

The ‘Durant’ Case and its impact on the interpretation of the Data Protection Act 1998

In the recent case of *Durant v Financial Services Authority*¹ the 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 by the Information Commissioner. This paper focuses on what the Commissioner considers to be the two most important of the 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”?

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

What “data” are “personal” for the purposes of the Data Protection Act 1998 (“DPA”)

The DPA applies only to ‘personal data’ and therefore a clear understanding of what is meant by this term is essential for compliance with its provisions. The Court of Appeal concluded that:

‘personal data’ “is information that affects [a person’s] privacy, whether in his personal or family life, business or professional capacity”.

The concept of privacy is therefore clearly central to the definition of personal data. This suggests to the Commissioner that you should take into account whether or not the information in question is capable of having an adverse impact on the individual. The Court identified two notions that may assist in determining whether information “is information that affects [an individual’s] privacy”:

“The first is 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 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 the *Durant* case the Court of Appeal did not consider the issue of the identifiability of an individual in the definition of ‘personal data’ set out in section 1(1) of the DPA. This is often

¹ 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 the Court Service website at www.courtservice.gov.uk

the starting point in developing an understanding of personal data. Instead, the Court of Appeal in this case concentrated on the meaning of “relate to” in that definition, identifiability not being an issue in the case.

Where an individual’s name appears in information the name will only be ‘personal data’ where its inclusion in the information affects the named individual’s privacy. Simply because an individual’s name appears on a document, the information contained in that document will not necessarily be personal data about the named individual.

It is more likely that an individual’s name will be ‘personal data’ where the name appears together with other information about the named individual such as address, telephone number² or information regarding his hobbies³.

Provided the information in question can be linked to an identifiable individual the following are examples of personal data:

- information about the medical history of an individual;
- an individual’s salary details;
- information concerning an individual’s tax liabilities;
- information comprising an individual’s bank statements; and
- information about individuals’ spending preferences.

These types of information may be contrasted with the following examples of information which will not normally be personal data:

- mere reference to a person’s name where the name is not associated with any other personal information;
- incidental mention in the minutes of a business meeting of an individual’s attendance at that meeting in an official capacity; or
- where an individual’s name appears on a document or e-mail indicating only that it has been sent or copied to that particular individual, the content of that document or e-mail does not amount to personal data about the individual unless there is other information about the individual within it.

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 DPA] 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”;
- “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”.

Information that has as its focus something other than the individual will not be ‘personal data’. For example, information that focuses on a property (e.g. a structural survey) is not ‘personal data’, nor is information about the performance of an office department or a branch

² See European Court of Justice decision in *Bodil Lindqvist v Kammaraklagaren* (2003) C-101/01, paragraph 27, as referred to in paragraph 28 of the *Durant* judgment.

³ See *Lindqvist* case (see above), paragraph 27, and *Durant* at paragraph 28.

of a chain of stores. While such information may include information 'about' an individual, where the focus of the information is something other than the individual, such information will not 'relate to' the individual and, therefore, is not personal data.

However, there are many circumstances where information, for example about a house or a car, could be personal data because that information is directly linked to an individual. One example would be a valuation of a house where this was being used in order to determine the assets of a particular individual in a matrimonial dispute. Another example would be the details of a car photographed by a speed camera where those details are used to direct a notice of intention to prosecute to the registered keeper of the vehicle.

Manual files covered by the DPA 1998

The Act only applies to "personal data". "Data" as defined by the DPA includes both information held on computer and manual information provided the manual data is organised into a "relevant filing system"⁴.

In the Durant case the Court of Appeal took the view that the Act 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 the 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 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 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";

4

A "relevant filing system" is defined in section 1(1) of the DPA 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".

- “if the [DPA] statutory scheme [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 with a minimum of time and costs, 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”.

In the Information Commissioner’s view it follows, therefore, that when a subject access request is received for information held in manual form (other than information contained in an “accessible record”⁵), the statutory right to be given access to personal data will only apply if the filing system is structured as a ‘relevant filing system’. That is to say, the filing system is structured in such a way as to allow the recipient of the request to:

Either:

- a.
 - know that there is a system in place which will allow the retrieval of file/s in the name of an individual (if such file/s exists); and
 - know that the file/s will contain the category of personal data requested (if such data exists); or
- b.
 - know that there is a system in place which will allow the retrieval of file/s covering topics about individuals (e.g. personnel type topics such as leave, sick notes, contracts etc); and
 - know that the file/s are indexed/structured to allow the retrieval of information about a specific individual (if such information exists) (e.g. the topic file is subdivided in alphabetical order of individuals’ names).

Where manual files fall within the definition of relevant filing system, the content will either be so sub-divided as to allow the searcher to go straight to the correct category and retrieve the information requested without a manual search, or will be so indexed as to allow a searcher to go directly to the relevant page/s.

For example, 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 because the divisions/referencing do not assist a searcher in retrieving the required personal information without the need to leaf through the file contents.

It is important to note that the Freedom of Information Act 2000 (“FOIA”) will, in 2005, amend the DPA to expand the definition of “data”. As a result of the expanded definition, public sector bodies caught by FOIA must ensure that the personal data they hold (including unstructured manual personal data **except** unstructured manual personnel records) must be

⁵ “Accessible records” are records relating to health, education and certain other accessible public records. See s.68 and Schedule 12 DPA for further information.

accurate, up to date and accessible under section 7 DPA. They should also note that the compensation and rectification provisions of the DPA will apply in respect of such data although so far as subject access fees are concerned, the charges under the FOIA will apply.⁶

Where information is filed in a system using individuals' names as file names, the system may not qualify as a relevant filing system if the indexing/referencing/sub-division is structured otherwise than to allow the retrieval of personal data without leafing through the file.

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 appropriately structured/indexed/divided or referenced to allow the retrieval of personal data without leafing through the file.

Personnel files and other manual files using individuals' names or unique identifiers as the file names, which are sub-divided/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 DPA. However, following the Durant judgment it is likely that **very few manual files will be covered by the provisions of the DPA**. Most information about individuals held in manual form does not, therefore, fall within the data protection regime.

Information Commissioner's Office
02/02/04

⁶ FOIA does not cover private or voluntary sector bodies save where they carry out public functions for a public sector body. For further information on the impact of FOIA on the meaning of 'personal data' see "Freedom of Information Act 2000: An Introduction" available from the Commissioner's website at www.informationcommissioner.gov.uk. Also, see "FOI Awareness Guidance No. 1 on Personal Information" which can also be found on the Commissioner's website. The relevant provisions of the FOIA, amending the DPA, are sections 68 to 73 inclusive and Schedule 6.

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 DPA 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’ for the purposes of the DPA. 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 may 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 short induction, explanation and/or 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 of your custom and practice is required, whether of your type of work, of the documents you hold or of 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. If there is 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. If there is 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. If there is 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. If there is 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. If there is a file entitled “John Smith” with sub-dividers that classify the contents of the file in a vague or ambiguous way, (such as “correspondence”, “comments” and “miscellaneous”), established members of staff only know through experience and knowledge of the particular practice and custom of filing in that system that, for example, leave details are recorded on the back page of a report that is filed in the “miscellaneous” section.

However, 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. That would only become clear were the temp provided with additional information specific to that particular workplace and system. **This is not a relevant filing system.**

Quick guide to understanding the DPA definition of 'relevant filing systems'

1. Does your filing system contain information about individuals?
Yes – go to Q. 2.
No – 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?
Yes – go to Q. 4.
No – go to Q. 3.
3. Does the filing system use criteria relating to individuals (eg. sickness absence, pensions, or qualifications) as the file name?
Yes – go to Q. 4.
No – you **do not** have a 'relevant filing system'.
4. Is the information in your files held solely in chronological order?
Yes – you **do not** have a 'relevant filing system'.
No - go to Q. 5.
5. Is the content of your files indexed or subdivided to allow direct access to specific information about the individual?
Yes – you are likely to have a 'relevant filing system'.
No – you **do not** have a 'relevant filing system'.