Has the legal right to access personal data been diluted by the English and Welsh Courts?

A critical analysis of the English and Welsh Courts application of the right to access in the 1984 and 1998 Data Protection Acts set alongside the expectations of the law makers to establish whether the Courts have diluted the intention of the executive.

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1. Declaration

I declare that the work contained in this project is my own and that it has not been submitted for assessment in another programme at this or any other institution at postgraduate or undergraduate level. I also confirm that this work fully acknowledges the opinions, ideas and contributions from the work of others.

I confirm that the research undertaken for the completion of this project was based entirely on secondary material or data already in the public domain (case law, journal articles, published surveys etc.). It did not involve people in data collection through empirical research (e.g. interviews, questionnaires or as a result of observation).

Signed: *Nigel Gooding*

Dated: **19.5.2021**

2. Introduction and approach

This dissertation considers the meaning of the legal right to access personal data, hereafter known as, the right of access, from a Data Controller.[1] The report will analyse the intention of the lawmakers in the development of the right. The analysis will use the Data Protection Act 1984[2] a starting point (the 1984 Act), and the 1998 Data Protection Act[3] (the 1998 Act) as the concluding legislative reference on the introduction of the General Data Protection Regulation[4](the GDPR) in 2018.

The report will give weight to the decisions of the English and Welsh Courts on matters relating to the right. The analysis will determine whether there has been a dilution of lawmakers intention in the application of the right.

2.1 The approach

The analysis follows through the determination in English and Welsh Courts from cases arising from the right of access. The report then sets aside that judgement alongside the known and validated view of the lawmakers to establish a correlation between the executive and the judiciary. The analysis whilst unable to apply an 'algorithmic' approach to determining the correlation between the executive and judiciary research provided an approach that this paper follows is:

- Establish the political and legislative context that framed the 1984 and 1998 Data Protection Acts. This will be found in **Chapter 3** and sets the context, but moreover, provides the report with a legislative benchmark in which to assess judicial interpretation later in the report. This Chapter analyses the stated view of the lawmakers to developing the 1984 and 1998 Acts which the report shows provides direction to the judiciary in future cases.
- Undertake an analytical assessment of the seminal *Durant*[5] case to determine the judicial interpretation of the right set aside the 1998 Act, Information Commissioner guidance, and the developing EU perspective. **Chapter 4** provides a critical

[1] As defined in General Data Protection Regulation [2016] OJ 2 119/33 Art.4.7.
[2] Data Protection Act 1984, s 35.
[3] Data Protection Act 1998, s 29.
[4] General Data Protection Regulation [2016] OJ 2 119/33.
[5] *Durant v FSA* [2003] EWCA Civ 1746.

assessment of Durant, sets aside the reports legislative benchmark, provides an analysis based upon the reaction of lawmakers to that landmark judgement, and provides an assessment against the report question of **dilution.**

- Undertake an analytical assessment of past case law, to determine the judicial interpretation of the right set out in the analysis of the judgement in ***Durant,*** the 1998 Act, the Information Commissioner guidance and the developing EU perspective. **Chapter 5** provides evidence of judicial revising of *Durant* through later cases to provide a greater correlation between the judiciary and the lawmakers.
- A concluding chapter, **Chapter 6** which determines the judicial correlation between the right and legislative intent. To assist in that concluding the analysis will focus on three areas of the right of access and the judicial interpretation to make this judgement. These are:
    - The definition of Personal Data concerning the right of access.
    - The inclusion of manual data in the right of access.
    - The proportionality element of the search for personal data in the right of access.

3. The historical context and analysis

3.1 The Current legislative position of the right

At midnight on the 25th of May 2018, the GDPR became law across the 28 Countries of the European Union (the EU). At the same time the UK Data Protection Act 2018[6] had received royal assent. The 2018 Act acknowledged GDPR in Part 1 and made additions to the data protection regime in part 2. This was the third UK Data Protection Act since 1984 to include the right to access personal data into UK law.

The GDPR provided a set of guiding data protection principles across the 28 member states, contained with 99 articles and 173 recitals. An analysis of the obligations placed upon UK Data Controllers on the introduction of GDPR when set alongside the 1998Act, was that they were minimal. The 1998 Act had been comprehensive and provided the right of access in GDPR since its inception. Commentators such as Peter Carey went so far as describing the changes as mere 'tweaks the pre-GDPR legal requirements that organisations were already required to undertake when processing personal data'[7] referencing that the GDPR was a reinforcement of the obligations that existed within the 1998 Act.

The current right of access to personal data is provided for in Article 15 of the GDPR.[8] This article is supported recitals 63 & 64.[9] The right of access in Article 15 confers on Data Controllers the requirement to provide information on the nature and scope of processing that is taking place and providing a copy of that information in a format that is intelligible[10] to the Data Subject.[11] The right of access requests is, now widely known as a subject access request or SAR.

The right of access under Article 15 only applies to personal data. This has always been to case, the first test of any Data Controller or Court is to assess the request and its validity relating to personal data.[12] This will be a key test for the report when considering later

[6] Data Protection Act 2018, s 12.
[7] Peter Carey, *Data Protection, A practical guide to UK Law and EU Law* (5th edn, Oxford University Press 2018) Introduction.
[8] General Data Protection Regulation [2016] OJ 2 119/33 Art.15.
[9] General Data Protection Regulation [2016] OJ 2 119/33 Rct.63 & 64.
[10] 'Subject Access Code of Practice' (*ICO*, 2017) <https://ico.org.uk/media/for-organisations/documents/2259722/subject-access-code-of-prActice.pdf> page 43. accessed 1st November 2020.
[11] As defined in General Data Protection Regulation [2016] OJ 2 119/33 Art.4.1.
[12] Personal data request validity is defined under GDPR Article 12.

judgements such as *Durant.*[13] GDPR through Article 2 (1)[14] brings into scope both personal data that is processed through electronic or manual filing systems. This an important distinction when we consider the development of the right over time. The definition of a filing system is further enhanced by the 2018 Act which states a 'Filing system' 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'.[15] Whilst the scope of personal data filing systems to include electronic and manual data to be included within the right may seem obvious to the casual observer, this definition has not always been the scope of the right. In 1984 when introducing the Data Protection bill to parliament the Home Secretary Leon Brittan, when discussing the scope of the bill stated, 'It does not apply to those who keep personal information only in manual form — in old-fashioned paper records'.[16]

The right of access, whilst enshrined within the GDPR, and having the post Brexit protection of the 2018 Act, is not an absolute right. Under Article 23 and recital 73 of the GDPR, member states are allowed to restrict the rights and freedoms of Data Subjects, including the right of access. These range from National Security, Law Enforcement, and the rights of others, there are ten areas in total. Thus, allowing member states to deny the right to Data Subjects by placing legally acceptable exemptions in law.[17] In the UK's case, the right of access is restricted through statute since its inception in the 1984 Act. Successive law makers have been consistent in articulating that the right of access is not an absolute right, and a balance between the Data Subjects' rights and the burden on controllers needs to be made. Matt Hancock is the latest in a line of sponsoring ministers who gave the report evidence that their intention is a balance between statutory obligations.[18] This provided clarity in the analysis as it showed a consistent legislative intention on which to base the assessment of the project question.

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[13] *Durant v FSA* [2003] EWCA Civ 1746.
[14] As defined in General Data Protection Regulation [2016] OJ 2 119/33 Art.2.1.
[15] Data Protection Act 2018 Part 1 s.3.7
[16] HC Deb, January 1984, vol 53, column 33.
[17] Data Protection Act 2018 c. 12 Schedules 1-4.
[18] Matt Hancock, Sec of State at DCMS., 2021. *EU Data Protection Rules - Monday 12 December 2016 - Hansard - UK Parliament*. [online] Hansard.parliament.uk. Available at: <https://hansard.parliament.uk/Commons/2016-12-12/debates/6EB0C615-2571-4B26-A75B-8CD1CF5FD854/EUDataProtectionRules> [Accessed 9 May 2021].

The historical statutory journey to the GDPR current day right of access is an important step in being able to address the project question. This for three reasons (1) It develops a chronological footpath of the development of the right over time and allows the analysis to examine the opinions of the Courts and lawmakers. (2) It tracks developments such as technology since 1984. (3) It can lend weighted evidence to the development of social influences such as the perceived rights of privacy which will allow the analysis to assess the project question.

3.2 The 1984 Data Protection Act.

Prior to 1981 Act there had been several attempts to introduce the general right to privacy and the right to access. The first attempt was introduced by Jim Callaghan, a Labour home secretary in 1970, who initiated the Younger Committee to review privacy. The Younger Committee[19], which reported under a Conservative government in 1973, resulted in no new legislation. However, three years later a Labour government led by Jim Callaghan, published a white paper entitled Computers and Privacy,[20] from this white paper, the Lindop Committee [21]was established, and reported back in 1978. Observers of the Lindrop report[22] made the observation 'that the DPA[23] should be given the task of striking the right balance between the interests of the Data Subject, user and community at large'.[24] The Lindop report did not give, as Durbin states 'that subjects should have an absolute right to inspect data about themselves'[25] but reflected on the view of the committee that discussed the right to access, and how it was a means to an end, rather than as ends in themselves. Their proper place is therefore in the detailed rules which would need to be made in order to apply the principles'.[26]

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[19] Dworkin, Gerald. 'The Younger Committee Report on Privacy.' *The Modern Law Review*, vol. 36, no. 4, 1973, pp. 399–406. *JSTOR*, www.jstor.org/stable/1093890. Accessed 28 Nov. 2020.
[20] White Paper, Computers and Privacy, Cmnd 6353. (1975). London: HMSO.
[21] Under the Chair of Sir Norman Lindop.
[22] Report of the Committee on Data Protection (1978). (Chairman: Sir Norman Lindop), Cmnd 7341. London: HMSO.
[23] Proposed Data Protection Authority.
[24] Durbin, J. 'Statistics and the Report of the Data Protection Committee.' *Journal of the Royal Statistical Society. Series A (General)*, vol. 142, no. 3, 1979, pg. 304 s.7 *JSTOR*, www.jstor.org/stable/2982483. Accessed 28 Nov. 2020. S.7.
[25] Durbin, J. 'Statistics and the Report of the Data Protection Committee.' *Journal of the Royal Statistical Society. Series A (General)*, vol. 142, no. 3, 1979, p305. *JSTOR*, www.jstor.org/stable/2982483. Accessed 28 Nov. 2020.
[26] Report of the Committee on Data Protection (1978). (Chairman: Sir Norman Lindop), Cmnd 7341. London: HMSO. Page 201.

In January 1981 The European Council opened the Convention for the Protection of Individuals concerning the Automatic processing – 'Convention 108'[27] Convention 108 developed in Article 5 a set of core principles for data undergoing automatic processing which bear resemblance to the current set of principles outlined in Article 5 of GDPR. The driver for the Convention was the increased use of technology in processing personal data and the Council of Europe's recommendation 509.[28] This recognised the need to protect personal data and the rights and freedoms enshrined within Article 8 of the European Convention of Human Rights.[29]

In Article 9 (1)(b) the right of access is firmly established within the convention:

> Every individual shall have a right: to obtain, on request, at reasonable intervals and without excessive delay or expense, confirmation of the processing of personal data relating to him or her, the communication in an intelligible form of the data processed, all available information on their origin, on the preservation period as well as any other information that the controller is required to provide in order to ensure the transparency of processing in accordance with Article 8, paragraph 1;

The right of access, when read in a literal context is absolute and at first glance when set aside the current Article 15 GDPR rights look broadly similar. The concept of the right of access is established, the UK became signatories on the 14th May 1981 and as Philip Coppel notes 'By signing Convention 108, the United Kingdom had signified its willingness to enact data protection legislation'.[30]

The development of legislation took three years to enact, the 1984 Act received Royal Assent in July 1984. The Data Protection Act 1984, section 21 (1) now enshrined the right of access into law.[31]

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[27] Full list and Council Europe, 'Details Of Treaty No.108 Convention For The Protection Of Individuals With Regard To Automatic Processing Of Personal Data' (*European Council Treaty Office*, 1981) <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/108> accessed 20 November 2020.
[28] 'PACE - Recommendation 509 (1968) - Human Rights And Modern Scientific And Technological Developments' (*Assembly.coe.int*, 2020) <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=14546&lang=en> accessed 20 November 2020.
[29] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art (8).
[30] Philip Coppel QC, *Information Rights Law, Volume 1* (5th edn, Hart publishing 2020) Pg.133 s7 – 009.
[31] Data Protection Act 1984, c.35 section 21 (1).

3.3 Analysis - UK Government intention with the 1984 Act.

The delay in enacting the 1984 Act was due to earlier legislation falling due to running out of time approaching the 1983 General Election, but as A.C.M. Nugter attributes the delay down to parliamentarians 'It appears from the debates that this was due in great part to the complexity of the subject. Members of both Houses were regularly perplexed by the technical subject matter of the Bill and the complexity of its structure.'[32] The report found in analysis that the sponsoring minister shared the same concerns at the opening of the debate for the second reading of the bill:

> We do not have to be experts in computer technology, or fluent in the jargon of mainframes and minis and micros and optical character readers, to understand the implications of the Bill for the protection of the individual and the enhancement of his rights. I hope, therefore, that hon. Members will not allow the apparently technical nature of the subject matter to obscure the importance of the Bill as a protection both for individuals and for the business community.[33]

The report came to the conclusion that if parliamentarians struggled with the 'technical' nature of the bill then the legislation drafted is likely to have a minimal effect. This technical challenge is not restricted to the 1984 Act as parliamentarians brought forward similar concerns about their understanding of the 1998 Act. The role of the legislators is to provide scrutiny to enable the bill to pass into law with a clear understanding of the intention of the obligations the law sets on Data Controllers. A valid argument is that if parliamentarians could not grapple with the complexity of legislation in front of them, then how likely is it that Judges would have the same issue? The report returns to this issue later in *Durant* when providing support to the view that the lack of clarity in areas of the 1998 Act because of failure of parliamentary challenge left judges with a vacuum to fill with judicial licence.

The 1984 Act, according to Philip Coppel, served a dual purpose 'to protect against the misuse and overuse of personal information and to ensure the free movement of data'.[34] The

[32] A.C.M. Nugter, *Transborder Flow of Personal Data within the EC*, Springer, Netherlands, 1990 (p. 107 – 109).
[33] Leon Brittan, The Secretary of State for the Home Department on Monday 30 January 1984 https://hansard.parliament.uk/Commons/1984-01-30/debates/8e096af8-0265-48aa-907a-697ac5fff799/DataProtectionBill#contribution-afb576f9-4be5-4fea-aed7-1c7605c43181 (Accessed 10/5/2021)
[34] Philip Coppel QC, *Information Rights Law, Volume 1* (5th edn, Hart publishing 2020) Pg.134 s7 – 009.

passage through parliament reflected these purposes, however, what the report found is that the 1984 act never once mentions the word 'privacy' which was first and foremost at the heart of Article 1 of Convention 108 in 1981. The 1984 Act also contained other points of relevance for the analysis of the development of the current right of access. Data was defined as 'information recorded in a form in which it can be processed by equipment operating automatically in response to instructions given for that purpose'[35] manual/paper data was excluded from the act. The report found that the 1984 Act's right of access was not absolute in the minds of the law makers. The law in part 4 of the 1984 Act contained numerous exemptions to the right of access ranging from National Security to Examinations. These reflecting Convention 108 article 11 exceptions, thus the act supported the notion of the right of access is a balance between Data Controllers, Data Subjects, and the state. The report is minded supporting the view that a balance was the intention UK government when establishing the 1984 Act.

The UK Government's position in bringing forward the legislation was outlined by The Minister of State, Home Office, David Waddington in the second reading of the bill in parliament summed up debate 'My right hon. and learned Friend the Home Secretary explained the basic aims of the Bill. They are to protect British business interests by enabling us to ratify the European convention on data protection and to protect individuals from the possible misuse of personal information held about them on computers'.[36] This premise of the report reinforces earlier comments made by the sponsoring Minister Leon Brittan in the same debate that emphasised that the 'Business depends more and more on the free flow of data — often personal data — between countries. This free flow of information must continue if business is to flourish'.[37] The clear requirement to ratify Convention 108 and give reassurances to not only business partners but also Data Subjects was clear in the government intentions for the bill. Brittan went on to say that 'Britain needed to remain in the vanguard of technical developments'[38] a clear reference to the commercial considerations as well as the right of the Data Subject.

[35] Data Protection Act 1984, c.35 section 1 (2).
[36] HC Deb, January 1984, vol 53, column 99.
[37] HC Deb, January 1984, vol 53, column 31.
[38] HC Deb, January 1984, vol 53, column 31.

The Home Secretary, during the second reading, went so far as to state that the bill was about protecting the data of the Data Subjects and the UK commercial interests rather than inferring a set of new rights and freedoms to the Data Subject:

> Every safeguard for the subject is a potential burden to the user. Throughout our consideration of the Bill, therefore, it will be vital to remember the need to achieve a reasonable balance, ensuring that the rights of individuals as Data Subjects are properly protected, without imposing unreasonable burdens on the data users[39] who collect and process personal data.[40]

The report analysis did find some balance in ministerial intentions by responding to opposition criticism Brittan in the same speech continued 'It sometimes seems to me that those who criticise the Bill for not doing enough for Data Subjects have underestimated the importance and novelty of this new right of subject access.' The sponsoring minister saw the right as a novelty rather than a fundamental right.

The analysis drew the conclusion that the government sponsoring of the bill intentions were first and foremost interested in the enabling business free flow of data, thus enabling their obligations to convention 108 with a bare minimum approach to legislation. Commentators supported the opinion that the bill was minimalist[41] and doing the minimum and was light touch to ensure the obligations of Convention 108 were met. John Lamidey, a former Data Protection Registrar, advanced the view in his analysis of the 1984 Act[42] that the executive deliberately created the Data Protection Registrar with limited powers, ministerial oversight, and resources that the regulatory burden on controllers would be minimal.

The intention of 1984 lawmakers is such that a balance between controller and Data Subject should exist. Leon Brittan makes the case for that balance and one key determination of this report is to establish whether that balance has been upheld in the UK Courts when

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[39] The 1984 Act used Data Users, this reflects the GDPR Data Controller definition.
[40] HC Deb, January 1984, vol 53, column 32.
[41] *'Mrs Thatcher's Data Protection Legacy*' (*Hawktalk*, 2013) <https://amberhawk.typepad.com/amberhawk/2013/04/mrs-thatchers-data-protection-legacy.html> accessed 28 November 2020.
[42] John Lamidy (1994), '*Data Protection the first decade', Journal of Financial Regulation and Compliance*, Vol. 2 No. 4, pp. 350-355. https://doi.org/10.1108/eb024822

considering matters concerning the right. The balance of reasonableness in the application of the law is one we will return to when we consider the case of *Ezsias V Welsh Minsters.*[43]

The government during the second reading was able to lay down its reasons for excluding manual data from the act. The report found that the exclusion of manual data from the Act in 1984 when computers were in their infancy and personal records mainly existed in paper form as incredulous. It is the report's contention that if the main driver were to be seeking privacy, then the access to manual records, which formed the bulk of personal data in 1983 would be included. The report did find consistency in the governments position. David Waddington, the Minster of State who forwards the idea that it was excluded as it was difficult to hack and therefore requiring a lower level of protection, Waddington stated that :

> We make no apology for the fact that the Bill does not deal with manual data. It would be extraordinary if it did. The White Paper pointed out that a special threat to privacy was posed by the rapid growth in the use of computers, with their ability to process and link at high-speed information about individuals. Of course, information remains information in whatever form it is held or processed, and if it is incorrect or misleading, or used in certain ways, the subject of the information may be at risk. But the extent of that risk is greatly increased when information is recorded on computers because computers make the handling, the retrieval, the transfer and the use of information so much quicker and easier.[44]

Therefore, the argument of only including computers forwarded by the UK government is one of risk to the security of computers rather than a balance tilted in favour of the right of access of all information in whatever format. This proposition is supported by the Court in *Durant v FSA*[45] which is a case that is discussed later in this report.

The development of the exemptions in the 1984 Act are still enforced in Schedules 1- 4 of the current Data Protection Act 2018. In the second reading, Leon Brittan made it clear that exemptions to the right of access can be used sparingly and only 'but only if granting subject

[43] *Ezsias v Welsh Ministers* [2007] A11 ER (D) 65.
[44] HC Deb, January 1984, vol 53, column 99
[45] *Durant v FSA* [2003]EWCA Civ 1746.

access would prejudice those purposes'[46] this is still a test required for the exemption application under the 2018 Data Protection Act.

Therefore, the analysis in developing a benchmark for future Court judgements it is possible to draw the following conclusions to the intention of the law makers in 1984:

- That the application of the right to access is a balance between reasonableness of request but focused on computer data only.
- That the right is not absolute but a balance between rights of others through the use of exemptions.
- That in 1984, the scope of the data captured for the right of access was very narrow.[47]
- That the delivery of the Data Protection Act statutory duties is a balance between reasonableness and proportionality in particular in the area of the right of access.
- Remedies did exist in section 23 of the 1984 Act to address non-compliance.

The 1984 Act key principles were according to Carey 'not too dissimilar to this now contained in the General Data Protection Regulation'.[48] Carey went onto say that in the 1984 Act 'The UK had created one of the world's first comprehensive legislative measures on the protection of people's personal information'. The 1984 Act was both a first for the UK and progressive, but it would be another 14 years before we saw comprehensive legislation addressing Data Protection, with the introduction of the 1998 Data Protection Act[49] hereafter known as the 1998 Act.

3.4 Context - Development of the right of access post-1984.

The 1984 Act provided the right of access, subject to exemptions to personal information, held on computers. However, as the report noted the 1984 Act was deficient in providing access to manual records, which in 1984 would have contained most of the important details of the individual. In 1987 the MP, Archy Kirkwood[50] a Lib Dem rose to open the second reading[51] in the House of Commons on the Access to Personal Files Bill. A private members

[46] HC Deb, January 1984, vol 53, column 39.
[47] HC Deb, January 1984, vol 53, column 36.
[48] Peter Carey, *Data Protection, A practical guide to UK Law and EU Law* (6th edn, Oxford University Press 2020) Chapter 1, Pg.2.
[49] Data Protection Act 1998 (c. 29).
[50] Api.parliament.uk. 2021. *Mr Archy Kirkwood (Hansard)*. [online] Available at: <https://api.parliament.uk/historic-hansard/people/mr-archy-kirkwood/index.html> [Accessed 13 May 2021].
[51] HC Deb 20 February 1987 vol 110 cc1165-223.

bill introduced the right for individuals to see records held in manual format on request. Kirkwood summed the purpose of the bill up:

> The principle of access is surely beyond dispute and non-controversial. I say that because the principle forms part of the Government's computer legislation. From November, the Data Protection Act 1984 will allow people to see the personal information that is held on them provided that that information is held on computer files. However, they will have no right to see information about themselves that is kept on ordinary paper files and records, and that is where most important information is still kept. The Bill seeks to extend the right of access to certain classes of those ordinary manual records.[52]

The proposal in itself has cross-party support, Kirkwood also expanded in his speech that the Bill enjoyed cross-party support and numerous voluntary organisations, representatives of local authorities.[53] The cross-party support was evident when Steven Norris, Conservative MP[54], rose to support the Bill and the right of access. Norris spoke in the debate about the requirement to understand decisions made by others based upon details contained on manual records. Norris developed a line of government thinking that we see used by Judges in one of the most important cases in the right of access, *Durant v Financial Service Authority*[55]. Norris said in reply to his colleague Bill Cash[56] 'As Access to Personal Files Bill does not mean an open access to files Bill, it means a particular right of access for an individual to the file that contains information relating to him'. The use of the words of 'information relating to him' forming a key part of the *Durant* case and the formulation of the current ICO guidance[57] on the right of access and the information supplied.

The Bill was eventually to spawn the Access to Personal Files Act 1987[58] which gave access to manual records in housing and social services. In 1988 the right to access to manual

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[52] HC Deb 20 February 1987 vol 110 cc1166.
[53] HC Deb 20 February 1987 vol 110 cc1167.
[54] Api.parliament.uk. 2021. *Mr Steven Norris (Hansard)*. [online] Available at: <https://api.parliament.uk/historic-hansard/people/mr-steven-norris/index.html.> [Accessed 13 May 2021].
[55] *Durant v Financial Services Authority* [2003] EWCA Civ 1746.
[56]Api.parliament.uk. 2021. *Mr Bill Cash (Hansard)*. [online] Available at: <https://api.parliament.uk/historic-hansard/people/mr-bill-cash/index.html> [Accessed 13 May 2021].
[57] 'What Is The Meaning Of 'Relates To'?' (*Ico.org.uk*, 2020) <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/what-is-personal-data/what-is-the-meaning-of-relates-to/> accessed 21 November 2020.
[58] Access to Personal Files Act 1987 c. 37.

records was extended to Health Reports when the Access to Medical Reports Act [59]became law. The Access to Medical Records Act[60] following in 1990. The UK entered the 1990s with a comprehensive set of legislative measures to ensure, within a balancing framework of exemptions that Data Subjects could now access both computer and manual information that relates to them. This right of access acknowledged principle by legislators of all political parties and now firmly within UK Law.

3.5 Context - 1998 Data Protection Act

The 1998 Data Protection Act[61] came onto the statute with effect from March 2000. The Act was driven by the need to develop primary legislation to enact Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals and the processing of their personal data, along with the free movement of that data (Hereafter known as *the 1995 directive*). The directive which was driven by Convention 108 was intended to harmonise data protection across the EU.

The 1995 directive consolidated the requirements of section 21 of the 1998 Act and subsequent UK rights of access legislation into Article 12 which said:

> Article 12
>
> Right of access
>
> Member States shall guarantee every Data Subject the right to obtain from the controller:
>
> (a) without constraint at reasonable intervals and excessive delay or expense:
>
> - confirmation as to whether or not data relating to him are being processed and information at least as to the purposes of the processing, the categories of data concerned, and the recipients or categories of recipients to whom the data are disclosed,

[59] Access to Medical Reports Act 1988. c. 28.
[60] Access to Medical Records Act 1990. c. 23.
[61] Data Protection Act 1998. c. 29

- communication to him in an intelligible form of the data undergoing processing and of any available information as to their source,

- knowledge of the logic involved in any automatic processing of data concerning him at least in the case of the automated decisions referred to in Article 15 (1).

(b) as appropriate the rectification, erasure or blocking of data the processing of which does not comply with the provisions of this Directive, in particular because of the incomplete or inaccurate nature of the data;

(c) notification to third parties to whom the data have been disclosed of any rectification, erasure or blocking carried out in compliance with (b), unless this proves impossible or involves a disproportionate effort.

3.6 Analysis - 1998 Data Protection Act

The report found the UK was reluctant to do more than was required to enact the 1995 Directive. In 1996 the UK government in their responses to the Home Office Consultation Paper on the Directive[62] expressed the 1984 Data Protection Act met the needs of the Directive and went further by saying 'that those provisions are sufficient…. over-elaborate data protection threatens competitiveness and does not bring additional benefits to for individuals. It follows that the Government intends to go no further in implementing the Directive than is absolutely necessity'.[63] The view of the report is that the government was intent on making as little change as possible and saw that the 1984 Act and the 95 Directive as a burden on Controllers. Tom Sackville the Junior Minister charged with launching the consultation paper made the government's position clear:

> The Government is determined to do this in a way which minimises the burden on business and other users. That is why we are seeking the views of those who will be affected before we bring forward our proposals.

[62] The White paper was brought forward by a Conservative Government the same ruling party that had brought forward the 1984 Act with a consistent theme of protecting personal data without a burden on Controllers.
[63] Consultation Paper on the EC Data Protection Directive, Home Office, (1995) Dep 3s 3059 s.1.2

> We are also keen to take advantage of the scope for flexibility which the Directive allows. This will enable us, in particular, to ease the burden of the registration requirement under the 1984 Act.[64]

The report considers the intention of the legislators and the balance of the legislation attempts to bring clear from these ministerial pronouncements. This is further supported by a House of Parliament research paper on the 1995 Directive and the consultation which stated:

> In March 1997, a summary of responses to the consultation paper was published[65]. The consultation paper asked how the Government should deal with those provisions of the Directive which are unclear or open to a range of interpretations. The majority requested clear and precise definitions in the implementing measures to provide as much certainty as possible. Many stressed that uncertainty about the scope and extent of the provisions would be burdensome.[66]

The report concluded that in the minds of the legislators the 1998 Act needed to be 'light touch' and free from any burden.

The 1998 Bill, which was introduced by the new Labour government [67]received cross-party support through both Houses of Parliament[68] however this support was tempered by the Conservative opposition spokesman, Sir Brian Malwhinney, who supported the introduction of the 1998 Act only in so far as 'wanting to know how much gold plating is in the bill'.[69] A reference to only supporting the minimum requirements of the 1995 Directive. Malwhinney the author of the 1996 Home Office Consultation Paper when Home Secretary continued the view of the Conservatives that the bill should contain as little gold plating over and above the Directive. The report notes this further indication of the need not to provide business with undue burdens the main focus of parliamentarians. The report notes this as further evidence of the 'regulatory burden' importance placed upon the 1998 Act.

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[64] '*Tom Sackville Seeks the Right Balance on Data Protection'*, Home Office Press Notice 85/96, 22.3.96.
[65] Consultation Paper on the EC Data Protection Directive, Home Office, (1995) Dep 3s 3059 s.1.2
[66] Edward Bell, The Data Protection Bill [HL] Bill 158 of 1997-98 Research Paper 98/48 (April 1998).
[67] The 1984 Act and subsequent legislation being brought forward by Conservative Governments until 1997.
[68] HC Deb 20 April 1998 vol 310 cc529-34.
[69] HC Deb 20 April 1998 vol 310 cc532.

The right of access enshrined in the 1984 Act survived intact into the 1998 Act and the key points for our later analysis are:

- The Directive Article 12,[70] and the existing s.21 of the Data Protection Act 1984 the Right to Access was enhanced into section 7 of the 1998 Act.
- That the Act consolidated computer-processed and information that was contained in a relevant filing system as in scope for the 1998 Act. The criteria for this was that it had to be structured or referenced to relating to an individual[71].
- That the right of access has to be completed within 40 days.

In reviewing the 1998 Act 0the report drew the assumption that manual data in a filing system was included in the scope of the right to access. Sections (1(c) of the 1998 Act made explicit reference to data, of which the right to access exists includes 'relevant filing system or with the intention that it should form part of a relevant filing system' and in section 1 (d) goes on to confirm that if it 'forms part of an accessible record' then it is in scope.

Pinsent Masons were of the opinion that the law was complex 'Whether or not manual files are covered by the Act is not always an easy question to answer'.[72]

There is one notable addition to the 1998 Act which was driven by the introduction of the Freedom of Information Act 2000.[73] Under the 1998 Act,[74] Data Subjects could request access to data that resided in a computer or manual 'relevant filing system'. The Data Subject would be excluded from all information held unless it was in a 'relevant filing system'. This would have created a conflict with the new Freedom of Information Act (FOI Act) whereby Data Subjects could go one step further and use the wider definition of data contained within sections 66 -73 of the FOI Act, that included 'all recorded' information which put manual data not in a filing system in scope. This potential conflict was solved by the executive by broadening the right of access in the 1998 Act to include 'an accessible record' under section 68. However, this right was only extended to public authorities to

[70] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Art.12.
[71] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Recital 15.
[72] 'Guide To The 1998 Data Protection Act' (*Pinsentmasons.com*, 2008) <https://www.pinsentmasons.com/out-law/guides/data-protection> accessed 21 November 2020.
[73] Freedom of Information Act 2000 c .36.
[74] Data Protection Act 1998 c.29 s 1(1).

avoid potential conflict with FOI requests[75] and bringing the right of access into one piece of legislation.

This report returns to the analysis of the definition of manual data later, under the Courts approach to the 1998 Act. It is clear that the right to access was now established in EU and UK law and that would remain the case as previously stated on the introduction of GDPR on 25th May 2018.

3.7 Analysis – The intentions of the lawmakers

In reflecting on the analysis of the lawmakers the report concludes that the right of access has:

- A consistent cross-party support from the executive and parliament during the period 1970 to 1998.
- Been seen by the executive as an administrative burden and therefore lawmakers were keen to restrict the right to the minimum required under convention 108.
- Had legislation to control the scope of the right of access concerning manual records to deliver the right acknowledging the administrative cost and complexity in delivering the right. (known as the administrative burden hereafter)
- Recognised the need for balance between public interest, the Data Subject, controller and authorities in the use of exemptions.
- Maintained as a right between 1984 – 2018 and became enhanced on the introduction of GDPR with the removal of fees and a time limit of 30 days to respond.
- That parliament made a clear distinction between 'data' and 'information' the 1984 Act providing clarity that the right existed to provide personal data the principle set aside in later legislation such as the access to Medical Reports Act 1988 which provided the requirement to provide medical reports.

The latter legislative inconsistency in the personal data v information was one that the Courts had and early sight of in the seminal case *Durant v Financial Services Authority*[76] in 2003.

[75] Only Public Authorities are in scope for the Freedom of Information Act.
[76] *Durant v Financial Services Authority* [2003] EWCA Civ 1746 [2004] FSR 28.

4. The Durant case

To establish a correlation between the intention of the executive and the judiciary the paper will now examine relevant cases in turn. This will allow a reflection on the paper's main theme that the judiciary had diluted the intention of the executive or merely added an interpretive flair to a right of access they were reluctant to introduce through lack of parliamentary understanding of the issues at hand as raised earlier in the report.

This report turns to one of the earliest, and for many years the formative cases to commence the judicial analysis, *Durant v Financial Services Authority.*[77] *Durant* was an early test of the 1998 Act and the judgement caused controversy and in some cases outrage amongst academics and lawyers, one commentator went so far as saying of the decision of the Court that:

> Sir Humphrey would have been delighted with this decision. The definition given by the Court of Appeal to personal data is so restrictive in relation to manual filing systems, as to constitute a serious obstacle to any citizen seeking to verify the accuracy of information held about him/her by the state.[78]

The facts are Durant, the Appellant, had requested from the Financial Services Authority[79], the respondent information that they held about the appellant when investigating a complaint, he had made about his bank. The FSA had supplied information to Durant who had exercised his right of access under s.7 of the 1998 Act but refused to provide information that was contained in manual files, citing they did not feel they met the criteria for 'personal data' within in s.1(1) of the 1998 Act as it was not part of a structured filing system. The case came to the Court of Appeal on appeal when an earlier case in a lower Court[80] had supported the *FSA's* decision.

[77] *Durant v Financial Services Authority* [2003] EWCA Civ 1746 [2004] FSR 28.
[78] *'Durant V Financial Services Authority* - 5RB Barristers' (*5RB Barristers*, 2020) <https://www.5rb.com/case/durant-v-financial-services-authority/> accessed 29 November 2020.
[79] Hereafter *FSA.*
[80] *Durant v Financial Services Authority* [2003] EWCA Civ 1746 [2004] FSR 28

The case hinged on four files of manual information that contained material relating to Durant's complaint to the *FSA* concerning his bank. The *FSA* as a financial regulator having a statutory responsibility to investigate bank complaints escalated by Data Subjects.

4.1 Analysis - *Durant*

The judgement in three areas of the 1998 Act provided an opportunity to examine whether the judiciary had diluted the intention of the executive when providing a binding judgement in the areas, these areas are:

(1) What is personal data, and what is the scope in the right of access?

(2) What is a relevant filing system?

(3) What is redaction and the inclusion of others when responding to a third party?

The analysis will address each of these in turn.

Before addressing *Durant* in detail the Court's decision caused many to deem the outcome as outwith the meaning of the legislators. Lillian Edwards[81] reflected that 'the scope of personal data had been narrowed in the UK at least by the controversial Court of Appeal of the decision in *Durant v FSA'*.[82] This view is one the report supports.

The view of *Durant* depended on where you sit, as a controller or Data Subject as Simon Chalton forwarded the point out 'The Court of Appeal's judgment has been welcomed as clarifying the 1998 Act and in particular as cutting down the burdens which the Act places on Data Controllers in relation to subject access.'[83] The report finds this view aligns with that of the legislators. The report concedes that the narrow interpretation of Auld LJ in *Durant* would enable controllers to forward a defence to refrain from undertaking the right of access. This would only meet one of the criteria of the legislators, that being reducing the burden of the Data Controller. This in turn failed to address the right of Data Subject to ascertain if

[81] Co-Director, AHRB centre for IP and Technology Law, Edinburgh School of Law.
[82] Lilian Edwards., 2004. Taking the 'Personal' Out of Personal Data: Durant v FSA and its Impact on the Legal Regulation of CCTV. *SCRIPT-ed*, 1(2), pg.342.
[83] Simon Chalton., 2004. The Court of Appeal's interpretation of 'personal data' in Durant v FSA – a welcome clarification, or a cat amongst the data protection pigeons? *Computer Law & Security Review*, 20(3), pp.175-181.

their data is being processed lawfully. The analysis concluded that in a sense, Durant has diluted the right, tipping the balance in favour of the Data Controller.

4.2 Analysis - The personal data issue.

The Court approached the issue of personal data as outlined in section 1(1) of the 1998 Act 'personal data means data which relates to a living individual who can be identified' The Court was of the view that the main issue was whether 'any information' relating to *Durant's* complaint against the bank was personal data.[84]

The Court as expected assessed the definition of personal data derived from Convention 108 and the 1995 Directive and its subsequent adoption into the 1998 Act. The Court making it clear that the 1995 Directive definition was 'faithfully'[85] reproduced within the 1998 Act.

The report sees this as an error on the part of the Court. The 1995 Directive definition can be found in Article 2 (a) which states:

> Personal data' shall mean any information relating to an identified or identifiable natural person ('Data Subject'); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity.[86]

The 1998 Act defined Personal Data[87] as;

> '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,

[84] *Durant v Financial Services Authority* [2003] EWCA Civ 1746 [2004] FSR 28 para 21.
[85] *Durant v Financial Services Authority* [2003] EWCA Civ 1746 [2004] FSR 28 para 26.
[86] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Article 2 (a).
[87] Data Protection Act 1998 s.1.1 (a)

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;[88]

There is considerable difference between the two definitions, which was not reflected in the *Durant* judgement. Commentators agree that the inclusion of the first two characteristics of personal data were straight forward.[89] The data of a living human being, was in scope, however, the relationship between the third element of the 1998 Act definition 'data which relates to a living individual' was the subject of legal argument in *Durant,* in particular the word relate. The Court spent much time mulling over the principle that a mere mention of someone's name, did not mean that the information contained in files was about that individual. As with this case, just because the Data Subject had complained about their bank, did this mean the investigation into the bank by the *FSA* become the data of the Data Subject?

The Court held that for the right of access to exist, then the following criteria should apply 'names or directly refers to him will qualify',[90] LJ Auld extended the Court's definition by stating 'Mere mention of the Data Subject in a document held by the Data Controller does not necessarily amount to his personal data'[91] going on to say the dependence being 'a continuum of relevance or proximity to the Data Subject'.[92] LJ Auld further narrowed the definition of personal data when stating that 'The mere fact that a document is retrievable by reference to his name does not entitle him to a copy of it under the act'.[93] In essence, because *Durant* had made a complaint and the information in his request related to the FSA investigation into his bank, the mere fact that he had complained was not enough to warrant being in scope for personal data. In analysis, Auld LJ introduced the concept to meet the personal data test there must 'biographical significance' and 'focus'.[94] The mere mention, involvement with or transaction with the controller will not be in scope using this definition as Auld LJ went onto in paragraph 28 to provide judicial clarity that personal data must be 'information that affects [a person's] privacy, whether in his personal or family life, business or professional capacity'. This definition was seen by commentators as a narrowing of the definition that parliament intended and as one commentator opined 'This was a complicating and potentially

[88] Data Protection Act 1998 c.29 s 1(1).
[89] Philip Coppel QC, *Information Rights Law, Volume 1* (5th edn, Hart publishing 2020) Pg.382 s15 – 020.
[90] *Durant v Financial Services Authority* [2003] EWCA Civ 1746 [2004] FSR 28 para 27.
[91] *Durant v Financial Services Authority* [2003] EWCA Civ 1746 [2004] FSR 28 para 28.
[92] *Durant v Financial Services Authority* [2003] EWCA Civ 1746 [2004] FSR 28 para 28.
[93] *Durant v Financial Services Authority* [2003] EWCA Civ 1746 [2004] FSR 28 para 30.
[94] *Durant v Financial Services Authority* [2003] EWCA Civ 1746 [2004] FSR 28 para 28.

unhelpful development. Focus makes sense – an email in which your name is mentioned in passing may well not be about you. But the biographical significance is an unnecessary and restrictive innovation'.[95]

More accomplished academics such as Mark Watts held the view that:

> If the individual has been identified, then it's hard to see how the information 'John Smith' could have as their focus any-one or anything other than John Smith. Accordingly, a known individual's name alone ought to be personal data. In practice, of course, it is perhaps unlikely that a known individual's name would ever be processed completely in isolation, for any of this to matter.[96]

Dr Mark Watts supported the view, and the view of this analysis made by Auld LJ on this narrow issue of 'substance' of the data needed to be viewed in context of the data it was associated with.

At first, this may seem aa a constraint to the right of access, if names cannot be in scope of personal data what is? The mention of someone within a document is personal data under the definition contained within s.1(1) of the 1998 Act. It is only when reading Auld LJ judgement, the clarity of his argument becomes clear. Auld LJ was clear, because the Act allows you to determine whether your personal data is being processed, what it does not do is give you the rights of access to documents, only personal data. In this case an investigation into *Durant's* bank, *Durant's* only involvement was to prompt the complaint in the first place. Auld LJ went on to say that it was not the 'intention of parliament'[97] to require the FSA to disclose any document arising out of the complaint just because *Durant* had raised the matter. It should be noted that this assertion was never referenced by the Court. The key word is in the definition being relate. The data must relate and have substance about an individual rather than just mention their name, it needs to be about them. The report supports the view that Auld LJ was correct in his view that the request was for personal data not information, however if personal data is provided with no context and information relating to

[95] *Definition Of Personal Data: Durant Revisited*. [online] Act Now Training. Available at: <https://Actnowtraining.wordpress.com/2014/02/19/defintion-of-personal-data-durant-revisited/> [Accessed 20 December 2020].
[96] Mark Watts, 'Information, Data And Personal Data – Reflections On *Durant V. Financial Services Authority*' (2006) 22 Computer Law & Security Review.
[97] *Durant v Financial Services Authority* [2003] EWCA Civ 1746 [2004] FSR 28 para 30.

it is redacted then will the Data Subject ever achieve the principle of the right to access? All the Data Subject will see is their name. The report does not agree with this interpretation of Auld LJ summary and the ICO supported this position in their code of practice.[98]

In the analysis of Hansard, during the passing of the 1998 Bill, there was no evidence to support the view that parliament had made affirmative statements stating that 'documents' relating to an individual were out of scope for the right. The conclusion for this could lay in that the right of access was translated in its entirety across from the 1984 Act and the 1995 Directive, therefore, as there was a broad understanding of the right of access which required very little debate or as shown earlier understanding. However, when reviewing the intention of parliament over the rights of access during earlier debates, the Access to Personal Files Bill[99] (enacted in 1987)[100] it was clear that the intention of parliament was for 'information' rather than a narrow personal data focus given in *Durant.*

The sponsor of the Bill, Archy Kirkwood MP, was explicit in his opening statement to parliament when moving the second reading:

> It is true and fair to say that in essence this is a simple measure and it is based on the entirely reasonable proposition that people should be able to see the records held on them by public authorities and other institutions and to check that they are accurate.[101]

In defence by Auld LJ of the term 'records' never appeared within the definitions of the 1998 Act, but personal data and information did. The first test is that personal data is about a living individual who can be identified, the second was a determination of the inclusion 'any expression of opinion about the individual and any indication of the intentions of the Data Controller'. The latter clearly less objective than the first element of the test.

This report is of the conclusion that that parliament wanted people to see their own records, post the 1984 Act there were a number of Acts, allowing access to manual records, but the

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[98] Ico.org.uk. 2017. *SAR code of practice*. [online] Available at: <https://ico.org.uk/media/for-organisations/documents/2259722/subject-access-code-of-prActice.pdf> Pages 41 – 48 [Accessed 10 May 2021].
[99] HC Deb 20 February 1987 vol 110 cc1165-223.
[100] Access to Personal Files Act 1987 c. 37.
[101] HC Deb 20 February 1987 vol 110 cc1165-223.

lack of a clear definition in law meant that the judges in *Durant* case were left with a narrow definition of personal data on which to make an assessment. *Durant's* motive was never aligned with the notion of protecting his personal data, merely progressing a vexatious campaign against Barclays Bank.

The paper returns to this definition later when we consider the use of *Durant* in later cases concerning the personal data definition is used to determine the right of access.

In the assessment of the judgement and the narrow definition of personal data, the report supports the view that the 1998 Act definition provided a difficult task for the Court in *Durant.* The 1995 Directive and the 1998 Act seemed to give conflicting definitions of personal data. The 1998 Act applied a two-part definition that required an objective and easy to measure first element[102], but a subjective second element[103] This presented the Court with an interpretative challenge. Durant was the first opportunity to assess what was in the minds of legislators when determining what was in scope for the right of access. The Court had to balance the right against the unclear definitions within the legislation and whilst parliament in previous legislation had paid due regard to using terms such as 'reports' and 'information' the granularity of defining what this meant was lost in the debate of the 1998 Act.

The report drew on reference to the 1984 Act and the support this gave to the argument of 'relates to a Data Subject'. The 1984 Act, section 7, determined processing as 'by reference to the Data Subject'. The support of the Court for the continuum of the view that a mere mention is not personal data without substance is followed through into the 1998 Act and supported in *Durant.* This is an argument supported forward by Mark Watts who commented 'Following Durant, 'processing personal data' under the 1998 Act, may not in some situations be a broader concept than under the 1984 Act, despite the omission of 'by reference to the Data Subject'.[104]

[102] 1998 Data Protection Act s. 1 (1) (a) personal data means data which relate to a living individual who can be identified.
[103] 1998 Data Protection Act s. 1 (1) (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.
[104] Mark Watts, 'Information, Data And Personal Data – Reflections On *Durant V. Financial Services Authority*' (2006) 22 Computer Law & Security Review.

Therefore, the conclusion of this paper, in addressing the definition of personal data, *Durant* failed to provide clarity on the personal data issue thus diluting the intention of the lawmakers. LJ Auld introduced a complex and confusing test for personal data which was absent from both the legislation and parliamentary scrutiny. Support for the papers position is provided later in Chapters 4.5 and 5 when both the EU working party 29 and the UK Information Commissioner both issue guidance contradicting the view taken by Auld LJ.

In the second part of the judgement there was more clarity and alignment between parliament and the judiciary on the matter of 'relevant filing system'

4.3 Analysis - Relevant filing system

The relevance to the Court in *Durant* establishing judicial interpretation of a relevant filing system is that *Durant* believed that he was denied access to paper-based personal data held in manual files. It is in this part of the judgement that the report concludes there is alignment between the judiciary and the executive. The Court indicated clear alignment with the 1995 Directive and the 1998 Act.[105] In so much that manual data could only be included within a right of access request where it was in a structured filing system and as indicated in Article 15 of the 1995 directive 'permits easy access to the personal data in question'.[106]

The report notes that the 1998 Act or the 2005 Directive does not contain express requirements to search for data, but in the area of relevant filing systems, the requirement to search is implied in law. Therefore the Court is attempting to define what that search may look like where no clear legislative direction exists.

Auld LJ summed up the Court's thinking when reflecting on both the 1998 Act and the 1995 Directive when in judgement said, 'It is clear from the provisions that the intention is to provide, as near as possible the standard or sophistication to of accessibility to personal data in manual filing systems as to computerised records'.[107] Auld LJ further expanded his support for both the initial hearing judge and the parliamentary draftsman in their clarity of the term structured data.[108]

105 *Durant v Financial Services Authority* [2003] EWCA Civ 1746 [2004] FSR 28 para 32.
106 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Article 15.
107 *Durant v Financial Services Authority* [2003] EWCA Civ 1746 [2004] FSR 28 para 34.
108 *Durant v Financial Services Authority* [2003] EWCA Civ 1746 [2004] FSR 28 para 34.

The Court was reminded of the views of the executive when Mr Sales acting for the respondent highlighted the government's position when the sponsoring minister Lord Williams of Mostyn made it clear to the House of Lords that the executive definition of manual data was very clear:

> The criteria are that the records must be in a structured set; that the structure must be by reference to individuals; and that particular data relating to particular individuals must be easy of access. We believe that this brings in highly structured sets such as card index systems and excludes collections of papers which only incidentally contain information about individuals.[109]

This allowed the Court to introduce in *para 45* the concept that legislation supported both the privacy of personal data, and those manual files were not easy to access and that searching manual data was a 'far cruder searching mechanism' with the inference that this was an undue burden on the Data Controller. This echoed the words, previously outlined in this paper of the then minister David Waddington, for the exclusion of manual data.[110] This supporting a clear alignment of legislative and executive thinking.

The Court held that the mere mention of a person's name in a paper record does not meet the criteria for a right of access. As the Court was keen to establish[111] that a manual filing system needs to be structured, have a referencing mechanism, and the files or information can be easily found for this information to be in scope.

In the *Durant* case, the files were named *Durant* and filed in chronological order, like most filing systems that exist in organisations. This would seem a simple 'search' process for most administrators, then why did the Court not feel these documents were in scope? The report concludes that Court's view of manual data was narrow, restricted and considering that most data held on persons in 2004 would be held in manual files and not reflective of the reality of records management systems in the year 2004. The judgement whilst in alignment with a literal interpretation of the legislation, was not alignment with modern administrative practices of the day.

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[109] HL Debs, 2nd Feb 1998, vols 585, col 438.
[110] HC Deb, January 1984, vol 53, column 99.
[111] *Durant v Financial Services Authority* [2003] EWCA Civ 1746 [2004] FSR 28 para 34.

This analysis of the report is supported by Marcus Turle:

> In the author's experience, manual filing systems are invariably structured in alphabetical order, with information in each file arranged in date order. But, according to Lord Justice Auld, such systems are not relevant filing systems. It is an interesting question where one might find a manual filing system which *does* qualify, or indeed whether any such manual filing systems actually exist. What kind of manual filing systems: are of sufficient sophistication to provide the same or similar ready accessibility as a computerised filing system?[112]

Turle, however, missed the point that the judgement is focussed on personal data within the files, not the files themselves. The report finds that despite the Courts narrow view of manual filing systems there is still alignment of the executive and the judiciary. The analysis which is supported by academic review[113] deduced that the Court introduced a 'pragmatic'[114] approach to searching manual files that would balance the right or access against the burden of searching for Personal Data.

These being:

- That the system at the outset, via an index should indicate to the searcher which files contains personal data.
- That it should have a referencing system that allows the searcher to find the personal data within the files with speed and ease.

The ability to search personal data within files with ease being the key.

When setting *Durant* alongside both the 1995 Directive, the 1998 Act, and the intention of lawmakers. Philip Coppel supports the conclusion of the paper when he commented that:

- The Court supported and aligned to a strict interpretation of the law and that of parliament.

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112 Marcus Turle, *'Durant V FSA* – Court Of Appeal's Radical Judgment On The Data Protection Act' (2004) 20 Computer Law & Security Review.
113 Mark Watts, 'Information, Data And Personal Data – Reflections On *Durant V. Financial Services Authority*' (2006) 22 Computer Law & Security Review.
114 Mark Watts, 'Information, Data And Personal Data – Reflections On *Durant V. Financial Services Authority*' (2006) 22 Computer Law & Security Review.

- The Court supported the principle of the lawmakers not to burden Data Controllers with the requirement to search manual records in the hope that personal data would exist.
- That a manual filing system, is a system whose access is easy to access as a computerised search. [115]

Coppel goes onto to say in the same paragraph 'This interpretation was consistent with the Government's view, which had been expressed by Lord Williams of Mostyn during the passing of the Data Protection Bill through Parliament.'

Therefore, this paper cannot establish any dilution in *Durant* of Parliament's intentions in their interpretation of manual filing system. The paper supports the view that the judiciary and executive were aligned following the judgement.

4.4 Analysis - Third parties and redaction

Durant as part of its pathfinder judgement was asked to consider the redaction by the FSA of key elements of the computer data that was supplied in *Durant. Durant* wanted to establish, for reasons unknown, the names of staff within the FSA who had dealt with the complaint into the bank. The 1998 Act gave protection to third parties who may be identified when a right of access request is released to a Data Subject.

Section 7 (4) of the 1998 Act gave the principle of proportionality consideration in releasing third-party identification. Section 7 (4) states:

> Where a Data Controller cannot comply with the request [i.e. for information under section 7 (1)] without disclosing information relating to another individual who can be identified from that information, he is not obliged to comply with the request unless…

Section 7(4) then gave several exemptions which included consent of the third party, professional status, a public interest test where consent was not relevant and a requirement to balance the duty of confidentiality and the human rights of the third-party. This balance explained at length by Auld LJ when alluding to the conjecture of the 1998 Act, the 1995

115 Philip Coppel QC, Information Rights Law, Volume 1 (5th edn, Hart publishing 2020) Pg.379 s15 – 013.

Directive and Articles 8.1 to 8.2 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended (the ECHR).[116]

The judgement in *Durant* is important as Data Controllers can omit sections of a right of access citing this principle, the principle still survives in GDPR and the 2018 Act. The balance is to ensure the subject access request is not rendered meaningless to the Data Subject by redaction by an over-zealous Data Controller.

The redaction issue forms a minor part of the *Durant* judgement but does form relevance for later rulings and guidance for the right of access. Auld LJ once again introduces a two-part test to address the issue of not releasing the identity of third parties.[117] The first test being, is the information relating to the third-party part of the personal data sought? If not, then in scope for release and no need for the second stage balancing test. This second test being that the information released has to be material to the Data Subject and as LJ Auld quoted 'so bound up with the Data Subject as to qualify as his personal data'.[118] The Court in reaffirming the circumstances where the law allows the release of third-party details also reaffirmed an important principle that successive legislators were keen to ensure that the burden of compliance to the law rests with the Data Controller.

The report notes once again a reference to reducing the burden on Data Controller which this report earlier showed. This being a key strand of the lawmakers in 1983 during the passage of the 1984 Act. A clear indication of alignment between the legislators and the Court.

Durant forwarded the argument that the term 'reasonable' in the 1998 Act section 7(6)[119] imposed a duty on Data Controllers to consider whether to allow the exposure of the third party to a Data Subject. LJ Auld was clear that this duty is not imposed on the Data Controller but 'leaves the Data Controller with a choice whether to disclose the personal data sought or by redaction, to disclose only part of it'.[120]

In balancing the analysis of the action of the Court, with regards to redactions, LJ Auld on behalf of the Court provides clarity in their role in assessing rights of access cases:

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[116] *Durant v Financial Services Authority* [2003] EWCA Civ 1746 [2004] FSR 28 para 54.
[117] *Durant v Financial Services Authority* [2003] EWCA Civ 1746 [2004] FSR 28 para 64-66.
[118] *Durant v Financial Services Authority* [2003] EWCA Civ 1746 [2004] FSR 28 para66.
[119] Data Protection Act 1998 c.29 s 7(6).
[120] *Durant v Financial Services Authority* [2003] EWCA Civ 1746 [2004] FSR 28 para 56.

> Parliament cannot have intended that Courts in applications under section 7 (9) should be able routinely to 'second-guess' decisions of Data Controllers, who maybe employees of bodies large or small, public or private or be self-employed. To so interpret the legislation would encourage litigation and appellate challenge by way of full rehearsing on the merits and, in that manner, impose disproportionate burdens on them and their employers in the discharge of their many responsibilities under the Act.[121]

The Court of Appeal made an affirmative statement that it is for the Data Controllers to assess what is reasonable in terms of their compliance of the law, not the Court, which is a key part of GDPR[122] today. The Court of Appeal makes a clear statement that their role is to assess the role of controllers in complying with the obligations, rather than the testing the decisions of the Controller in Court. These decisions based upon the principle determined by Parliament in debates leading up to the 1984 and 1998 Acts that the right of access should not be an undue burden on Data Controllers but a proportionate balance between the rights of the Data Subject.

In analysing the role of the redaction and disclosure of third parties, the report finds there is close alignment with the law and the intention of the lawmakers. The Court correctly dismissed the need to know this information as it was not data about him and therefore not personal data in respect of the law. The second precedent established by this element of the case was that Controllers are responsible for demonstrating a reasonable and proportionate approach when fulfilling an obligation under the right of access, as not to place an undue burden on themselves. To that end in respect of the issue of redaction, the paper found no divergence of dilution from the views of legislators, moreover, there was clear convergence of both the Court and the legislator's thoughts.

4.5 Analysis – A review of Durant

Durant provided the formative case on which Courts and Data Controllers were to default to when considering the right of access. To many commentators the judgement seemed to

[121] *Durant v Financial Services Authority* [2003] EWCA Civ 1746 [2004] FSR 28 para 60.
[122] GDPR Article 5 (2) makes that affirmative statement that it is for Data Controllers to demonstrate compliance.

provide, as Phillip Coppel QC stated, with 'practical and legal difficulties',[123] because of the definition of personal data and its relationship with the modern technology. This in an age where information and personal data were so interlinked that the practicalities of defining what is in the scope of *Durant*, was a challenging task for any Data Controller. The key determination of any controller is to consider 'is it personal data?' in any access request. The narrow definition of personal data and its out of alignment with the views of legislators would in the opinion of the report, dilute the intention to such a degree that the balance was tipped in favour of Data Controllers.

The Information Commissioner shared the concerns of the narrow *Durant* interpretation and delivered clarification to Controllers. In 'The *Durant* Case and its Impact on the Interpretation of the Data Protection Act 1998'[124] The ICO attempted to clarify the *Durant* position and put a broader interpretation on the definition of personal data. Some months after this guidance, the EU Working Party 29[125] (hereafter the WP29), in what was an attempt to show the broader scope of the definition of personal data, gave what was described as an 'extraordinarily broad interpretation on the meaning of personal data and hence potentially also broadened the scope of all European data protection laws'[126] in their non-binding view of *Durant.*[127]

The WP29 paper was clear in that the intention of the 1995 Directive lawmakers was broader than the narrow interpretation in *Durant* when looking at the definition of personal data. The wording of the opinion could almost be seen as a rebuke for the narrow nature of the definition in *Durant* and reflected back to the initial intentions of the EU lawmakers. WP29 said the Directive contains a broad notion of personal data and that the definition of personal

[123] Philip Coppel QC, Information Rights Law, Volume 1 (5th edn, Hart publishing 2020) Pg.385 s15 – 023.
[124] The *Durant* Case and its Impact on the Interpretation of the Data Protection Act 1998', Information Commissioner's Office, 27 February 2006, www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/the_durant_case_and_its_impAct_on_the_interpretation_of_the_data_protection_Act.pdf> (last visited on 18th January 2021).
[125] The Article 29 Working Party (Art. 29 WP) is the independent European working party made up of all 28 Countries of the EU that dealt with issues relating to the protection of privacy and personal data until 25 May 2018.
[126] 'New ICO Guidance On The Scope Of The Data Protection Act Will Confuse The Issue Further | Lexology' (*Lexology.com*, 2007) <https://www.lexology.com/library/detail.aspx?g=19eea41d-e5c8-4e23-ad88-ad1e7882d08c> accessed 18 January 2021.
[127] 'Opinion 4/2007 On The Concept Of Personal Data' (*Ec.europa.eu*, 2007) <https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2007/wp136_en.pdf> accessed 18 January 2021.

data contained in Directive 95/46/EC (henceforth 'the data protection Directive' or 'the Directive') reads as follows:

> Personal data shall mean any information relating to an identified or identifiable natural person ('Data Subject'); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity'.

It needs to be noted that this definition reflects the intention of the European lawmakers for a wide notion of 'personal data', maintained throughout the legislative process. The Commission's original proposal explained that 'as in Convention 108, a broad definition is adopted to cover all information which may be linked to an individual' . The Commission's modified proposal noted that 'the amended proposal meets Parliament's wish that the definition of 'personal data' should be as general as possible, to include all information concerning an identifiable individual', a wish that the Council also took into account in the common position.[128]

The WP29 rebuke of *Durant was* the prompt for further ICO guidance which supported the broader concept of an interpretation in *Durant.* Felecity Gemson, from Allen Overy, described this guidance as having identified 'three central concepts of how data may relate to an individual in a way which makes it personal data – purpose, content, and result – and endorses a broad interpretation of personal data in clear contrast to the restrictive interpretation in *Durant*'.[129]

The report considered another area of the judgement in *Durant* that Auld LJ flawed obiter[130] that judicial discretion was afforded to Judges under section 7.9 of the 1998 Act 'discretion

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[128] 'Opinion 4/2007 On The Concept Of Personal Data' (*Ec.europa.eu*, 2007) Pg. 3 <https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2007/wp136_en.pdf> accessed 18 January 2021.

[129] *'Court Of Appeal Endorses Information Commissioner Office Guidance On Meaning Of Personal Data* - Allen & Overy' (*Allen Overy*, 2014) <https://www.allenovery.com/en-gb/global/news-and-insights/publications/Court-of-appeal-endorses-information-commissioner-office-guidance-on-meaning-of-personal-data> accessed 18 January 2021.

[130] *Ittihadieh v 5-11 Cheyne Gardens RTM Company Ltd and Others* [2017] EWCA Civ 121 p105 – Lewison LJ in judgement made it clear that he 'respectfully' disagreed with Auld LJ obiter observations and was more akin to supporting the view of Green J in *Zaw Lin v Commissioner of Police for the Metropolis* [2015] EWHC 2484 (QB) at [98] 'If Parliament had intended to confer such a broad residual discretion on the Court then, in my view, it would have used far more specific language in section 7(9) than in fact it did'.

conferred by that provision is general and untrammelled'[131] to have no supportive evidence from the research undertaken. The report viewed this statement to infer that Auld LJ believed incorrectly that he had judicial discretion on the issues at hand.

The report concluded that the decision of the Court is based upon this incorrect judicial interpretation of discretion on the personal data issue and therefore leading to the decision that *Durant's* name in a file was not personal data. This view supported by Andrew Murray, who summed up this error 'how could the Court find that files ordered by Mr Durant's name was not data about him'.[132] Murray alluded to the fact that *Durant's* name in the subfile was akin to him being Hamlet, the main character in the play, not a bit part player and as the eponymous hero, he was certainly entitled to his personal data.

At the end of 2007, it was far from clear to Data Controllers who was right in their interpretation of the law makers intentions. *Durant* representing the view of the UK Parliament that the right of access did exist, but it was a balance not to inflict undue burdens upon the controller. The WP29 and ICO were both of the opinion that, as broad as possible interpretation should be given to the definition of personal data as intended by European lawmakers. The analysis agrees with commentators for reasons highlighted above that it was flawed[133] from the moment it was handed down and agreed with the view of Andrew Murray that it 'can no longer to be said to be good law'.[134]

It would take three cases and nearly 15 years from *Durant* to align the view of the Courts to that of the ICO and that of the UK and EU law makers.

Chapter 5 will now examine the three cases, post Durant, which attempted to strike the balance between the legislators and the judiciary.

131 para.74.
132 Andrew Murray, 2019. Information Technology law. 4th ed. Oxford: Oxford University Press, p.603.
133 Andrew Murray, 2019. Information Technology law. 4th ed. Oxford: Oxford University Press, p.603.
134 Andrew Murray, 2019. Information Technology law. 4th ed. Oxford: Oxford University Press, p.603.

5. Revising the law post Durant

5.1 Edem v IC and FSA – The personal data issue

In the first case, *Edem v IC and FSA,* [135] the issue related to a desire by Edem under the Freedom of Information Act(hereafter known as FOIA)[136] to establish the names of the junior FSA staff who had dealt with a complaint actioned against Egg Plc. The FSA had refused to release to names, applying the FOIA personal data exemption. The ICO agreed and Edam appealed to the First Level tribunal (hereafter known as the FTT) who upheld the appeal. The FTT decision was clearly wrong in the opinion of the report as the names of the staff are clear identifiers of a living person. The FTT rationale being that in applying the *Durant* is the information requested of biological significance principle to the three employees, their finding was that the request was not about them but Edem, therefore the information could be released. On appeal to the Upper Tribunal (Administrative Appeal Chamber) the decision was reversed, the case then appealed by Edem to the Court of Appeal.

The First Level Tribunal (hereafter FTT) had relied on *Durant* as a benchmark, in this case, to determine that the three names can be released, as the data request was not about but Edem. They were merely incidental that they had dealt with the complaint. The Upper Tribunal disagreed and as did the Court of Appeal, noting that the context of both cases were different. *Edem* was seeking names whereas *Durant* was seeking documents. The context in *Durant* was different and in *Edem* this was reflected in Moses LJ judgement.[137]

As Felecity Gemson summed up the case:

> Importantly, the Court confirmed the approach in ICO Guidance that the biographical significance and focus tests should be confined to particular factual scenarios like *Durant* where information requested is not 'obviously about' an

[135] *Edem v IC and FSA [2014] EWCA Civ 92.*
[136] Freedom of Information Act 2000. c. 36 (hereafter FOIA)
[137] *Edem v IC and FSA [2014] EWCA Civ 92. p.17*

> individual or clearly 'linked to' them. On the facts in question, it was straightforward that the names were personal data, and the FTT had wrongly applied the tests when there was no reason to do so.[138]

At the Court of Appeal *Moses LJ* was strident in providing clarity that the names of individuals were clearly in scope for personal data.[139] Moses LJ went so far as saying 'It is however necessary to understand how any difficulty, in what appears to be so straight forward of case arose'.[140] The Court identified that the FTT had incorrectly applied *Durant's* interpretation to personal data, incorrectly assuming that to meet the definition of personal data, it had to maintain a 'significance' about the Data Subjects. Moses LJ supported the view that the information in *Edem,* where three named individuals were the subject of a report and was in scope because of they were named and that it had substance about them.[141] The requirement to undertake a legal analysis of 'substance about' is not required when you clearly have clear personal data, in this case their names! Moses LJ went so far as to say, 'Neither of Auld LJ notions had any application, and to seek to apply them runs contrary to the statute'.[142]

5.2 Analysis – Edem

The report found that *Edem* supported the challenge that Judges had in *Durant* in determining *Durant's* motives. The lawmakers had intended that the right of access exists for Data Subjects to check whether personal data was being legally processed and held securely, *Durant* was more interested in having reports he could use in future legal action. Whereas in *Edem* the motives and personal data question was about third parties so a 'like for like' interpretation of *Durant* restrictive nature judgement could not be applied as the two cases context differed widely. The report supports the view that *Edem* 'diminished the importance of Durant'.[143] In the future Controllers will be unable to use a broad application of *Durant* to restrict the right of access. *Edem* provided Data Subjects with hope that the restrictive use of *Durant* would in future be limited. This view is supported by Francis Aldhouse who said

[138] 'Court Of Appeal Endorses Information Commissioner Office Guidance On Meaning Of Personal Data - Allen & Overy' (*Allen Overy*, 2014) <https://www.allenovery.com/en-gb/global/news-and-insights/publications/Court-of-appeal-endorses-information-commissioner-office-guidance-on-meaning-of-personal-data> accessed 18 January 2021.
[139] *Edem v IC and FSA [2014] EWCA Civ 92. p.12*
[140] *Edem v IC and FSA [2014] EWCA Civ 92. p.15*
[141] *Edem v IC and FSA [2014] EWCA Civ 92. p.17*
[142] *Edem v IC and FSA [2014] EWCA Civ 92. p.17*
[143] Philip Coppel QC, Information Rights Law, Volume 1 (5th edn, Hart publishing 2020) Pg.388 s.15-026

'*Edem* is another step in the direction of judicial sanity in refining the meaning of 'personal data'.[144]

The report determines that *Edem* has not replaced *Durant,* the report found that *Durant* was right in limited circumstances, (this supported by the later 2017 Court of Appeal case *Ittihadieh v 5-11 Cheyne Gardens[145])* those being when the Data Subject is mentioned but not the subject of the information contained in documents. In the latter case of *Ittihadieh* there is support for both *Durant* and *Edem* judgements adding more confusion for practitioners.[146] In analysis the report established that *Edem* did support the ICO technical guidance, the view of WP29, and that of the EU Council that a broader contextual interpretation is required.[147] The report holds the view *Edem* however should not be seen as replacing *Durant* as an all-embracing reference for 'personal data' definitions in the right to access but can be referenced when taking into account by controllers in the disclosure of third parties. Thus still leaving *Durant* with considerable force and further scope for judicial interpretation in a range of circumstances, albeit limited which gives credence to the notion of judicial dilution of the law makers intentions. This view supported by Francis Aldhouse 'the First-Tier Tribunal seems overly attached to the two notions (LJ Auld in *Durant*[148]) and might yet need further instruction from the Court of Appeal to wrench these tools from their grasp'.[149]

The analysis saw the challenge of *Durant* in *Edem* as key balancing towards the Data Subject in the area of personal data, away from Data Controllers and the Courts supporting the rebalancing. A recent example of Controllers attempting to use *Durant* and Auld LJ judicial interpretation of personal data was in *TLU and others v Secretary of State for the Home Department,*[150] where the Court asked to hear an appeal on the matter of a confidential data breach of Asylum claimants personal data. The Home Office relying on the narrow

144 Francis Aldhouse, *'Edem V. The Information Commissioner And The Financial Services Authority* [2014] EWCA Civ 92' (2014) 30 Computer Law & Security Review <https://www.sciencedirect.com/science/article/pii/S0267364914000569> accessed 18 April 2021.
145 *Ittihadieh v 5-11 Cheyne Gardens RTM Company Ltd and Others* [2017] EWCA Civ 121.
146 'Yet Another Subject Access Judgment... | Panopticon' (Panopticon, 2021) <https://panopticonblog.com/2017/03/06/yet-another-subject-access-judgment/> accessed 18 April 2021.
147 'Freedom Of Information And Data Protection:' (Freedom of Information and Data Protection: Case Law Update 2014, 2014) <https://1f2ca7mxjow42e65q49871m1-wpengine.netdna-ssl.com/wp-content/uploads/2015/02/FOIA_DP.pdf> accessed 18 April 2021.
148 Biological significance and focus.
149 Francis Aldhouse, *'Edem V. The Information Commissioner And The Financial Services Authority* [2014] EWCA Civ 92' (2014) 30 Computer Law & Security Review <https://www.sciencedirect.com/science/article/pii/S0267364914000569> accessed 18 April 2021.
150 *TLU and others v Secretary of State for the Home Department*[2018] EWCA Civ 2217

definition of personal data within *Durant* to try and take out of scope the data that had been breached. In the first instance on application to the High Court damages were awarded for the Data breach. In judgement Gross LJ was unequivocal about the practical application of *Durant* in this and subsequent cases 'for practical reasons, with respect, Auld LJ was anxious to establish a narrow meaning for personal data',[151] here the appeal was dismissed. This provides evidence that *Durant* is no longer an effective defence in the UK Courts due to its narrow definition.

The report will now move onto the area of searches for personal data where the judicial interpretations exist to lay alongside the intentions of the legislators.

5.3. Analysis - The search for personal data

The requirement to provide personal data was a key criterion in the minds of the lawmakers in 1983, though never expressly mentioned in law, you can only provide data to the requester if you search for it! Several cases have dealt with the issue of 'the search for personal data' and concluded with similar outcomes. The report is of the opinion based upon parliamentary intention that the requirement to search for personal data needed to be proportionate. Phillip Coppel QC believes that in the three cases the report considered where the issue of proportionality was at issue the judges had arrived at an 'immaculate conception'.[152] His argument based upon the 1998 Act or the 2005 Directive had no words limiting the obligation and that the word 'proportionate' did not appear in the right of access therefore the Courts made up the proportionality test. A contention that is at odds with the report's findings of the need to balance the right against the burden on the controller.

In providing the personal data to the Data Subject the report previously emphasised the words of the Home Secretary, Leon Brittan when introducing the Data Protection Bill to parliament in 1984:

> Every safeguard for the subject is a potential burden to the user. Throughout our consideration of the Bill, therefore, it will be vital to remember the need to achieve a

[151] *TLU and others v Secretary of State for the Home Department*[2018] EWCA Civ 2217 p.41.
[152] Philip Coppel QC, Information Rights Law, Volume 1 (5th edn, Hart publishing 2020) Pg.247 s10 – 016.

> reasonable balance, ensuring that the rights of individuals as Data Subjects are properly protected, without imposing unreasonable burdens on the data users.[153]

In respect of the search for personal data, the report studied three cases to determine the correlation of the 'reasonable balance' on searches for personal data by data users, the modern-day Data Controllers when set aside judgements by the Courts.

These judgements must be viewed in context, as the 1998 Act or the 2005 directive does not contain an express obligation to search for personal data, however, this implied as to how else is a Data Controller going to supply the information to the Data Subject.[154] Therefore this accounting for the requirement for the Courts to provide judicial interpretation to the task of fulfilling the right of access.

In *Ezsias v Welsh Ministers,*[155] *Ezsias* was progressing a claim against the Welsh Government. The claim was wrapped up as part of an employment claim following his dismissal as a clinician whilst working in the NHS. *Ezsias* made multiple requests to his former employers and then took his battle to the Welsh Government. As a result, multiple and repeated requests were made to public authorities in Wales mainly to gather evidence for a future employment rights claim. The issues were (1) that the Welsh Ministers and various bodies had exceeded the 40 days required to provide the Subject Access Information.[156] (2) That information requested in the search was not provided by the Welsh Ministers on conclusion of the subject access request. (3) That the search undertaken by the Welsh Ministers to fulfil the search 'was inadequate: and further efforts ought to have been made to ensure the search was reasonable and proportionate'.[157]

On the first issue, the Court held that ministers had exceeded the 40 days, on the second issue, the Court dismissed that Ezsias's request for information mirrored that of *Durant* where the request was for information rather than personal data.[158] It is the latter point, the claim of an inadequate search which is of most interest to the report in determining the context of determining the diluting of the legislation by the Courts.

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[153] HC Deb, January 1984, vol 53, column 32
[154] *Ittihadieh v 5-11 Cheyne Gardens RTM Company Ltd and Others* [2017] EWCA Civ p.95.
[155] *Ezsias v Welsh Ministers* [2007] All ER (D)
[156] Data Protection Act 1998. s.7.10.
[157] *Ezsias v Welsh Ministers* [2007] All ER (D) p.91
[158] *Ezsias v Welsh Ministers* [2007] All ER (D) p.59

It was *Ezsias* own submission and the view of Hickinbottom J in the case which gives evidence to a unique judicial interpretation. In paragraph.91 Hickinbottom J states '*Ezsias* submits that efforts made by the National Assembly to identify and disclose his personal data (as set out in the Affidavit of Natalie Lancey 10 May 2005) were inadequate: and further efforts ought to have been made to ensure the search was reasonable and proportionate.' *Ezsias* own submission providing the words *'ensuring the search was reasonable and proportionate'.* The use of these words gave rise in paragraph 93 to Hickinbottom J to say, 'Under the 1998 Act, upon receipt of a request for data, a Data Controller must take reasonable and proportionate steps to identify and disclose the data he is bound to disclose.' The report sees clarity and authority of the Hickinbottom J in using the words 'reasonable and proportionate' however nowhere in the 1998 Act are these words mirrored. This report believes that it was *Ezsias* in his own submission to introduce the notion of 'reasonable and proportionate'. The Judge adopting these words because all parties were happy with that term. The report draws that conclusion on the basis that the arguments put forward by Hickinbottom are not supported by detailed reference to law or precedent cases.

The report found that Hickinbottom J attempted to justify the terms 'reasonable and proportionate' in paragraph 95 when discussing the provision of copies of information and the term 'disproportionate effort' contained in the 1998 Act section 8(2)(a). The report believes the judge errored in law because this provision was in place to allow Controllers show original copies where copying information would be time consuming, they could discharge their obligations under the act in some other way. The reports view is the judge had used this clause and incorrectly applied it across all aspects of the Subject Access Request. The report view is supported by the Law Gazette who said at the time 'Here, the Court sought to widely interpret the provision, which on the face of it only applies to the provision of hard copies. The Court seems to have interpreted it as reflecting the whole ethos of subject access'.[159]

[159] Law Gazette. 2021. *Subject access and disclosure*. [online] Available at: <https://www.lawgazette.co.uk/law/freedom-of-information/4632.article> [Accessed 11 May 2021].

The introduction of the terms of 'reasonable and proportionate' whilst echoing the words of Leon Brittan seem to have little foundations in law and was controversial.[160]

An analysis of the judgement found no explanation for the inclusion of the new search definition within, or from any other source, 'the immaculate conception' alluded to earlier in the report was born. The findings of this report are that there is no clear legal justification for this definition of a search and this view is supported by legal commentators[161] who also point out that even the UK ICO found difficulty with the judgement who stated in their guidance that the current DPA 'does not place any express limits on your duty to search for and retrieve the information'.[162]

The report found evidence that the judge in the case responding to the context of the case and expressing the view of Ezsias as a 'serial'[163] complainer was reflecting the view that parliament did not intend the right of access to be used in such a way, to address serial complainers. There were numerous reflections by the judge on *Durant* and provided clarity in the judgment that the right to access does not extend to information but personal data.[164] The numerous requests from *Ezsias* were burdensome and therefore the report can understand how the judge came to the conclusion that he did, despite no clear legal basis to do so. This report considers the judgement in *Ezsias* had diluted the intention of parliament when considered in isolation, however, *Ezsias* was cited with approval by the Court of Appeal in *Ittihadieh v 5-11 Cheyene Gardens RTM Company and Others*[165] giving clarity to the proportionality issue.

[160] Linklaters.com. 2008. *UK - Dealing With Unreasonable Subject Access Requests*. [online] Available at: <https://www.linklaters.com/en/insights/publications/tmt-news/publicationissue20080125/uk---dealing-with-unreasonable-subject-access-requests> [Accessed 21 April 2021].
[161] Cloisters - Barristers Chambers. 2015. *Proportionality and Data Protection - Cloisters - Barristers Chambers*. [online] Available at: <https://www.cloisters.com/proportionality-and-data-protection/> [Accessed 22 April 2021].
[162] Ico.org.uk. 2017. *SAR code of practice*. [online] Available at: <https://ico.org.uk/media/for-organisations/documents/2259722/subject-access-code-of-prActice.pdf> [Accessed 10 May 2021].
[163] *Ezsias v Welsh Ministers* [2007] All ER (D) p.66.
[164] *Ezsias v Welsh Ministers* [2007] All ER (D) p.59-67.
[165] *Ittihadieh v 5-11 Cheyne Gardens RTM Company Ltd* and Others [2017] EWCA Civ 121.

5.4 Analysis - Ittihadieh v 5-11 Cheyene Gardens RTM Company and Others

Ittihadieh provided the report with a foundation to the analysis of the judgements of *Ezsias* and that in *Durant* relative to the right of access and the project question. The issue in *Ittihadieh* was he was a resident and owner of property in 5-11 Cheyene Gardens. Several disputes had occurred over the years. *Ittihadieh* had requested under his right to access personal data from fellow residents, the management company, RTM and its directors. In 2014 via lawyers *Ittihadieh* had requested information to further a claim against 'RTM Company, its directors and company secretary, both in their capacity as directors or company secretary and personally, for the discrimination against, harassment and victimisation of our client'.[166] Late in 2014 information was provided to *Ittihadieh.* A further claim for a 'missing' file was requested by *Ittihadieh* lawyers which was dismissed by RTMs lawyers. *Ittihadieh,* not content, lodged a notice of action to the High Court in which he requested the judge used his discretion under the 1998 Act section 7(9) to order the release of the remaining documents. The case heard in May 2014 in the High Court, Seymour J held that RTM had met their obligations and were proportionate in supplying the personal data to *Ittihadieh.*[167]

Ittihadieh is an important case to the report. The case addresses and supports the judgement of proportionality as held *in Ezsias.* It reflects on the purpose of SARs and for the report, it more importantly addresses the long held judicial obiter of Auld LJ in *Durant* in paragraph 74 that Judges have discretion under section 7(9) of the 1998 Act, which is a key factor in understanding the intention of the lawmakers. This analysis was addressed earlier in the report, where the Court held that there was no support for LJ Auld judicial discretion when considering the 1998 Act.

In addressing the 'proportionality' issue the report holds the view the legislators held the view of the legislation was there to address a need to protect personal data in a way that it did become not burdensome for the Data Controller. In *Ezsias* there was an implication of this position but no referencing evidence by the Judge of legislative support of proportionality

166 *Ittihadieh v 5-11 Cheyne Gardens RTM Company Ltd and Others* [2017] EWCA Civ 121 p.9.
167 *Ittihadieh v 5-11 Cheyne Gardens RTM Company Ltd and Others* [2017] EWCA Civ 121 p.13.

over and beyond the 'not place an undue burden on the Data Controller'. In *Ittihadieh* the analysis found clarity on the proportionality issue.

The report found the Court, unlike in Ezsias, provided a clinical dissection of the intention of legislators on the issue of proportionality. Lewinson LJ pointing out that the 1995 Directive 'did not intend to impose excessive burdens on Data Controllers'[168] and recitals 15 & 27 both defined the structures of data required to allow easy access to personal data for Data Controllers. The Court in paragraphs 97 and 98 forwarded evidence from the European Courts to support the principle of proportionality with Data Protection cases.[169] The support of the Court in *Ezsias* could not have been clearer ' in *Ezsias v Welsh Ministers* at [93] Judge Hickinbottom 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. In my judgement he was right'[170] This is a significant element of the analysis and the central argument that the Courts ever since *Durant* have moved back towards the intention of the lawmakers. There is clear correlation between the language of lawmakers, the language of the 1995 directive and the judges which in the report's opinion corrected the poor drafting of section 7, which failed to expressly build in the intentions of the legislators to provide balance.

5.5 Analysis - Dawson - Damer & Ors v Taylor Wessing LLP

The last case the analysis reviewed was *Dawson - Damer & Ors v Taylor Wessing LLP.*[171] The case was a complex appeal case involving offshore trusts in Bermuda but of interest to the analysis was the right to access served on Taylor Wessing concern the benefactors of payments from the trusts concerned. The issues relating to the search are bounded by on one side a claim from Taylor Wessing that to search for documents some of which would be covered under legal and professional privilege[172] would be disproportionate and the other issue, the subject rights of access to 35 paper files held by Taylor Wessing on behalf of the Trusts.

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[168] *Ittihadieh v 5-11 Cheyne Gardens RTM Company Ltd and Others* [2017] EWCA Civ p. 96
[169] Case C-582/14 *Breyer v Bundersrepublik Deutshland* at 46 , Case C-553/07 *College van burgemeester en wethouders van Rotterdam v M.E.E. Rijkeboer,* Joined Cases C-27/00 and C-122/00 *R (Omega Air Ltd) v Secretary of State for the Environment Transport and the Regions* [2002] ECR I-2569 at [62];
[170] *Ittihadieh v 5-11 Cheyne Gardens RTM Company Ltd and Others* [2017] EWCA Civ p. 99
[171] *Dawson-Damer v Taylor Wessing LLP [2017] EWCA* It should be noted that the 2017 Court or Appeal case has been superceded by both parties appealing the judgement and the case reconvened after referral to the Chancery Division in 2020.
[172] The report does not address this issue.

The case is relevant to this analysis, as it addresses *Durant* head on and reversed the restricted[173] view given by *Durant* but moreover provides clarity under the context of reasonable and proportionality a key link between establishing the will of the legislators.

The Data Protection issue rested on whether the 35 manual files constitute personal data and would it be reasonable and proportionate to search those files if they were in scope? The High Court earlier finding them in scope hence the appeal from Taylor Wessing. Taylor Wessing had brought forward the argument, which was held by the Court of the Appeal, that the requirement for trained legal professionals[174] to undertake a search cannot be in the meaning of the legislator's minds when considering a reasonable search of manual file. The argument forwarded by Taylor Wessing that to search for personal data using lawyers would be disproportionate and not the intention of the legislators. The Court agreed to cite[175] the ICO 'temp test'[176] as a benchmark to hold against the proportionality issues of searching for personal data and tackling the ambiguity given by Auld LD in *Durant* about the scope of the search.

The report found that *Dawson-Damer* provided clarity with regards to the required search for personal data and finally dealt a blow to the restricted view of searching manual files. The report came to the view that the Court aligned with intention of parliament, evidenced by successive legislation in the late 1980s to access manual records. Commentators supported the approach of the Court when reviewing the judgement in the light of *Durant* 'Nor could the approach of *Durant* that manual records are only caught by the DPA if they survive the same or similar ready accessibility as a computerised filing system survive'.[177] The report concurs that the days of *Durant* as the single judicial authority under the right of access were over.

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[173]McDermott Will & Emery (2020) https://www.mwe.com/media/dawson-damer-v-taylor-wessing-mcdermott-consolidates-trust-beneficiaries-rights-with-victory-in-landmark-Court-of-appeal-case-on-data-protection-Act.
[174] *Dawson-Damer v Taylor Wessing LLP* [2020] EWCA paragraph. 99 'If access to the relevant data requires the use of trainees and skilled lawyers, turning the pages of the files and reviewing the material identified, that is a clear indication that the structure itself does not enable ready access to the data'.
[175] *Dawson-Damer v Taylor Wessing LLP* [2020] EWCA paragraph. 100
[176] Ico.org.uk. 2021. *Frequently asked questions and answers about relevant filing systems*. [online] Available at: <https://ico.org.uk/media/for-organisations/documents/1592/relevant_filing_systems_faqs.pdf> [Accessed 8 May 2021].
[177] *Panopticon. 2021. Trust(s) in the DPA: Dawson-Damer (Part the Fourth) | Panopticon. [online] Available at: <https://panopticonblog.com/2020/03/17/trusts-in-the-dpa-dawson-damer-part-the-fourth/> [Accessed 11 May 2021].*

The report supports the premise of the right of access in law was to establish the nature of and legality of processing. In *Dawson - Damer* the request for documents was based upon a premise of 'fishing' for information that could be used later for a legal challenge. In *Dawson Damer* it was clear that the original that the intention of the law makers was at odds of the legal challenge and the Court held to support the intention of the lawmakers. The report's conclusion is supported by academic reference by Charles Towl who reflected:

> The underlying purpose of SARs is likely to be equally conservative. Rather than granting expansive rights of discovery, their function is to enable the Data Subject to ensure that the controller in question is observing the relevant duties imposed by the Act. Within this framework, the SAR provides the necessary accountability which guarantees the existence of the duties owed by the controller to the subject in relation to their personal data. Importantly, this function does not include the facilitation of fishing expeditions in aid of foreign litigation.[178]

The report concludes that the search and the subsequent proportionality of that search whilst never clearly articulated within the 1998 Act has now been given clarity by the judgements in *Ittihadieh* and *Dawson Damer*. The 1998 Act drafting allowing *Durant* to have an undue influence over the restricted practice of controllers in denying the right of access. *Ezsias* which was affirmed by the Court of Appeal in *Ittihadieh* have become landmark, and in the words of commentators the 'leading authority'.[179] This is clear that following *Ittihadieh* the ICO update its guidance and code of practice so that Data Controllers are not required to undertake activity in responding to a request for personal data that is 'unreasonable or disproportionate to the importance of providing subject access to the information'.[180]

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[178] *Charles Towl, Gone fishing: legal professional privilege and Data Subject access requests in trust law Dawson-Damer v Taylor Wessing LLP [2020] EWCA Civ 352,* Trusts & Trustees*, Volume 26, Issue 8-9, November 2020, Pages 884–889, https://doi.org/10.1093/tandt/ttaa073*

[179] Fieldfisher. 2021. *Subject Access Requests and the Search for Proportionality*. [online] Available at: <https://www.fieldfisher.com/en/services/privacy-security-and-information/privacy-security-and-information-law-blog/subject-access-requests-and-the-search-for-proport> [Accessed 8 May 2021].

[180] Ico.org.uk. 2017. *Extent of the duty to provide subject access*. [online] Available at: <https://ico.org.uk/media/for-organisations/documents/2259722/subject-access-code-of-prActice.pdf> [Accessed 8 May 2021].

6. Conclusion

The analysis noted that it had taken the Courts nearly 20 years from the inception of the 1998 Act[181] to apply the principles of ensuring that the burden on Controllers was 'reasonable.' The report has earlier cited many examples of the legislators' intentions in this area. The report holds the view that the main driver for this was the undue influence that the judgement of *Durant* gave both Controllers, the Courts, and Legislators. As the report has shown *Edem, Ezsias, Ittihadieh,* and *Dawson Damer* provided clarity on the personal data issue, the manual filing issue and the scope of a reasonable and proportionate search. The report draws the conclusion that *Durant*, unlike later cases, was unique in that it attempted to address judicial interpretation of the personal data issue, manual files and proportionality all in one judgement. This led to the judicial unpicking of *Durant* over time as none of the cases, with the exception of *Ittihadieh,* have the range of Data Protection issues raised in *Durant*. This view is supported by Andrew Murray, who supports the notion that Durant was seen as an 'unbendable authority on the question'[182] which resulted in Data Controllers and Courts falling in behind *Auld LJ*.

The analysis found that during the period in question there were no legislative interventions to attempt to address the decisions of the Courts. This however is understandable considering the position of the UK ICO and the European Working Party 29 took opposing the view of *Durant.* The subsequent guidance providing a robust response and a non-judicial and legislative to a non sensical judgement.

In conclusion, this report holds the view that the personal data and manual filing issue decision in *Durant* supported the intention of the lawmakers in reducing the burden on Controllers but tipped the balance of the right towards Data Controllers. This respected the views of the sponsoring government but not of the collective view of all legislators.

The judicial interpretation given in *Durant* allowed controllers to restrict access and Courts to fall behind *Durant,* thus denying the right of access to many. The judicial unfreezing of

[181] The benchmark being the *Ittihadieh* judgement.
[182] Andrew Murray., 2019. *Information Technology Law*. 4th ed. Oxford: Oxford University Press, pp.603 - 606.

Durant was prompted only by the introduction of the EU directive and subsequent judgements from the EU Courts.

The report finds that in respect of the personal data issue that the Courts have moved away from the restrictive view of *Durant* and now have adopted a pragmatic and contextual view of the issue. This view is considered to be more reflective of the wider Parliament.

The report finds that in respect of the manual filing issue that the limited judgement in *Durant held* has now been replaced by a more pragmatic four- part test including the 'Temp Test' which provides a balanced approach to the right of access to manual files.

The report finds that in terms of the proportionality of search, the Courts have met the intention of parliament by introducing a balance between the Controller and Data Subject.

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