OMBUDSMAN
CAYMAN ISLANDS

Case 202200069

Decision

The Cabinet Office/PACT Caucus

28 June 2022

EXECUTIVE SUMMARY

The complainant submitted an application to the Cabinet concerning his immigration status pursuant to the Immigration (Transition) Act (2021 Revision). Cabinet considered the application, and the complainant received notification of the decision.

Subsequently, the complainant sought to obtain a copy of the personal data processed by the Cabinet Office when considering his immigration application. The complainant therefore submitted a request to the Cabinet Office and PACT Caucus (the Data Controllers) under section 8 of the Data Protection Act (2021 Revision) (DPA), which grants a qualified right of access to one's own personal data.

On 16 February 2022, the Ombudsman received a complaint against the Data Controllers concerning an allegation of non-compliance with the complainant's section 8 request. The complainant alleged that after he submitted his section 8 request, the Data Controllers did not provide all the personal data he was entitled to under the DPA. The complainant requested that the Ombudsman review the source records disclosed by the Data Controllers and either: (1) order any undisclosed personal data to be disclosed; or (2) provide a reasonable explanation as to why the information was withheld.

After reviewing the source records, we identified four (4) paragraphs within an unredacted Cabinet Paper that the complainant was entitled to receive. The Data Controllers agreed and voluntarily disclosed the additional information to the complainant. After the Data Controllers disclosed the additional information, the complainant made further submissions asserting that the entire Cabinet Paper related to him and was thus his personal data, which he was entitled to access.

Consequently, we considered whether the entire Cabinet Paper should be classified as personal data under the DPA, to which the complainant should have access by way of the section 8 request. After careful consideration, the Ombudsman concluded that the undisclosed information contained in the Cabinet Paper formed part of the legal analysis used to support the administrative decision of the Cabinet and did not contain data relating to the complainant. As such, following legal precedent further explained below, the relevant information could not be classed as personal data and was consequently not disclosable under section 8 of the DPA. The complainant had received all the personal data he was entitled to under the DPA, and no other information contained in the Cabinet Paper was required to be disclosed by the Data Controllers pursuant to section 8 of the DPA.

A. CONSIDERATION OF THE ISSUES

How is personal data defined in the DPA?

[1] Section 2 of the DPA defines personal data as follows:

> *"personal data" means data relating to a living individual who can be identified and includes data such as —*
>
> > *(a) the living individual's location data, online identifier or one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the living individual;*
> > *(b) an expression of opinion about the living individual; or*
> > *(c) any indication of the intentions of the data controller or any other person in respect of the living individual;*

What access rights are granted by section 8 of the DPA?

[2] Sections 8 and 9 of the DPA provide details of data subjects' right to access. Section 8(2)(a) is particularly relevant in the present case. It states:

> *(2) A data subject is entitled to communication in an intelligible form, by the relevant data controller, of —*

(a) the data subject's personal data; …

[3] The Data Controllers have submitted communications to the complainant providing access to the personal data they believe he is entitled to under section 8 of the DPA.

What were the complainant's claims concerning the unredacted Cabinet Paper?

Edem v IC and Financial Services Authority

[4] The complainant claimed that the leading case on the interpretation of the definition of personal data and whether personal data "relates to" an individual is *Edem v IC and Financial Services Authority [2014] EWCA Civ 92*. In paragraph 21 of that judgment, the Court of Appeal referenced the guidance of the United Kingdom (UK) Information Commissioner's Office (ICO) regarding the same. In particular, the court stated that paragraph 6 of the ICO's Data Protection Technical Guidance provides:

> *…data may be personal data because it is clearly 'linked to' an individual because it is about his activities and is processed for the purpose of determining or influencing the way in which that person is treated….*

[5] Applying *Edem*, the complainant argued that the information contained in the Cabinet Paper must be "linked to" the complainant, or otherwise, it would have no reason for being included in the document. The complainant further argued that regardless of whether the information contained in the Cabinet Paper is a discussion of the law or any other matter, it is still "linked" to him and is, therefore, information he is entitled to under section 8 of the DPA.

Article 29 Data Protection Working Party's Opinion 4/2007

[6] The complainant sought to rely on "Opinion 4/2007 on the concept of personal data" from the Article 29 Data Protection Working Party, on which the ICO's guidance is based. In that Opinion, the Working Party stated that for personal data to relate to an individual, one of the following elements must apply: the "content" element, the "purpose" element or the "result" element. The complainant argued that the "purpose" and "result" elements apply to the

complaint as the redacted portions of the Cabinet Paper were intended to assist the Government in determining his immigration status. The complainant asserted that the information contained in the Cabinet Paper must have had some bearing on the decision of his situation and was, therefore, necessary to evaluate, treat in a certain way, make a decision about, or influence his status.

Does the right in section 8 apply to information consisting of legal analysis?

Durant v Financial Services Authority [2003] EWCA Civ 1746

[7] While *Edem* is relevant to the definition of personal data and the construal of the words "relates to", the case of *Durant v Financial Services Authority [2003] EWCA Civ 1746* remains applicable and has not been overturned by *Edem*. *Edem* clarified what should have been an obvious point that some data controllers willfully missed, i.e. that someone's name is their personal data, and one need not consider the *Durant* tests to draw that conclusion.

[8] In discussing the scope of the definition of "personal data" in *Durant*, Auld LJ said that the purpose of the individual's right of access to personal data under section 7 of the UK Data Protection Act (1998) was to enable him to check whether the data controller's processing of the data unlawfully infringed his privacy and if so, to take such steps as the Act provided to protect it. It was **not** an automatic key to any information, readily accessible or not, of matters in which he might be named or be involved. Nor was it to assist him, for example, in obtaining discovery of documents that might help him in litigation or complaints against third parties.

[9] For an example of *Durant* still being cited post-*Edem*, see the cases of *Deer v University of Oxford [2015] EWCA Civ 52, [2015] ICR 1213* and *Ittihadieh v 5-11 Cheyne Gardens RTM Company Ltd& Ors [2017] EWCA Civ 121 (03 March 2017)* from 2017, which reference both *Durant* and *Edem*, and confirm that both are relevant and still good law but deal with different situations.[1]

[1] They were considered together here: https://www.bailii.org/ew/cases/EWCA/Civ/2017/121.html - see particularly paras 61-69, which discuss the definition of personal data. Paragraph 66 confirms no conflict between *Durant* and *Edem*, arguing that they cover different circumstances.

[10] Furthermore, although *Durant* was doubted in *Dawson-Damer and others v Taylor Wessing LLP - [2020] 4 All ER 600*, this was concerning the definition of a "relevant filing system". The Court of Appeal in *Dawson-Damer* concluded that some aspects of the judgment in *Durant* could no longer be relied on following the European Court of Justice (the CJEU) ruling in the 2018 *Tietosuojavaltuutettu* case[2] due to the narrow approach to the definition of "a relevant filing system" in *Durant*; this was because the ruling in the *Durant* case came before the right to protection of personal data in the English courts. The right to personal data protection has since increased as it is now enshrined as a fundamental right in European Union law by Article 8 of the Charter of Fundamental Rights of the European Union (the Charter).

YS v Minister voor Immigratie,Integratie en Asiel (Joined cases C-141/12 & C-372/12),[2015]1WLR 609)

[11] The ruling by the CJEU in *the above cases* is most relevant to the complainant's matter. In these CJEU cases, third-country nationals who had applied for residency rights in the Netherlands and had been refused sought access to an administrative document (entitled a "minute") setting out the legal basis upon which the Netherlands Immigration and Naturalisation Service had determined their respective residency applications.

[12] According to the judgment, each minute was an internal document drawn up by the case officer of the Dutch authority responsible for making the draft decision on a permit application. The minutes contained, among other things, data relating to the applicants, including their names, dates of birth, nationality, gender, ethnicity, religion, and language. Also comprised were details of the procedural history of the applications and statements made by the applicants and an assessment of that information in light of the relevant legal provisions, known as the legal analysis.

[2] Case C-25/17 Tietosuojavatuutettu ECLI:EU:C:2018:551. See at: https://www.bailii.org/eu/cases/EUECJ/2018/C2517.html

[13] Until 14 July 2009, such minutes had been made available to the public upon request to the Dutch Authorities. However, that policy was abandoned in light of their view that a large number of those requests resulted in too great a workload, that the data subjects often misinterpreted the legal analyses contained in the minutes which were made available to them, and that, because of that availability, the exchange of views within the Immigration and Naturalisation Service had become recorded less frequently in the minutes. As a result, data subjects' requests for access to the minutes had since been systematically refused.

[14] In accordance with this practice, all three applications were rejected by the Minister for Immigration, Integration and Asylum, and the Dutch Data Protection Authority upheld the decision. In one case, the applicant received a summary of the data relating to him contained in the minute, save for the legal analysis. After their objections against those decisions were declared unfounded, the applicants appealed to the Netherlands court, arguing that the legal analysis was personal data and that they had the right to access the minute under EU law. The court then stayed the proceedings and referred the following questions to the CJEU for a preliminary ruling:

a. Whether the data relating to an applicant for a residence permit and the legal analysis included in the minute constituted "personal data" within the meaning of Article 2(a) of Council Directive 95/46 of the European Parliament and the Council (on the protection of individuals with regard to the processing of personal data and the free movement of such data) (the Directive);
b. Whether Article 12(a) of the Directive and Article 8(2) of the Charter gave an applicant a right of access to any personal data contained in the minute and, if so, whether the authorities were required to provide the applicant with a copy of that minute; and
c. Whether Article 41(2)(b) of the Charter gave an applicant a right to access the national file relating to his application.

[15] The CJEU ruled that:

a. Article 2(a) of the Directive had to be interpreted as meaning that the data relating to the applicant for a residence permit contained in the minute and, where relevant, the data in the legal analysis contained in the minute were personal data within the

meaning of that provision, whereas, by contrast, that analysis could not in itself be so classified (see [48] of the judgment);

b. An applicant for a residence permit had a right to access all personal data concerning him, which were processed by the national administrative authorities within the meaning of Article 2(b) of the Directive. For that right to be complied with, it was sufficient for the applicant to be provided with a full summary of those data in an intelligible form, namely, a form which allowed him to become aware of those data and to check that they were accurate and processed in compliance with that Directive so that he could, where relevant, exercise the rights conferred on him by that Directive (see [60] of the judgment); and

c. It was clear from the wording of Article 41 of the Charter that it was addressed not to the Member States but solely to the institutions, bodies, offices and agencies of the European Union. Consequently, an applicant for a resident permit could not derive from Article 41(2)(b) of the Charter a right to access the national file relating to his application (see [67]-[69] of the judgment).

[16] The opinion of Advocate General Sharpston of the CJEU distinguished between the factual information upon which the analysis was carried out (which was personal data) and the legal analysis (which was not). She noted, at para 56:-

> *In my opinion, only information relating to facts about an individual can be personal data. Except for the fact that it exists, a legal analysis is not such a fact. Thus, for example, a person's address is personal data but an analysis of his domicile for legal purposes is not.*[3]

[17] Therefore, the ruling of the CJEU in *YS*, as confirmed by the opinion of the Advocate General, is of particular significance to the complainant's matter. The ruling sets the precedent that an analysis produced by an administrative agency to inform and support the agency's formal decisions is not itself "personal data" as defined under the Directive. It also clarifies: (1) the boundaries of what constitutes "personal data" under EU law and (2) that a data subject's

[3] YS v Minister voor Immigratie, op.cit., para 56.

right of access under the Directive does not necessarily require access to the actual records containing personal data.

[18] The CJEU made clear in paragraph 46 of the judgment that the Directive's purpose is not to extend a right of access to administrative documents. Instead, its purpose is to promote the protection of personal data:

> *… extending the right of access of the applicant for a residence permit to that legal analysis would not in fact serve the directive's purpose of guaranteeing the protection of the applicant's right to privacy with regard to the processing of data relating to him, but would serve the purpose of guaranteeing him a right of access to administrative documents, which is not however covered by Directive 95/46.*[4]

[19] Having reviewed the unredacted copy of the Cabinet Paper, we confirmed that no personal data was present in the undisclosed parts of the document to which the complainant would be entitled. Those undisclosed parts of the Cabinet Paper contain purely legal analysis and no data relating to the complainant.

Do decisions made by the CJEU bind the Office of the Ombudsman?

[20] It is noted that the UK courts, including the Supreme Court and courts of UK British Overseas Territories (BOTs), are not bound by decisions of the CJEU made after 11 pm on 31 December 2020 and are free to depart from decisions made before that time pursuant to the EU Withdrawal Agreement Act (i.e. following Brexit). Nonetheless, the courts will apply the same test the Supreme Court uses when deciding whether to depart from its case law in making such a determination. Accordingly, the relevant UK courts will only deviate from a previous decision of the CJEU where it appears correct to do so and may have regard to the same if appropriate.

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[4] YS v Minister voor Immigratie, op.cit., para 46.

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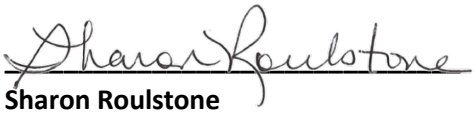
B. FINDINGS AND DECISION

Applying the ruling of the CJEU in YS to the case at hand, the legal analysis used to support the administrative decision of the Cabinet in the Cabinet Paper does not contain the complainant's personal data. Furthermore, legal analysis "cannot of itself" be classed as personal data and is therefore not disclosable under section 8 of the DPA.

As the Data Controllers have provided the complainant with those parts of the Cabinet Paper that contain personal data, the Data Controllers have satisfied their obligations under section 8 of the DPA.

For the reasons explained above, no further actions are required from the Data Controllers to satisfy the obligations they owed to the complainant under section 8 of the DPA. Case # 202000069 is now closed.



Sharon Roulstone
Ombudsman