Revisiting the definition of 'relevant filing system'

The question of what constitutes a 'relevant filing system' under the DPA 1998 has always been a vexed one, particularly since the Court of Appeal's ruling in Durant v Financial Services Authority [2003]. The Court of Appeal's interpretation in the Durant case has been criticised in various quarters for being too restrictive and particularly for focussing on the burdens and costs imposed on data controllers rather than the rights of the data subjects. Therefore the recent decision by the High Court in in *Dawson-Damer v Taylor Wessing LLP [2019]* may be welcomed by those who believe a more 'rights- based' approach is appropriate. However, the decision is likely to cause some concern to Trustees and their legal advisors.
The case concerned subject access requests (SARs) made by Mrs Dawson-Damer and her two adopted children, Piers and Adelicia, in August 2014. The requests were made to Taylor-Wessing LLP (TW), an English firm of solicitors. The requestors were not clients of TW. However the law firm, maintained numerous trust files which contained the personal information of the requestors because they were named potential beneficiaries in a number of family trust settlements created under Bahamian law. TW, as Data Controller, refused the SARS, and this resulted in a sequence of litigation culminating in the most recent High Court judgment in May 2019. The litigation concerned the now repealed Data Protection Act 1998. The rights of access to personal data are now governed by the GDPR and the Data Protection Act 2018, which contain a subtly different definition of a filing system (see below).

The definition of relevant filing system under DPA 1998

Readers familiar with the DPA 1998 will recall that the 1998 Act provided a definition of 'data' that was covered by the Act. This included data processed or intended to be processed by equipment operating automatically. It also included 'manual' data recorded as part of a 'relevant filing system'. Personal data was defined as 'data' which relate to a living individual who can be identified from those data, or from that data and other information, which is in the possession of, or is likely to come into the possession of, the Data Controller.

In Durant, the Court of Appeal interpreted the concept of a 'relevant filing system' as a system of files in which the files forming part of it *"are structured or referenced in such a way as clearly to indicate at the outset of a search"* whether the personal information of a person requesting the information is held within the system, and if so in which file or files it is held. In addition the structuring or referencing mechanism of the filing system had to be sufficiently sophisticated and detailed to indicate whether and where the requestors information could be located. The key

feature of this interpretation is the focus on the way in which the system is structured by reference to individuals and the ease with which specific information could be accessed. Personal information held in an unstructured manual filing system did not fall within the scope of the DPA 2018. For example, personnel files held by an employer in relation to each employee would form part of a relevant filing system whereas files containing chronological data about employees' training records, which were not sub-divided by the name of employees might not if it would require browsing throughout the file to locate an individual's records.

The Dawson-Damer litigation

The SARs were made to Taylor Wessing in August 2014. What appears to have triggered the SARs is the fact that the Mrs D-D and her children became aware, in 2013, that a large amount of money (some $402 million) had been appointed for the benefit of the children of the brother of Mrs DD's deceased husband. Mrs D-D has sought to challenge the validity of this appointment in the Bahamian courts and that litigation is reported to be ongoing.

Taylor Wessing, refused to disclose most of the personal information on the basis that the information was exempt (under Paragraph 10, Schedule 7 of the DPA 1998) from disclosure because it carried legal professional privilege and that it would involve a disproportionate effort for the law firm to search through all the information. (S. 8 (2) DPA 1998 removed the obligation on a data controller to supply copies of a requestors personal information in a permanent form if the supply of such a copy is not possible or would involve a disproportionate effort to supply the information.)

The requestors brought an action in the High Court in January 2015 seeking a declaration that TW had acted unlawfully and an order requiring the law firm to disclose their personal information. The High Court found in favour of the law firm, but the requestors appealed to the Court of Appeal. In 2017 the Court of Appeal decided that TW had not shown that it would involve a disproportionate effort (as it claimed) to locate the personal information. However the Court of Appeal decided that it would remit the case back to the High Court to decide whether the personal information in dispute was held in a relevant filing system, and whether any of the information carried legal professional privilege under English law.

In this blog we focus on the 'relevant filing system' issue.

The Trust Files: Do they form part of a relevant filing system?

The issue in this case related to paper files (manual data) that were processed and held by the law firm prior to 2005, when it moved over to an electronic filing system. Specifically the law firm identified a number of manual files that were labelled by reference to their clients or the respective Trusts and which contained correspondence and advice that was arranged chronologically. They argued that the only way it could determine if the files contained the personal information of the requestors was to go through each file page by page and therefore the any personal information was not easily accessible.

The question for the High Court was whether these paper files formed part of a relevant filing system. According to Taylor-Wessing the files did not, and therefore any personal information about the requestors contained in the files was outside the scope of the DPA 1998. If they were right, then they had no obligation to provide the personal information to Mrs D-D and her children. The requestors argued that the files did form part of relevant filing system and that the law firm had failed to carry out a reasonable and proportionate search of them. The High Court decided:

1. 35 files referenced by the name of a specific Trust formed part of a relevant filing system.
2. In the light of recent domestic and European case law the decision in Durant was too restrictive and the requirements of a relevant filing system are that:

    a) The data must be structured by reference to specific criteria; and
    b) The criteria must be “related to individuals”; and
    c) The specific criteria must enable the data to be easily retrieved.

The Court decided that the files were filed under the description of the relevant Trust and the client is recorded as the Trustee. These files clearly related to Trusts in which the requestors were potential beneficiaries. The High Court was satisfied that this was sufficient to satisfy (a) and (b). Turning to point (c) the Court said that since the files were arranged chronologically this would of course require someone to ‘turn the pages’ of the files to locate the personal information. However, the Court did not think that this would be an onerous task and the search would enable the personal information of the requestors to be easily retrieved. In any event the Court acknowledged that the law firm must have done this exercise in order to reach its conclusion that the majority of the personal data it held was subject to legal professional privilege.

In reaching this decision the Court considered the following to be important considerations:

1. The decision in Durant was taken before the right to the protection of personal data was enshrined as a fundamental right in EU law by Article 8 of the Charter of Fundamental Rights.

2. In the light of more recent case law it was necessary to remember that the purpose of the Data Protection Directive (and hence the DPA 1998) was to provide a high level of protection of data subjects' rights. The Court stated that "the focus is on the need for the protection of the data subject, as opposed to the burden on the Data Controller"

The disproportionate effort issue

The High Court also had to consider whether TW had failed to fulfil its obligations, as Data Controller, by failing to carry out a reasonable and proportionate search of the requestor's personal data. The law firm had argued that it would involve disproportionate effort to go through all the documents in order to determine what information was subject to legal professional privilege. The Court's decision here largely rests on the facts. However it did make it clear that

- The onus is on the Data Controller to provide evidence why a search would involve disproportionate effort. TW had made some assertions about the numbers of documents involved but had not produced evidence setting out the time and cost involved in the search.
- The fact that the requestors wanted the information to assist them with their litigation in the Bahamas is not a relevant factor in deciding the proportionality of the search.
- It would be disproportionate to require the law firm to search the mimecast back-up system (that contained all emails not saved to the document management system) because the search would reveal confidential information or information about TW employees or other unrelated clients.
- It would not be proportionate to require the firm to search through the personal spaces of ex- employees, but would be for current fee earners.

Consequently Taylor Wessing has been required to search through is paper based Trust files in order to finally disclose the personal information of the requestors. It has only taken 5 years!

Implications of the decision

The case was considered under the DPA 1998 and therefore is of limited value in relation to future cases. However, it is quite clear that the Courts have adopted an approach to data protection laws that is more focussed on the rights of data

subjects than the burdens faced by Data Controllers. The way in which the Court interpreted and applied the definition of a relevant filing system is much wider than the Court of Appeal in Durant. It is also clear that Data Controllers need to produce clear evidence in terms of time and costs if they wish to argue it would involve disproportionate effort to supply personal information.

However, as we noted at the outset. The definition of 'relevant filing system' in the 1998 DPA has been replaced with a new definition in the GDPR (Article 4 (6) and DPA 2018 S. 3(6). This now refers to 'a filing system' which means
" any structured set of personal data which is accessible according to specific criteria, whether held by automated means or manually and whether centralised, decentralised or dispersed on a functional or geographical basis.".

Despite this subtle change it is most likely that Data Controllers who continue hold paper manual filing systems will need to take heed of this decision and be prepared to search through large numbers of files in response to subject access requests.