Deer-v-University of Oxford [2017] EWCA (Civ) 121

Data Protection: Court of Appeal gives important judgment on rights of data subject to make subject access request under section 7 Data Protection Act 1998, concerning definition of "personal data", significance of proportionality and the limit on exercise of discretion by Court under section 7(9) Data Protection Act 1998.

By Rhodri Williams QC

In this latest development in the important field of data protection, on 3 March 2017 the Court of Appeal (Civil Division) in *Deer-v-University of Oxford [2017] EWCA (Civil) 121* delivered a significant judgment on the scope of the rights of a data subject to make a subject access request (SAR) of a data controller with a view to discovering what personal data the data controller has in its possession about the data subject.

The appeal was heard together with that in *Ittihadieh-v-5-11 Cheyne Gardens RTM Co. Ltd* and the judgment included rulings on the scope of the definition of "personal data" in section 1 of the DPA; the extent of the duty to comply with a SAR in respect of a reasonable and proportionate search; and the extent of the court's discretion under section 7 (9) of the DPA to order or to decline to order a data controller to comply with a SAR.

The judgment was also handed down shortly after that given by a differently constituted Court of Appeal on 16 February 2017 in *Dawson-Damer-v-Taylor Wessing LLP [2017] EWCA Civ 74*.

Background

1. Dr. Cécile Deer had been engaged in employment litigation with the University of Oxford. Part of that litigation has already been the subject of an appeal to the Court of Appeal. On 27 July 2010 Dr Deer made the first of the two SARs under section 7 of the DPA. The SAR requested personal data held electronically and in any other relevant filing system within nine separate categories, concerning principally her attempt to obtain a job reference for a post at the University and her complaints and claims arising out of the refusal to provide her with such a reference.

2. The SAR also asked that, once Dr Deer's personal data had been identified, information constituting that data be provided in accordance with Information Commissioner Office (ICO) Guidelines, and that information be supplied identifying the source of the data and recipients to whom the data was or may have been disclosed. Finally, in respect of personal data which the University decided to withhold, a request was made, again in accordance with ICO guidelines, for details to be provided of the searches conducted, a description of the data withheld and the reasons for withholding the data.

3. In its reply of 25 October 2010 the University said that Dr Deer was making improper use of the DPA 1998 on the basis that she was at the time involved in litigation with the University in the Employment Tribunal. It was alleged that she was seeking to use the DPA 1998 as a proxy for obtaining disclosure for the purposes of the ET litigation and that the Court of Appeal in the case of *Durant v Financial Services Authority* had made it clear that this was improper. The University therefore declined to provide access to any data which it considered was linked to the ongoing litigation which, it stated would be the subject of a disclosure process in the ET. It nevertheless provided some other information insofar as it considered it reasonable to do so and insofar as it considered this data "detached" from the ongoing litigation.

4. In respect of the seven of the nine specific categories of data for which Dr Deer had requested access, access to information in seven of the categories was refused "on an application of the *Durant* principles." Further, in respect of the other two categories, access was refused on the basis that the information was contained in communications which were subject to legal professional privilege. However, on 25 October 2010 and 18

November 2010 the University disclosed certain information to Dr Deer.

5. On 14 February 2013 Dr Deer issued a Part 8 claim form alleging that the University had failed to respond to her SARs in accordance with the requirements of the DPA. On 5 September 2013 the University disclosed to Dr Deer some information that had been withheld from her solely on the basis of the *Durant* argument (i.e. that the request was an abuse of the right of subject access), while continuing to withhold information where it claimed that there was some other reason for doing so. Although the University said that it had carried out an adequate search, Dr Deer disputed that assertion.

6. An application for an interim order came on for a hearing before Mr. Recorder Hancock QC who handed down judgment on 4 March 2014. He made an order requiring the University to carry out searches of its servers for data contained in emails or electronic documents sent to or received from 22 named individuals between specified dates. It also required the University to search the servers used by five departments and faculties. The University carried out further searches for Dr Deer's personal data, and as a result it made further disclosures to her on 17 April 2014. In the course of carrying out those searches the University reviewed over 500,000 e-mails and other documents at a cost of some £116,116.

7. The claim came back before the court in April 2014 when the first instance judge heard argument about whether the University had complied with its obligations under the DPA. The judge heard submissions about the concept of personal data, and examined certain documents that referred in some way to Dr Deer but that were said by the University not to constitute her personal data.

8. In a first judgment of 11 July 2014 the judge concluded that: (i) none of the withheld material constituted Dr Deer's personal data; and (ii) in any event, if there were any errors of taxonomy in his analysis, then in the exercise of his discretion he would not require the University to take any further steps in compliance, as this would serve no useful purpose. In a second judgment that the judge gave on 23 February 2015 the judge made a declaration that the University ought to have disclosed the documents that Recorder Hancock QC's order resulted in being disclosed, within a reasonable time of the first SAR and ordered the University to pay Dr Deer's costs up to the date of the Recorder's order.

The judgment of the Court of Appeal

The purpose of the legislation

9. The Court held that the DPA 1998 was enacted to give effect to Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data. It was common ground, therefore, that the Court should interpret the DPA in conformity with the Directive. The purpose underlying the Directive is set out in its recitals. Recital (2) states that data processing systems must "*respect [natural persons'] fundamental rights and freedoms, notably the right to privacy*".

10. The European Court also laid emphasis on privacy. In *C-553/07 College van burgemeester en wethouders van Rotterdam v Rijkeboer,* the court said that the purpose of the Directive was "*to protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data*" and in *C-141/12 & C-372/12 YS v Minister voor Immigratie, Integratie en Asiel, Minister voor Immigratie, Integratie en Asiel v M*, the court referred to the Directive's "*purpose of guaranteeing the protection of the applicant's right to privacy with regard to the processing of data relating to him*".

The Data Protection Act 1998

11. The definition of "personal data" in the Directive is reflected in section 1 (1) of the DPA which provides:

> *"personal data" means data which relate to a living individual who can be identified—*
>
> *(a) from those data, or*
>
> *(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,*
>
> *and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual."*

12. Section 7 of the DPA, reflecting article 12 of the Directive, gives a data subject a right of access to personal data:

> *"(1) Subject to the following provisions of this section and to sections 8, 9 and 9A, an individual is entitled–*
>
> *(a) to be informed by any data controller whether personal data of which that individual is the data subject are being processed by or on behalf of that data controller,*
>
> *(b) if that is the case, to be given by the data controller a description of—*
>
> > *(i) the personal data of which that individual is the data subject,*
> >
> > *(ii) the purposes for which they are being or are to be processed, and*
> >
> > *(iii) the recipients or classes of recipients to whom they are or may be disclosed,*
>
> *(c) to have communicated to him in an intelligible form—*
>
> > *(i) the information constituting any personal data of which that individual is the data subject, and*
> >
> > *(ii) any information available to the data controller as to the source of those data, and*
>
> *(d) where the processing by automatic means of personal data of which that individual is the data subject for the purpose of evaluating matters relating to him such as, for example, his performance at work, his creditworthiness, his reliability or his conduct, has constituted or is likely to constitute the sole basis for any decision significantly affecting him, to be informed by the data controller of the logic involved in that decision-taking."*

13. A request made under section 7 (1) is a subject access request or SAR. Section 7 (2) provides that a person is not obliged to comply with a SAR unless he has "received a request in writing" and "such fee (not exceeding the prescribed maximum) as he may require." Except where the request is made to a credit reference agency or the request concerns an educational record or health record, the maximum fee which may be required by a data controller is £10: The Data Protection (Subject Access) (Fees and Miscellaneous Provisions) Regulations 2000, reg. 3.

14. Finally, section 7 (9) provides:

> *"(9) If a court is satisfied on the application of any person who has made a request under the foregoing provisions of this section that the data controller in question has failed to comply with the request in contravention of those provisions, the court may order him to comply with the request."*

Personal Data

15. The Court held that since the DPA is intended to give effect to the Directive, it is convenient to begin with the EU jurisprudence. The expression "personal data" "*undoubtedly covers the name of a person in conjunction with his telephone details or information about his working conditions or hobbies*" as well as information that a person has been injured and is on half time; *C-101/01 Criminal Proceedings against Lindqvist*; or his name and address: *C-553/07 Rotterdam v Rijkeboer*. The same is true of the name, date of birth, nationality, gender, ethnicity, religion and language, relating to a natural person, who is identified by name, although it does not apply to legal analysis: *C-141/12 & C-372/12 YS v Minister voor Immigratie*. A person's name and salary also amounts to "personal data": *C-465/00 Rechnungshof v Österreichischer Rundfunk*. An image of a person recorded by a camera is also his personal data: *C-212/13 Ryneš v Úřad pro ochranu osobních údajů.*

16. The question what amounts to "personal data" has also been considered in a number of domestic cases. The first of significance is *Durant v Financial Services Authority [2003] EWCA Civ 1746*. The leading judgment was that of Auld LJ. He considered that the question of the scope of the definition of "personal data" turned on the meaning of the phrase "relate to" in the phrase "data which relate to a living individual". Thus Auld LJ was not concerned with the question whether Mr Durant could be identified from the data. If his name was mentioned, clearly he could be. What was at issue was whether the data "related to" him. Auld LJ referred to the purpose of section 7 as being to enable a data subject to check whether the data controller's processing of his personal data unlawfully infringes his privacy. It was not "*an automatic key to any information … in which he may be named or involved.*"

17. However, in *Edem v The Information Commissioner [2014] EWCA Civ 92* Moses LJ held that there was ample authority that "a person's name, in conjunction with job-related information, is their personal data." Moses LJ then turned to the question why the FTT had reached a contrary conclusion. They had applied the two "notions" which Auld LJ had described in *Durant*, but Moses LJ held that they were wrong to do so, adding: "There is no reason to do so. The information in this case was plainly concerned with those three individuals." He also approved the following statement in the Information Commissioner's Guidance:

> *"It is important to remember that it is not always necessary to consider 'biographical significance' to determine whether data is personal data. In many cases data may be personal data simply because its content is such that it is 'obviously about' an individual. Alternatively, data may be personal data because it is clearly 'linked to' an individual because it is about his activities and is processed for the purpose of determining or influencing the way in which that person is treated. You need to consider 'biographical significance' only where information is not 'obviously about' an individual or clearly 'linked to' him."*

18. There was one further point to be made. Information is not disqualified from being "personal data" merely because it has been supplied to the data controller by the data subject. On the contrary, one would expect that much of the data processed by a data controller will have been supplied by the data subject himself, for instance in an application form. One of the subject access rights is a right to know to whom personal data have been disclosed, and this may be of considerable importance in a case in which the personal data have been supplied by the data subject himself.

Purpose of the Subject Access Request

19. The underlying purpose of the right of access to personal data is for the data subject to check the accuracy of the data and to see that they are being processed lawfully. The right of access under section 7 of the DPA, however, is not subject to any *express* purpose or motive test. Nor is a data subject required to state any purpose when making a SAR.

20. It had been suggested, based on *Durant*, that the making of a SAR for a collateral purpose such as to obtain documents for the purposes of litigation entitles the data controller to refuse to comply with the request. An alternative way of putting the point is that it is disproportionate to require him to do so in such circumstances. The Court of Appeal did not consider this to be a valid objection. First of all, the target of a SAR is not documents; it is information. Secondly, in principle the mere fact that a person has collateral purposes will not invalidate a SAR, or relieve the data controller from his obligations in relation to it, if that person also wishes to achieve one or more of the purposes of the Directive. Thirdly, there is now a considerable body of domestic case law which recognises that it is no objection to a SAR that it is made in connection with actual or contemplated litigation.

21. Fourthly, section 27 (5) of the DPA 1998 provides that apart from exemptions contained in the DPA itself, the subject information provisions prevail over any other enactment or rule of law. Fifthly, there is a sufficient safety net in the form of the EU doctrine of "abuse of rights". This is a principle of interpretation of EU legislation which applies across the board. The Court of Appeal expressed a similar view in *Dawson-Damer* by reference to the domestic principle of abuse of process and the Court did not think that there was much difference between the two approaches in this context. Finally, the point has now been put beyond doubt by the recent decision of this court in *Dawson-Damer*.

Proportionality of Search

22. Although neither article 12 of the Directive nor section 7 of the DPA contain any express obligation on the data controller to search for personal data in response to a SAR, it was common ground that such an obligation must necessarily be implied. In *Dawson-Damer,* the court concluded that the obligation to search derived from section 8 (2). There are nevertheless indications in the Directive that the EU legislature did not intend to impose excessive burdens on data controllers. First of all, there is the description in the recitals of the kinds of systems to which the Directive applies. Secondly, in considering the scope of a Member State to lay down time limits for the retention of personal data, the CJEU in *C-553/07 Rotterdam v Rijkeboer* applied the principle of proportionality. Likewise in *C-101/01 Lindqvist* the court applied the principle of proportionality to a conflict between privacy on the one hand and freedom of expression on the other. In *C-582/14 Breyer v Bundesrepublik Deutschland* in considering whether an individual was likely to be capable of being identified from particular data, the court held that this meant capable without disproportionate effort.

23. Thirdly, the principle of proportionality is a general principle of EU law: *C-27/00 & C-122/00 R (Omega Air Ltd) v Secretary of State for the Environment Transport and the Regions*; and the CJEU treated it as such in *Lindqvist*. Fourth, in *Ezsias v Welsh Ministers* the High Court held that on receipt of a SAR, a data controller must take reasonable and proportionate steps to identify and disclose the data he is bound to disclose. The Court of Appeal in *Deer* endorsed this view.

24. Section 8 (2) of the DPA entitles a data controller not to supply a copy of the information in permanent form if to do so would involve disproportionate effort. However, there is

no express provision of the DPA which relieves a data controller from the obligation to supply the information required by section 7 (1) on the ground that it would be disproportionate to do so. In the Court's judgment, however, while the principle of proportionality cannot justify a blanket refusal to comply with a SAR, it does limit the scope of the efforts that a data controller must take in response. That was also the conclusion of the Court of Appeal in *Dawson-Damer.*

25. There is one further point to be made under this head. Because the implied obligation to search is limited to a reasonable and proportionate search, it is not an obligation to leave no stone unturned, the result of such a search does not necessarily mean that every item of personal data relating to an individual will be retrieved as a result. The Court held that there may be things beneath another stone which has not been turned over. Accordingly the mere fact that a further and more extensive search reveals further personal data relating to that individual does not entail the proposition that the first search was inadequate.

Exercise of discretion under section 7(9)

26. In *Durant* Auld LJ considered, *obiter*, the scope of the discretion under section 7 (9) of the DPA. He described it as "general and untrammelled." Although he said that this view was supported by *Lindqvist* it seemed to the Court of Appeal in *Deer* that the court in those paragraphs was dealing with a different question. Since the decision in *Durant* on the ambit of the discretion was *obiter* the Court of Appeal was not bound by it.

27. The Court had difficulty with the notion that a discretion conferred upon the court by legislation is "general and untrammelled". A discretion conferred upon the court by legislation is conferred upon the court *for a purpose*. When the court is called upon to exercise that discretion it must do so in furtherance of the purpose for which it is conferred. The discretion under section 7 (9) only arises if the court is satisfied that the data controller has failed to comply with his obligations under section 7. So the starting point for the exercise of the discretion is that there has been a breach of duty. That had to have a significant bearing on the way in which the court exercises its discretion.

28. The Court therefore respectfully disagreed with Auld LJ's *obiter* observations and preferred approach of Cranston J in *Roberts v Nottinghamshire Healthcare NHS Trust* [2008] EWHC 1934 (QB), and the observations of Green J in *Zaw Lin v Commissioner of Police for the Metropolis* [2015] EWHC 2484 (QB) which encapsulated the better approach, as did Warby J. in *Guriev v Community Safety Development (UK) Ltd* [2016] EWHC 643 (QB).

29. However, that said, in exercising its discretion the court must have regard to the general principle of proportionality which runs through EU law. The court made this clear in *Lindqvist* where it said that it was for courts responsible for applying the national legislation implementing the Directive to "ensure a fair balance" between the rights and interests in question. There is, therefore, a balance to be struck between the *prima facie* right of the data subject to have access to his personal data on the one hand, and the interests of the data controller on the other. In striking that balance there are many factors that the court may take into account.

30. One relevant factor is whether there is a more appropriate route to obtaining the requested information, such as by disclosure in legal proceedings: *Ezsias*. A second is the nature and gravity of the breach. If it is trivial that may be a good reason for refusing to exercise the discretion in favour of the data subject. Another is the reason for having made the SAR. While the absence of a stated reason does not in itself invalidate the SAR, the absence of a legitimate reason has a bearing on the exercise of the court's discretion; *DB v The General Medical Council* [2016] EWHC 2331 (QB), even though a collateral purpose of assisting in litigation is not an absolute bar: *Dawson-Damer*.

31. If the application is an abuse of rights, for example where litigation is pursued merely to impose a burden on the data controller, that would be a relevant factor. Likewise where the application is procedurally abusive. Whether the real quest is for documents rather than personal data is also relevant. If the personal data are of no real value to the data subject, that too may be a good reason for refusing to exercise the discretion in his favour. *Dawson-Damer* confirmed that the "potential benefit" to the data subject is relevant to the question whether a proportionate search has been carried out and, by parity of reasoning, the same must be true of the court's exercise of its discretion. If the data subject has already received the data or the document in which they are contained otherwise than under a previous SAR, that too may be a reason for refusing to exercise the discretion in his favour.

32. On the other hand, where it is clear that the data subject legitimately wishes to check the accuracy of his personal data that will be a good reason for exercising the discretion in his favour: *Kololo*. If there are no material factors other than a SAR in valid form and a breach of the data controller's obligation to conduct a proportionate search, then the discretion will ordinarily be exercised in favour of the data subject: *Dawson-Damer*.

33. Although on the facts of the appeal, the Court of Appeal found that the judge had made some errors of taxonomy, it held that he was entitled to consider (a) that further disclosure would serve no useful purpose; (b) the appellant's relentless pursuit of disclosure not merely of personal data but also of documents; (c) the lack of proportionality in the appellant's SARs. The exercise of his discretion was therefore within the permissible range (para 152-166). In the event both the appeal of Dr. Deer and the cross-appeal of the University of Oxford were dismissed.

Summary of judgment

34. In summary therefore:

- **Personal data -** The definition of "personal data" consisted of two limbs: (a) whether the data in question "related to" a living individual and (b) whether the individual was identifiable from those data. Information was not disqualified from being "personal data" merely because it had been supplied to the data controller by the data subject.

- **SAR and motive -** The right of access under section 7 was not subject to any express purpose or motive test. Nor was a data subject required to state any purpose when making a SAR. The requirements for a response to a SAR were laid out in section 7(1)(b) & (c) DPA 1998.

- **Proportionality -** The EU legislature did not intend to impose excessive burdens on data controllers and the court applied the principle of proportionality. Section 8 (2) entitled a data controller not to supply a copy of the information in permanent form if to do so would involve disproportionate effort. However, there was no express provision relieving a data controller from the obligation to search for and supply the information required by section 7(1) on the same ground. While the principle of proportionality could not justify a blanket refusal to comply with a SAR, it did limit the scope of the efforts that a data controller had to take. The implied obligation to search was limited to a reasonable and proportionate search, but the fact that a further and more extensive search might reveal further personal data did not mean that the first search was inadequate.

- **Discretion -** A discretion conferred upon the court by legislation was conferred for a purpose. In exercising its discretion, the court had to have regard to the general principle of proportionality. In striking the balance between the prima facie right of the data subject to have access to his personal data on the one hand, and the interests of the data controller on the other, the court could take into account, amongst other things, (a) whether there was a more appropriate route to obtaining the requested information; (b) the reason for making the SAR; (c) whether the application was an abuse of rights or procedurally abusive; (d) whether the request was really for documents rather than personal data; and (e) the potential benefit to the data subject.

By Rhodri Williams QC

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