Data Protection after "Durant"

Employers now breathe a sign of relief?

In November, 2003 I presented a Paper to Plato Blackwater (Monaghan and Armagh) titled "THE DATA PROTECTION ACTS and The Workplace – Employers Obligations (Northern Ireland and the Republic of Ireland)". Whereas that Paper was prepared by me with a view to making suggestions to employers as to procedures which should be adopted by the employers in order to comply with the obligations of employers in both Northern Ireland and the Republic of Ireland (which obligations applied under the Data Protection Act 1998 in the UK and the Data Protection Act 2003 in the Republic of Ireland), I also advised that employers must become alert to the fact that the Data Protection Act would be used by the employee as a means of getting relevant information in an employment dispute where information prejudicial to the employer with regard to that employee could be held on file. I advised that the Data Protection Act would be used more regularly in the future as a nuisance tactic resulting in the employer being involved in an enormous amount of time in responding to Data Access Requests from the employee. I pointed out that the employer must bear in mind that the employee can issue civil proceedings against the employer for breach of Access Requests and that the employee, in some cases where his Employment Claim may be unsuccessful, would still pursue a Claim under the Data Protection Act in order to force the employers hand. That Paper detailed the procedures which should be adopted by employers to ensure that they did not fall foul of the obligations under the Data Protection Act with regard to Subject Access Requests filed by employees. As that Paper ran to 14 pages, I do not intend to repeat the contents thereof. A copy of the Paper is on the Employment Articles Section of this Website.

Employers will be pleased to note that their obligations under the Data Protection Act appear to have been limited as a result of the UK Case of "Michael John Durant –v- Financial Services Authority". This 2003 Court of Appeal Decision has become commonly known as the "Durant" Decision. A full text of the Judgment is available from the Court Service Website at www.courtservice.gov.uk. Michael Durant was an unsuccessful litigant, pursuing disclosure of additional information held by the Financial Services Authority (FSA) in relation to a complaint he had made against Barclays Bank. Dissatisfied that the FSA had dismissed his complaint against the Bank, Durant made several requests to the FSA under Section 7 of the Act (the relevant Subject Access Request section of the UK Act) for Disclosure of personal data held about him in the FSA's manual and computerised records. The FSA provided Durant with copies of documents held in computerised records but refused his request for manual record copies on the grounds that the information did not constitute "personal data". This in turn lead to a number of Appeals being launched with the latest being heard by the Court of Appeal.

The Court of Appeal had to determine four key points, three of which may have a bearing on the approach that HR Managers and their advisors will take when dealing with Data Subject Access Requests:

- What constitutes "personal data"?
- What constitues a "relevant filing system" entitling an applicant under s.7 of the Act to disclosure of information held therein?
- In what circumstances was it "reasonable" for a data controller to comply with disclosure requests, even where the data held disclosed information about a third party who had not consented to its disclosure, ie when might redaction be permitted?
- When should a court intervene and exercise its discretionary power under s.7(9) of the Act to require disclosure?

The Court of Appeal rejected Durant's requests for disclosure and came to several important conclusions, narrowing definitions and seeking to prevent court claims of a similar nature in future. The Court specifically sought to reassure data controllers that the proper construction of the Act was not to involve "unjustifiable burden and expense" on data controllers through requests for disclosure of personal data held in manual records.

In summary, the Court decided the following

Personal Data
"Personal Data" should be biographical rather than simply making slant reference to that individual. As the information sought by Durant related to his complaint against Barclays rather than having a biographical slant about him personally, the Court concluded that it did not meet the requirements of the "personal data" definition and therefore did not give rise to a right of disclosure.

Relevant Filing system – manual files
It was decided that the definition of "manual files" should only relate to filing systems of equivalent standard or sophistication as computerised records and did not apply to unstructured files. Audley LJ stated that …. "anything….. which requires the searcher to leaf through files to see what and whether ….. personal data …… is to be found there would bear no resemblance to a computerised search" and would therefore not fall within the definition of "relevant filing system".

Redaction
Redaction relates to situations where personal data is requested but that data discloses information relating to another individual. Often, what will happen is that employers will blank out (or redact) information relating to third parties and disclose the remaining information. Audley LJ confirmed that the legal basis for redacting information sought under the s.7 disclosure application is a two-stage balancing process.

First, data controllers should consider what "legitimate interest" the data subject may have in requiring disclosure of the identity of another individual

named or identifiable from personal data to which he is otherwise entitled and whether that information about the other individual is "necessarily part of the personal data he has requested".

Secondly, and where the third-party information does necessarily form part of the personal data sought, the data controller must balance the data subject's rights with the obligations of confidentiality to the other party or to some other sensitivity that would require its non-disclosure.

The court's discretion to intervene
The Court supported the view of the High Court Judge who said that even if the FSA had not complied with its duty under s.7, the judge would not have exercised his discretion to order disclosure.

Since the Durant decision the UK Information Commissioner's office has issued guidelines on its website (www.informationcommissioner.gov.uk) on the 2nd February 2004 titled "the 'Durant Case' and its impact on the interpretation of the Data Protection Act, 1998". As both the UK and Irish legislation devolve from the same EU directive, the document will be of great benefit to HR Managers in Northern Ireland and the Republic of Ireland in determining what is "personal data" and what is meant by a "relevant filing system".

It is outlined that 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 infomraiton 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;
- incidential 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.

Noting the comments which were made in the Durant case with regard to the definition of Manual Files, the Information Commissioner concludes that 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 exist); 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. personal type topics such as leave, sick notes, contracts etc); and

- know that the file/s are indexed/structured to allow the retrieval of information abour 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.

The guidelines document also includes a very helpful FAQS Section to assist on what are “relevant filing systems”. It is suggested that, as a rule of thumb, one should apply the “temp test”. That is, if you employed a temporary administrative assistant (a temp), would he/she be able to extract specific information about an individual without any particular knowledge of your type of work or the documents held. 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 the temp to be able to use it. The temp test would not apply if any in-depth knowledge of the employers custom and practice is required, whether of the type of work, of the documents the employer holds or of any unusual features of the employers 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.

The Information Commissioner concludes that, 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.

Before employers jump for joy and decide to be reckless with all of their employee records, it must still be borne in mind that the Durant judgment specifically related to “manual files”. Information stored on computer can still be readily retrieved and is therefore subject to the Data Protection Act an liable to disclosure under a Subject Access Request. Employers therefore

must still be careful with regard to information recorded on employees particularly bearing in mind that most progressive employers now hold their employee records on computer.

By: Brian Morgan BC L
e-mail : bmorgan@morganmcmanus.ie

April. 2004