment is available from www.bailli.org

ⁱⁱ A "relevant filing system" is defined in section 1(1) of the Act as:
"any set of information relating to individuals to the extent that, although the information is not processed by means of equipment operating automatically in response to instructions given for that purpose, the set is structured either by reference to the individual or to criteria relating to individuals, in such a way that specific information relating to a particular individual is readily accessible".