

The Campaign for Freedom of Information

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Dear Mr Durant,

Following our conversation I am writing in connection with your forthcoming hearing before the Court of Appeal, in which you are seeking leave to appeal against the county court judgement in your case against the Financial Services Authority. You are welcome to submit this letter to the court if you feel it would be helpful to do so.

I should explain that the Campaign for Freedom of Information is a non-profit making organisation established in 1984 which seeks to improve the public's rights to official information. We have a particular interest in individual rights of access to personal data and promoted the private member's bills which became the Access to Personal Files Act 1987, the Access to the Medical Reports Act 1988 and the Access to Health Records Act 1990. We have also taken a keen interest in the Data Protection Act.

The judgement in your case relates to your application to the FSA under the Data Protection Act 1998 for access to its files into your complaint against Barclays Bank. The judge decided that the non-electronic material was not held in a 'relevant filing system' as defined in section 1(1) of the Act and was therefore not 'data' to which the right of access under section 7(1) could apply. However, he also held that even if the material had been subject to the right of access, in the exercise of his discretion under the Act, he would not have ordered its disclosure.

I understand that the Court of Appeal has indicated that while the substantive issues raised in this case might be a proper subject for its consideration, it is not minded to examine it given the judge's conclusion that he would not in any event have ordered disclosure. We hope the Court may be prepared to consider the case, as there is considerable uncertainty as to the meaning of a 'relevant filing system'. However, the decision on discretion itself raises important questions.

Hon. President: Godfrey Bradman
Co-Chairs: James Cornford, Neil McIntosh
Director: Maurice Frankel

Parliamentary Co-Chairs: Helen Jackson MP
Archy Kirkwood MP
Richard Shepherd MP

The judge explained his reasons for this decision on pages 12-13 of the judgement:

‘Even if I had come to the conclusion that the FSA were obliged to disclose the material...I would still not have exercised my discretion in favour of making an order for compliance, and I say that for three main reasons. First, I cannot see that the information could be of any practical value to the appellant. Secondly, the purpose of the legislation it seems to me is to ensure that records of an inaccurate nature are not kept about an individual. A citizen needs to know what the record says in order to have an opportunity of remedying an error or false information. In this case the appellant seeks disclosure not to correct an error but to fuel a separate collateral argument that he has either with Barclays bank or with the FSA, litigation which is in any event doomed to failure. I am entirely satisfied on the facts of the case that the FSA have acted at all times in good faith, and indeed there has been no suggestion to the contrary from the appellant; his argument is with Barclays bank, not with the FSA.’

Our concern is that this approach may have wider implications for people wishing to exercise their rights of access under of the Data Protection Act:

1. The right of access under section 7(1) of the Data Protection Act (DPA) 1998 applies regardless of the applicant’s purpose. Applicants are not required to explain to the data controller why they are exercising the right of access, and the applicant’s purpose or intentions are not relevant to the data controller’s decision on whether to disclose the information. There is no requirement that the applicant demonstrate that the information will be, in the judge’s words, ‘of practical value’. Indeed, the judge recognised this in his judgement when he agreed with the observation that ‘it does not matter if he wants them [the documents] just for the purpose of papering a wall, either he is entitled to them or not’ (12E). Having recognised that the applicant’s purpose is irrelevant to the existence of the right, considerations of purpose nevertheless led the judge to decline to enforce the right.

2. In explaining this, the judge suggests disclosure in this case would not reflect ‘the purpose of the legislation’ which he describes as ‘to ensure that records of an inaccurate nature are not kept about an individual’. This is certainly an important aspect of the legislation, but only one of many. It is surprising to find it described as ‘the’ purpose of the Data Protection Act, or even of the right of access.

3. A broad guide to the Act’s purpose can be found the long title, which describes it as an Act ‘to make new provision for the regulation of the processing of information relating to individuals, including the obtaining, holding, use or disclosure of such information’. The correction of inaccurate data is not mentioned.

4. One of the Act’s central requirements is the obligation under section 4(4) for every data controller to comply with the ‘data protection principles’ in relation to personal data. The eight principles are set out in Schedule 1. They require that personal data be processed fairly and lawfully, be obtained only for specified and lawful purposes, not be further processed for incompatible purposes, be adequate, relevant, not excessive,

accurate, up to date and not kept longer than necessary, be processed in accordance with data subjects' rights, protected against unauthorised or unlawful processing or accidental loss or damage and not transferred to any country which does not also provide adequate protection.

5. If the right of access is to be construed as having a purpose, rooted in the Act, it must surely include securing compliance with these principles. It is notable that section 13, which provides a right to compensation, applies where the individual has been damaged by *any* contravention of the Act, not merely a failure to maintain accurate data. For example, a data controller who obtains personal data unfairly or who discloses them in breach of an obligation of confidentiality would contravene the first data protection principle (which requires that data be processed fairly and lawfully). A data controller who fails to protect personal data from unauthorised access, would be in breach of the seventh principle. In such cases the data controller may be liable for damages, although the data is entirely accurate.

6. Even if the main purpose of the legislation (or of the right of access) *was* to permit errors to be corrected, I wonder whether it would be right to assume that this should be the *applicant's* purpose in making the request. Suppose the file held on an individual contains serious errors, and the individual has been prejudiced as a result. Suppose also that the applicant is not aware of these errors, but wrongly attributes his treatment to some form of discrimination (and for the sake of argument, that it is one, such as age discrimination, for which he has no remedy). He nevertheless asks for the records in the hope of confirming this. The approach in this case suggests that a court might refuse to order disclosure because it sees no practical use that he could make of the records and because he has not himself raised the possibility of inaccuracy. He would thus be denied the opportunity to correct the damaging errors, which may be readily apparent once he sees the record. He would also be prevented from seeking any compensation to which he may well be entitled under section 13. That surely would be inconsistent with the purposes of the Act, however narrowly construed.

7. The judge has also applied a test of whether the records would be of 'practical value to the applicant' and concludes that they were not. I wonder whether this too is an appropriate test. A consultation paper issued by the Lord Chancellor's Department, which is currently reviewing these provisions, sets this right in a wider perspective, stating:

'The Government's starting point is that the right of subject access must remain one of the central pillars of the UK's data protection regime. Not only does it ensure transparency and promote compliance with the data protection rules, it also encourages the efficient management of personal data.'¹

8. Even if a test of 'practical value to the applicant' is applied, it could be argued that it

¹ LCD, 'Data Protection Act 1998. Consultation Paper on Subject Access', CP 12/02, October 2002, paragraph 5

would be satisfied in this case. The applicant's purpose in applying for access to the FSA's records on his complaint may be said to be to satisfy himself that the FSA has properly investigated the complaint or, alternatively, to reveal any defects in its investigation. This would be an entirely reasonable basis for a request, likely to promote the accountability of this important public authority. If the disclosure indicates that the FSA has behaved diligently it should tend to dispel any suspicion which he may have about its conduct. If, on the other hand, the disclosure shows some error or misjudgement by the FSA, the Authority would itself presumably wish to reconsider its previous conclusions. The judge suggested that the applicant has no further opportunity to seek a legal remedy, but other legitimate options (such as asking an MP to raise the matter in the House of Commons) must still be available.

9. The third reason given by the judge is that 'the FSA have acted at all times in good faith'. However, the general assumption must be that public bodies like the FSA normally act with good faith. If this was a relevant factor in deciding whether or not individuals were entitled to the enforcement of their statutory rights, most individuals would usually not be entitled to them, and the legislation would be of little value.

10. The Act's approach is to specify in great detail the circumstances in which the right of access is not to apply. These can be found in sections 7-8, in the exemptions in Part IV of the Act and in Schedule 7. The broad tests applied by the judge in the exercise of this discretion could be seen as adding what are in effect new 'exemptions' to the Act, undermining its exhaustive description of the restrictions on access. Because the Data Protection Act 1998 implements a European Directive, with which the UK is bound to comply, the restrictions are limited to those permitted by the Directive and correctly transposed into the legislation.

11. This is reflected in section 27(5) which states that:

'Except as provided by this Part, the subject information provisions shall have effect notwithstanding any enactment or rule of law prohibiting or restricting the disclosure, or authorising the withholding of information'.

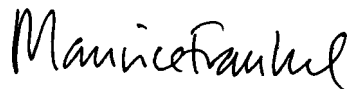
The right of access is intended to override all other obstacles to access including those that, for example, might arise under the laws of confidentiality, contempt of court, official secrets, copyright and defamation, unless specifically incorporated into the statute itself (e.g. as in section 7(6)(a)). For the right to be established in such powerful terms might suggest that any discretion to not enforce it should be exercised only in exceptional circumstances. For example, an applicant may be proposing to use the information for the purpose of a campaign of deliberate intimidation. Alternatively, an application may be made on behalf of another individual whose consent for the application has been obtained through coercion.

12. However, the judge has explained his decision in this case in terms which may be taken to be widely applicable general principles, relevant to anyone who seeks to exercise this right. The implication may be that to enforce the rights, an applicant would

have to show that (a) the request is prompted by a desire to correct errors (b) the information is of other practical use, or (c) the data controller has acted in bad faith.

13. It would be a matter of concern if data controllers began to act with reference to such principles (which have already attracted some publicity).² They may feel that there is no reason for them to disclose information in circumstances where the courts would ultimately not order them to do so. They may therefore feel entitled to respond to requests in light of the applicant's *purpose* in applying for information and in doing so create an entirely new and substantial obstacle to disclosure.

Yours sincerely,

A handwritten signature in black ink that reads "Maurice Frankel". The signature is written in a cursive, slightly slanted style.

Maurice Frankel
Director

² Partly because it appears to be the first involving the meaning of 'relevant filing system' the case has already attracted public attention, and has been the subject a detailed review in the December 2002 edition of 'Data Protection and Privacy Newsletter' published by the law firm Masons