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ICO Guidance: interpretation and consistency with ‘Durant’

The recent ICO guidance on the concept of ‘personal data’ sets out eight questions to help organisations determine if they are processing such data. Some of the questions are designed to assist organisations in determining if information ‘relates’ to an individual, a key issue which was considered in the recent *Durant* judgment, which the ICO were bound by in drafting this guidance. Renzo Marchini, Counsel at Dechert LLP’s London office, assesses this part of the guidance and its consistency with the *Durant* judgment.

Hot on the heels of the Article 29 Working Party opinion on the concept of personal data of June 2007 (the ‘WP Opinion’), we now have the UK ICO’s new guidance (the ‘ICO Guidance’), which by means of eight questions (and many examples) is intended to assist data controllers in deciding whether they are processing personal data. In this article we discuss one feature of that guidance (that which was considered in the *Durant* case); namely, what is meant by the requirement that information must ‘relate to’ an individual before it can be personal data. We also discuss whether the ICO Guidance is consistent with the *Durant* case.

It is worth noting at the outset that this issue is one which is at the margins of relevance to most businesses processing personal data. Indeed, it may well be the case that the only time a data controller (in the UK at least) needs to worry about whether or not a piece of information ‘relates to’ an individual is perhaps when, like the FSA, it is attempting to avoid subject access requests from an individual using the regime as a discovery mechanism to fuel some other dispute. By and large, most ‘databases’, in the traditional sense, will clearly always be populated (if they concern identifiable individuals) with information ‘relating to’ that individual.

Durant

First a brief reminder as to the main features of *Durant*. The Court of Appeal pointed out that the meaning of ‘personal data’ it was espousing was the true purpose of the Directive: information is not personal data (it does not ‘relate to’ the individual in the relevant sense) unless it: ‘is information that affects [a person’s] privacy, whether in his personal or family life, business or

professional capacity’¹. The Court identified two notions that may assist in determining whether a person’s privacy was affected: whether the information was biographical in a significant sense (going beyond the recording of [the individual’s] involvement in a matter or an event which has no personal connotations) and whether the information has the individual as its focus. It is not the case that either of these elements were necessary (as has often been said to be the case²); they are simply notions that assist in addressing the fundamental question as to whether information touches a privacy concern within the Directive’s intent. The court felt that all the information Mr Durant sought was about (or focussing on) either his complaints or Barclays Bank and the FSA who were involved in resolving his complaints; it was not information about, or relating to, him.

The UK ICO’s new guidance

The ICO Guidance sets out, by means of a questionnaire, a number of elements which point towards information being personal data. Questions 3 to 8 are to assist in determining whether information ‘relates to’ an individual. As will be seen, three of these questions are inspired directly by the WP Opinion (which described three relevant elements: ‘content’, ‘purpose’ and ‘result’). The relevant questions then are:

- Question 3: Is information ‘obviously about’ the individual? Broadly, this seems to be the same as the Working Party’s ‘content’ element, present in those cases where information is given about a particular person, regardless of any purpose of the data controller, or the impact of that information on the data subject.
- Question 4: Is information ‘linked’ to an individual? This

seems more a gateway element than a substantive test in its own right: information does have to be linked to (or connected with) the individual before any of the other elements could ever be engaged. As in the example in the Guidance under this question, once a job is filled, an advertised salary (previously not personal data) becomes linked with the individual and becomes personal data, as it is then surely 'obviously about' the individual.

● Question 5: Is information used or to be used to inform or influence actions about the individual? Broadly, this is the 'purpose' element of the WP Opinion. What seems to be envisaged is information about something else (such as utility usage at an address) which will be used to determine something about the individual (such as what to charge the individual). There is a future-looking element ('to be used'), and this could lead to some uncertainty; however the examples given seem to suggest that the future purpose must actually be anticipated.

● Question 6: Does the data have any 'biographical significance'? This is a restatement of the *Durant* indicator that information must be 'biographical in a significant sense'. The UK ICO however, in its examples, seems to equate biographical significance with simply having any personal connotation. One of the examples is the minutes of a meeting showing that an individual attended. That fact of attendance at a particular time and place is biographical and the minutes at the very least contain that by way of personal data³. However, the Court seemed to be saying something more. It said in this context⁴: 'The first is whether the information is biographical in a significant sense, that is, going

The meaning of some of the more opaque elements of the ICO Guidance will need to be considered

beyond the recording of the putative data subject's involvement in a matter or an event that has no personal connotations, a life event in respect of which his privacy could not be said to be compromised.'

Read in this context, it is hard to see how attendance at a (work-related) meeting⁵, without more, could be personal data.

● Question 7: Does the information have the individual as its focus? Again, a *Durant* indicator and in that sense not controversial. Although the Working Party said it was not necessary to have the individual as the focus of the information (implicitly criticising *Durant*, or at least the way it had been interpreted), it is certainly sufficient.

● Question 8: Does the information impact or potentially impact on an individual? Broadly, this is a restatement of the 'result' element identified by the Working Party; however the ICO seems to give it a narrower gloss. The WP Opinion envisaged any theoretical use of data (typically about objects) in a manner which may impact on an individual as fulfilling the requirement, even if there were never any intention of doing so⁶. The UK ICO says that processing information about objects will be processing of personal data of an individual, if there is a 'reasonable chance' that the information will be processed to learn, record or determine something about that individual.

Is the Guidance consistent with the *Durant* judgement?

Leaving Question 5 aside, of the five substantive tests bearing on the 'relate to' issue, three of them originate from the WP Opinion and two from *Durant*. At this point, it should be recalled that the crux of *Durant* was not the alternative elements of 'focus' or

'biographical significance' (these are simply two indicators which might go to show that information is affecting someone's privacy); the important point was that privacy was affected in the manner explained⁷. Reconciliation between *Durant* and the ICO Guidance is not possible therefore if the latter points towards the personal data being present even when the information does not affect privacy in that sense.

To explore and illustrate this, it would be interesting to speculate how the questionnaire would have applied to the information sought by Mr Durant. The court felt that the information did not touch his privacy and did not fulfil the 'focus' or 'biographical significance' notions. What then remains are Questions 3, 5 and 8 (the WP Opinion elements). If a faithful application of these notions leads to a conclusion inconsistent with that of the court, then there will indeed be a problem in reconciling *Durant*.

● The court found that the information was not about him, only about his complaint (and so it is not 'obviously about' him and the 'content' is not satisfied).

● Mr Durant might fare better under the 'purpose' element. Would the information generated within the FSA be used to determine how they would evaluate or treat him? Here we get to the same issue as the court addressed in *Durant*. Was the purpose of the FSA's investigation into Mr Durant's complaint to evaluate, treat in a certain way or influence his status; or was it instead to treat or evaluate his complaint? If you agree with the court in *Durant* and see such a distinction, then you can happily conclude that purpose is not fulfilled.

● Lastly, the 'result' element will be fulfilled if use of the data is likely

to have an impact on Mr Durant’s rights and interests. Now, arguably, this would be fulfilled, as the outcome of the investigation would have had such an impact on his rights and interests even if its purpose was merely to evaluate the complaint and, if this is right, then there is an inconsistency with *Durant*. However, the tenor of the court’s decision is that it would not be all rights and interests which are relevant to this test, but only those which impact upon the purpose of the Directive as the court saw it; namely the individual’s right to privacy. Decisions about his complaint did not, the court said, affect his privacy.

In conclusion, if a distinction between information about an individual and information about his complaint is valid, then there is no problem in reconciling the approaches. Whether there is such a distinction is a question now for the House of Lords and ultimately for the European Court of Justice. In the meantime, the UK courts and the UK ICO at least are bound by the *Durant* decision and the approach set out in that decision: the meaning of some of the more opaque elements of the ICO Guidance will need to be considered in the light of that judgement.

Accordingly, the ICO Guidance will be of marginal importance to data controllers. As the ICO is bound by *Durant*, it would have been helpful if the guidance mirrored some of its language (as in the earlier guidance) or at least explained how the questionnaire (in particular Questions 3, 5 and 8 which derive from the WP Opinion) is - as the UK ICO believes - consistent with *Durant*. In particular, it would have been illuminating if there could have been emphasis on or discussion of the connection to the right to privacy which the court had firmly

in mind. Why did it not do this or at least discuss it? Presumably because the ICO does not believe that to be the correct approach and, understandably, could hardly say so in guidance.

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1. The court refers in this discussion of the purpose of the Directive to Recital 10 of the Directive, which in turn refers to the right of privacy in Article 8 of the European Convention of Human Rights.
2. Various reports cite either requirements as being necessary, some reports deem both necessary. The UK ICO, in its earlier post-Durant guidance ('The Durant case and its impact on the interpretation of the Data Protection Act 1998' of February 2006), stated that 'Information that has as its focus something other than the individual will not be 'personal data''. The new ICO Guidance correctly recognises that this is not so (focus, being sufficient, but not necessary, for the information to be personal data).
3. In the UK ICO's earlier guidance (see footnote 2), attendance at a meeting in an official capacity was given as an example of something 'unlikely' to be personal data. There has clearly been a change of mind on this.
4. Auld LJ, at para 28.
5. Clearly, attendance at a club meeting (or similar, such as alcoholic anonymous) does communicate the fact of membership (or an alcohol problem) and that is considered personal data.
6. See the example on use of data in a database keeping track of cars which have been serviced in a garage (and of data on their owners), which could be used to monitor performance of staff.
7. See footnote 1.



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