LEM-V1

IN THE CENTRAL LONDON COUNTY COURT

CASE NO: 3YU22395

B E T W E E N :

DAVID MULCAHY

Claimant

-and-

THE COMMISSIONER OF POLICE FOR THE METROPOLIS

Defendant

JUDGMENT

1. This is a claim brought by Mr David Mulcahy against the Commissioner of Police for the Metropolis in which he alleges that the Defendant has failed to follow the rules of the Data Protection Act of 1998 and supply documents after receiving the £10 payment due.

2. The background to the matter is that Mr Mulcahy first wrote to the Defendant by letter dated 28 June 2011 in which he made a subject access request for a list of information which related to himself concerning his alleged offences and subsequent investigation by officers from the Defendant's force. He claims he was investigated in the period from 1997 to 2003 and that he was convicted on 2 February 2001 of seven charges of conspiracy to rape and five charges of rape for which he received a total sentence of imprisonment of 24 years. At the same time he was convicted on three counts of murder for which he received three life sentences. He remains a prisoner at HM Prison Full Sutton in York.

3. The information he requested was in a nutshell for all the evidence used in his prosecution together with all unused material including photographs, tape recordings or logs, expert witness evidence and any other material relating to himself or the case against him. He did not

initially make the necessary payment of £10 but subsequently did and his request was acknowledged by the Defendant by letter dated 5 September 2011. Under cover of a letter dated 10 November 2011 the Defendant sent to the Claimant the information it was said the Defendant was required to supply together with a copy of the standard police notification under which the data supplied is kept by the Defendant.

4. Mr Mulcahy did not accept that the Defendant had complied with his obligations to provide disclosure and wrote to that effect on 13 November 2011. This was taken by the Defendant as being a request for a review which was conducted and a letter sent to Mr Mulcahy with results dated 2 July 2012. In that he was again advised that he may wish to contact Hertfordshire Police as it appears it was a joint investigation between that police force and the Metropolitan Police. It was accepted on behalf of the Defendant that the information had not been provided within the statutory 40 day period. It was also disclosed that an exhibit list, which should have been disclosed with the original documents, had not been disclosed and a copy was sent to Mr Mulcahy.

5. Mr Mulcahy then took the matter up with the Information Commissioner's office who got in contact with the Information Access Service of the Metropolitan Police. That resulted in an email being sent to the case worker at the Information Commissioner's office on 6 August 2012 that it appears that no search had been made of the HOLMES system which is a system which can be used to capture information generated and/or obtained during a major investigation. It was disclosed that there are six case files of information on that system which if printed would fill 30 archivists' boxes for just one of the case files alone. It was stated that the investigation had been active for many years and as a result had generated voluminous quantities of documents.

6. The view expressed by the case officer dealing with the matter at the Information Commissioner's office concluded that it was unlikely that the Defendant had complied with the requirements of the Data Protection Act because it did not carry out appropriate searches to identify the information to which Mr Mulcahy was entitled. In addition the Metropolitan Police also failed to respond to Mr Mulcahy within 40 days, which is accepted by the Defendant.

7. By letter of 3 January 2013 Mr John Potts, the head of the public access office and deputy data protection officer and freedom of information officer at the Metropolitan Police Service wrote to the Information Commissioner's office again and set out in some detail the basis for the Defendant's refusal under Section 8 (2) of the Data Protection Act 1998 to provide the personal information in the HOLMES database. In essence the reason for that is because it was estimated to take in excess of eleven weeks to read all the held information together with additional time to print it. The estimated volume is in excess of 12,344 pages and it is estimated that allowing two minutes per page to read and make a decision if the information is Mr Mulachy's personal data, it would take a member of staff in excess of 441 hours or eleven weeks to

complete. Although the letter does not say as such, thereafter any redactions would have to be made and the documents then copied again before they could be provided to Mr Mulcahy. If they were to be provided to him in electronic form then they would then have to be scanned to enable that to take place.

8. On 10 April 2013 the Information Commissioner wrote to Mr Potts and informed him of the Information Commissioner's decision that the Metropolitan Police had breached the Data Protection Act by failing to search the HOLMES database when preparing a response to the subject access request made by Mr Mulcahy under Section 7 of the Data Protection Act. However it also communicated its decision to exercise the Information Commissioner's discretion and not to pursue formal regulatory action and no enforcement procedure was initiated against the Defendant.

9. The Information Commissioner's office also confirmed that it fundamentally disagreed with the Defendant's interpretation of the Data Protection Act relating to the provisions and interpretation of Section 8 (2) of that Act. That provides that the obligation to provide information does not have to be complied with if the supply of such copy of the information is not possible or would involve disproportionate effort.

10. Mr Mulcahy then issued these proceedings in the Northampton County Court on 5 December 2013. A defence was filed dated 7 January 2014. The case was then transferred to the York County Court but by application dated 26 March 2014 the Defendant applied to adjourn the case and transfer the proceedings to this court on the grounds that the Defendant would call Mr Potts to give oral evidence whereas the Claimant would have to give evidence by video link in any event and it was therefore immaterial to him in which court the hearing took place. By order made on 27 March 2014 the case was adjourned and transferred to this court for listing.

11. By order made on 12 July 2014 the case was allocated to the small claims track and listed for hearing on 3 November 2014. However that hearing did not proceed because the court was unable to get any reply from Full Sutton Prison where the Claimant is incarcerated. The hearing was adjourned and relisted on 30 March 2015. Unfortunately that hearing was curtailed due to difficulties with the video link at the prison with the result that Mr Mulcahy was only able to commence his submissions when the video link cut out. The case was adjourned part-heard with the Claimant being directed to file and serve further written submissions by 27 April 2015. The Defendant was ordered to file and serve replies by 11 May 2015 although they only reached the judge on 5 June 2015.

12. At the hearing Mr Mulcahy did not give evidence and had not served any written statements in accordance with the directions given. He confirmed at the commencement that he did not wish to do so but that

he did wish to ask Mr Potts some questions and did wish to make submissions, both of which he did.

13. Mr Potts gave evidence and was questioned by Mr Mulcahy and in turn by Counsel who appeared for the Defendant, Mr Hopkins. The court also asked Mr Potts some questions. From that it appears that the contents list only shows that for example a statement existed and it would give the name of the maker of the statement. If there is more than one statement by the same person, it would just list them but would give no indication as to what the statements concerned. He confirmed that the time which would be required for the Defendant to go through the HOLMES database would be very substantial and disproportionate. He said the process would involve the downloading of the database, printing it, reading and checking each document, redacting any third party information then sitting with a senior investigating officer of the case together with the families and the family liaison officers who were assigned to victims, going through the information held on a line by line basis once photocopies had been made of the documents and the redactions made, these would have to be recopied before being passed to the Defendant alternatively rescanned onto the system, put into a file before transferring to a CD for provision to the Claimant. The 23 working days referred to in his witness statement was an estimate of the time that would be required to redact the documents but did not include time spent for example in meetings.

14. In relation to operation HART, which is also referred to in his witness statement this is a research tool and the documents are contained in three four-drawer filing cabinets of research material which is in addition to the documents held on the HOLMES database. Mr Potts confirmed that it could be an additional 23-day exercise alone to redact the information contained in those filing cabinets. He confirmed that if the word HART was typed in search, all the documents would be listed in subdirectories.

15. From the above it is clear that the Defendant accepts that the Claimant made a valid subject access request under Section 7 of the Data Protection Act 1998. The Defendant's case is that it has complied with the request save in respect of the HOLMES database in which the Defendant holds a vast amount of personal information which relates to Mr Mulcahy under the operation name of Marford on the HOLMES database. He confirmed that within Marford there was a mention of the further operation name of HART to which I have already referred.

16. The issue in this case concerns the Claimant's outstanding request made under Section 7 of the Data Protection Act 1998 concerning the information and documents stored on the HOLMES database. The Defendant accepts that that database does contain a substantial amount of personal data on Mr Mulcahy but he relies upon the provisions of Section 8(2) of the Data Protection Act 1998 to resist the Claimant's subject access request.

17. I will now turn to the law and set out the relevant provisions not only of the Data Protection Act 1998, which I will refer to as the Act in this judgment but also to the various authorities to which I have been referred by the parties.

18. Section 1 of the Act defines personal data as meaning data which relates to a living individual who can be identified under

    (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

    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.

19. Data controller means, subject to Section 1(4), a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are or are to be processed. It is accepted that the Commissioner of Police for the Metropolis is the data controller for the Metropolitan Police.

20. Data is defined in Section 1(1) as being information which

    (a) is being processed by means of equipment operated automatically in response to instructions given for that purpose,

    (b) is recorded with the intention that it should be processed by means of such equipment,

    (c) is recorded as part of a relevant filing system with the intention that it should form part of a relevant filing system,

    (d) does not fall within paragraph (a) (b) or (c) but forms part of an accessible record as defined by Section 68, or

    (e) is recorded information held by a public authority and does not fall within any of paragraphs (a) to (d).

21. Section 7 of the Act sets out the right of access to personal data and it provides as follows

    (1) Subject to the following provisions of this Section and to Sections 8, 9 and 9A an individual is entitled that

        (a) To be informed by any data controller where the personal data of which that individual is the data subject are being processed by or on behalf of that data controller.

        (b) If that is the case, to be given by the data controller a description of –

(i) the personal data of which that individual is the data subject,

(ii) the purposes for which they are being or are to be processed, and

(iii) the recipients or classes of recipients to whom they are or may be disclosed.

(c) To have communicated to him in an intelligible form –

(i) the information constituting any personal data of which that individual is the data subject, and

(ii) any information available to the data controller as to the source of those data, and

(d) where the processing by automatic means of personal data of which that individual is the data subject for the purpose of evaluating matters relating to him such as for example his performance at work, his credit worthiness, his reliability or his conduct has constituted or is likely to constitute the sole basis for any decision significantly affecting him to be informed by the data controller of the logic involved in that decision taking.

22. Section 7(4) provides: where a data controller cannot comply with the request without disclosing information relating to another individual who can be identified from that information, he is not obliged to comply with the request unless –

(a) the other individual has consented to the disclosure of the information to the person making the request, or

(b) it is reasonable in all the circumstances to comply with the request without the consent of the other individual.

(5) In (4) the reference to information relating to another individual includes a reference to information identifying that individual as the source of the information sought by the request; and that subSection is not to be construed as excusing a data controller from communicating so much of the information sought by the request as can be communicated without disclosing the identity of the other individual concerned, whether by the omission of names or other identifying particulars or otherwise.

(6) In determining for the purpose of 4(b) whether it is reasonable in all the circumstances to comply with the request without the consent of the other individual concerned, regard shall be had, in particular, to

(a) any duty of confidentiality owed to the other individual,

(b) any steps taken by the data controller with a view to seeking the consent of the other individual,

(c) whether the other individual is capable of giving consent, and

(d) any express refusal of consent by the other individual.

23. Section 7(9) provides: if a court is satisfied on the application of any person who has made a request under the foregoing provisions of this Section that the data controller in question has failed to comply with the request in contravention of those provisions, the court may order him to comply with the request.

24. Section 8 of the Act deals with provisions supplementary to Section 7. Section 8(2) provides: the obligation imposed by Section 7(1)(c)(i) must be complied with by supplying the data subject with a copy of the information in permanent form unless,

(a) the supply of such a copy is not possible or would involve disproportionate effort, or

(b) the data subject agrees otherwise.

And where any of the information referred to in Section 7(1)(c)(i) is expressed in terms which are not intelligible without explanation the copy must be accompanied by an explanation of those terms.

25. The Defendant's case in a nutshell is that the obligation imposed under Section 7(1)(c)(i) cannot be complied with by the Defendant without involving disproportionate effort. That is disputed by the Claimant.

26. I have read with some care the Claimant's final written submissions which amount to some six typed pages with some five exhibits. The first three pages of the submissions relate to issues of disclosure of information in criminal proceedings and to the Criminal Procedure and Investigations Act of 1996 and the Code of Practice under Part 2 of that Act which incorporates the Attorney General's guidelines. It also concerns the responsibilities of investigators and disclosure officers as well as prosecutors, it governs the issue of retention of material and the issue of disclosure in criminal proceedings as well as a reference to Article 6 of the European Convention on Human Rights. In addition he refers to the amendment of the Criminal Procedure and Investigations Act of 1996 by the Criminal Justice Act of 2003. Mr Mulcahy then moves on to the decision of the Information Commissioner's office in this case and the determination made that the Defendant had breached the provisions of the Data Protection Act of 1998 but that no enforcement proceedings would be taken in the circumstances. The Information Commissioner's office also disagreed with the interpretation of the Defendant of the provisions of Section 8 (2) of the 1998 Act.

27. From Mr Mulcahy's written submissions it became plain for the first time that he seeks these documents to enable him to mount an appeal against his conviction and sentence in 2001. He refers to an article by Louise Shorter concerning the case of Eddy Guilfoil from 1992 in which he says evidence was kept hidden for twenty years. He also refers to an article on the Metropolitan Police Service's corruption and the shredding of a lorry load of evidence revealed in the Macpherson enquiry of 2003 and the subsequent Ellison review of 2003.

28. Mr Mulcahy has also produced a letter to himself from Professor D V Cantor a professor of psychology at the University of Liverpool dated 26 January 2006. In that Professor Cantor informs Mr Mulcahy that the interviews with John Duffy were carried out, he was told, by the senior investigating officer in the case and that Professor Cantor was told that officer has, the word "them" is omitted from the letter, within his personal possession which is why Professor Cantor thought that they might have been disclosed at Mr Mulcahy's trial. Professor Cantor also said that he has been told that the officer is not willing to make the tapes available to anyone. That does not appear to have any direct relevance to the case before this court.

29. Mr Mulcahy has also produced a copy of the decision of Lord Justice Ward in which he granted permission to appeal to a Mr Ezsias who had sued the Welsh Ministers alleging they failed to comply with a subject access request for personal data made by him under the provisions of Section 7 Data Protection Act of 1998. Lord Justice Ward granted permission to appeal but it seems the appeal was never pursued or heard. I am conscious and remind myself that decisions made granting or refusing permission to appeal are not binding and the judgment of His Honour Judge Higginbottom, as he was then, sitting as an additional judge of the High Court on 22 November 2007 in that case reported at **[2011] 1 Info Law Report at page 35** remains good and is binding upon this court.

30. Mr Mulcahy also provided a copy of the transcript of the decision on **Regina v B [2012] EWCA Civ page 414**, a decision of the Court of Appeal given on 29 February 2012. The judgment was by the Lord Chief Justice of England and Wales, Lord Judge.

31. That case concerned the issue of new and compelling evidence within the meaning of the Criminal Justice Act of 2003 in which the court held that evidence that had not been adduced at a criminal trial was new evidence within the meaning of that Act. That may be of assistance to Mr Mulcahy in relation to any future appeal but it is not the directly relevant to the court's decision in this case which solely concerns the provisions of the Data Protection Act 1998.

32. Mr Mulcahy also produced a copy of The Times Law Report of 4 December 2014 in the case of **Regina (Chief Constable of the West Yorkshire Police) v The Independent Police Complaints Commission** in which it was held that the function of the Independent

Police Complaints Commission when a complaint against a police officer was referred to it was to decide whether the officer had a case to answer and not to make findings that he was guilty of misconduct of a criminal or disciplinary nature. Again it is not clear what direct relevance that decision has to the issues currently before this court.

33. The last two items provided by Mr Mulcahy were firstly a copy of a newspaper report entitled 'Top judge in challenge to government over legal aid' which was a reference to a decision made by the President of the Family Division, Lord Justice Munby concerning lack of legal aid in family cases. Lastly there was a copy of another Times Law Report from 15 December 2014 which was a synopsis of a decision of the Supreme Court concerning rehabilitation as a purpose of indeterminate prison sentences in the case of **Regina (Kaiyam) v Secretary of State for Justice and Others**. That decision is not relevant to the issue of liability under the 1998 Act.

34. The court was referred to various authorities by Mr Hopkins of Counsel on behalf of the Defendant. The first is **Durrant v Financial Services Authorities** reported at [2011] 1 Info Law Reports 1 which was a decision of Lord Justice Auld in the Court of Appeal. There the Claimant had made a data access request under the provisions of Section 7 of the 1998 Act. In his judgment Lord Justice Auld held that the 1998 Act was enacted, in part, to give effect to Directive 95/46/EC 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, which I will refer to as the 1995 Directive. He held that it should therefore be interpreted, so far as possible in the light of and to give effect to, the Directive's provisions. He cites the decision of Lord Phillipps of Worth Matravers MR in **Campbell v MGN [2003] QB 633** in the Court of Appeal where at paragraph 96 of his judgment he held:

> "In interpreting the Act it is appropriate to look to the Directive for assistance. The Act should, if possible, be interpreted in a manner that is consistent with the Directive. Furthermore, because the Act has in large measure adopted the wording of the Directive, it is not appropriate to look for the precision in the use of language that is usually to be expected from the parliamentary draughtsman. A purposive approach to making sense of the provisions is called for."

35. Lord Justice Auld continued by saying:

> "The primary objective of the 1995 Directive is to protect individuals' fundamental rights, notably the right to privacy and accuracy of their personal data held by others 'data controllers' in computerised form or similarly organised manual filing systems whilst at the same time facilitating the free movement of such data between member states of the European Union."

He continued in paragraph 6 of his judgment:

> "The purpose of the 1998 Act was to provide for the regulation of the processing, including the obtaining, holding, use and disclosure by data controllers of personal data held or to be held electronically or, if held in manual files, as part of a relevant filing system, all as defined in Section 1 subSection 1 of the Act."

He then sets out the provisions of Sections 7 and 8 of the Act which I have already referred to in this judgment.

36. In this case the Defendant appears to concede that the subject access request made by Mr Mulcahy under Section 7 of the DPA 1998 does relate to or include personal data within the meaning of Section 1(1) of that Act so as to entitle Mr Mulcahy to its disclosure under Section 7 (1) of the Act. In paragraph 27 of his judgment, Lord Justice Auld held as follows:

> "In conformity with the 1981 Convention and the Directive, the purpose of Section 7, in entitling an individual to have access to information in the form of his personal data is to enable him to check whether the data controller's processing of it unlawfully infringes his privacy and, if so, to take such steps as the Act provides, for example in Sections 10 to 14, to protect it. It is not an automatic key to any information, readily accessible or not, of matters in which he may be named or involved. Nor is it to assist him for example to obtain discovery of documents that may assist him in litigation or complaints against third parties. As a matter of practicality and given the focus of the Act on ready accessibility of the information – whether from a computerised or comparably sophisticated non-computerised system – it is likely in most cases that only information that names or directly refers to him will qualify. In this respect, a narrow interpretation of personal data goes hand in hand with a narrow meaning of a relevant filing system and for the same reason (see paragraphs 46 to 51 below). But ready accessibility although important is not the starting point."

37. Lord Justice Auld referred to the decision of the European Court in criminal proceedings against Lindquist, case C-101/01 (6 November 2003) in which the court held, at paragraphs 27, that personal data covered the name of a person or identification of him by some other means for instance by giving his telephone number or information regarding his working conditions or hobbies.

38. In paragraph 31 of his judgment Lord Justice Auld held that Mr Durrant could not succeed on his application and that his claim was

> "a misguided attempt to use the machinery of the Act as a proxy for third party discovery with a view to litigation or further investigation, an exercise, moreover, seemingly unrestricted by considerations of relevance. It follows that much of Mr Durrant's complaint about redaction of other individuals' names and details falls away, regardless of the outcome of the correct application of the

provisions of Section 7(4)(2)(6) for protection of the confidentiality of other individuals."

39. This court has seen none of the documents or personal data either disclosed or not disclosed by the Defendant and is accordingly not in a position to form any view about it. In view of the nature of the investigation and the lengthy period of time over which it was conducted, it is reasonable to suppose that others will be referred to within the records as part of the investigation. It is also probably reasonably safe to assume that reference to them may not constitute data which relates to the Claimant. It is impossible to say whether any of it will do so so as to fall within the meaning of personal data in Section 1 (1) of the Act.

40. It is clear that the Defendant would have to consider in respect of each piece of personal data whether it contained information identifying another individual as the source of information sought by the Claimant and, if so, the data could be provided with the omission of the name or other identifying particulars of that individual. Clearly the data controller has to have regard to any duty of confidentiality owed to the other individual, any steps taken by the data controller with a view to seeking the consent of the other individual, whether the other individual is capable of giving consent and any express refusal of consent by the other individual. The convictions of Mr Mulcahy apparently relate to three convictions for rape and five convictions for conspiracy to commit rape. As Mr Mulcahy is protesting his innocence of these crimes, the court must assume that the victims gave evidence at his trial and that he pleaded not guilty to these offences. No information is available to this court as to whether they were permitted to give evidence behind a screen or any other special provisions or arrangements made. The court therefore is not in a position to form any view as to whether it would be reasonable for the data controller to either seek the consent of any of those victims or not. Any disclosure which might lead to Mr Mulcahy being able to identify their present whereabouts would clearly be relevant to the issue as to whether the data controller cannot comply with the request without disclosing information relating to another individual who can be identified from that information. Lord Justice Auld in paragraph 65 of his judgment in **Durrant**, having referred to the two-stage thought process that Section 7 (4) contemplates held as follows;

> "The first is to consider whether information about any other individual is necessarily part of the personal data that the data subject has requested. I stress the word necessarily for the same reason that I stress the word cannot in the opening words of Section 7 (4), 'where a data controller cannot comply with the request without disclosing information about another individual who can be identified from the information'. If such information about another is not necessarily part of personal data sought, no question of Section 7 (4) balancing arises at all. The data controller, whose primary obligation is to provide information, not documents, can, if he chooses to provide that information in the form of a copy

document, simply redact such third party information because it is not a necessary part of the data subject's personal data."

41. In paragraph 65 he continues;

> "The second stage, that of Section 7 (4) only arises where the data controller considers that the third party information necessarily forms part of the personal data sought. .... Equally where the third party is the source of the information, the data subject may have a strong case for his identification if he needs to take action to correct some damaging inaccuracy, although here countervailing considerations of an obligation of confidentiality to the source or some other sensitivity may have to be weighed in the balance. It should be remembered that the task of the court in this context is likely to be much the same as that under Section 7 subSection 9 in the exercise of its general discretion whether to order a data controller to comply with the data subject's request. In short, it all depends on the circumstances whether it would be reasonable to disclose to a data subject the name of another person figuring in his personal data, whether that person is a source, or a recipient or likely recipient of that information, or has a part in the matter the subject of the personal data. Beyond the basic presumption or starting point to which I referred in paragraph 55 above, I believe that the courts should be wary of attempting to devise any principles of general application one way or the other."

42. It is accordingly a matter for the data controller to consider in respect of each particular piece of personal data which encloses information about or includes reference to third parties who have a part in the matter the subject of the personal data. The identity of the Claimant's victims will have been known to him at his trial. What appears to be Mr Mulcahy's intention in making this subject access request is to see if there is any undisclosed material of which he is not aware and presumably also to find out the names of any other witnesses who were not relied upon by the prosecution and whose evidence was not disclosed to the defence as unused material. That of course is a different test to that set out in the provisions of the 1998 Act.

43. The Defendant submits that he cannot comply with the Claimant's subject access request without disclosing information relating to other individuals who can be identified from that information. He submits that he is not obliged to comply with the request in the absence of the consent of that other person or if the data controller considers it reasonable in all the circumstances to comply with the request without the consent of the other individual. The request relates to proceedings which concluded some fourteen years ago. Mr Mulcahy seeks these documents which he accepts were largely, although possibly not wholly, disclosed in the course of his criminal proceedings. As such he will have had access to them and no doubt his solicitors and Counsel had possession of them at one time. Mr Mulcahy's right to have such documents disclosed to them in the course of his prosecution and at his

trial is not what is in issue in these present proceedings. The purpose of the Data Protection Act is not to further litigation which must include any application for permission to appeal. That does not mean that none of the personal data of the Claimant held by the Defendant cannot be disclosed to him provided the provisions of Section 7(4) of the 1998 Act do not apply.

44. It should be noticed in neither of his witness statements does Mr Potts deal with this issue and so there is no direct evidence before the court that it is the decision of the data controller that he cannot comply with the request without disclosing information relating to another individual who can be identified from that information. In such circumstances and in the absence of evidence, the court is not in a position to make a decision on that point and for that reason alone declines to do so.

45. The focus of the defence of the Defendant is on Section 8 (2) which provides that the obligation imposed by Section 7(1)(c)(i) must be complied with by supplying the data subject with a copy of the information in permanent form unless (a) the supply of such copy is not possible or would involve disproportionate effort. It is to that issue that Mr Potts' witness statements, and in particular his first witness statement, are directed.

46. Section 7 (2) of the 1998 Act provides that a data controller is not obliged to supply any information under (1) unless he has received (a) a request in writing and (b) except in prescribed cases such fee not exceeding the prescribed maximum as he may require. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 set the appropriate limit in paragraph 3 which, in the case of a public authority the appropriate limit is £450. Regulation 4 concerns the estimating of the cost of complying with the request and subparagraph 3 thereof provides that in a case in which this Regulation has effect, a public authority may, for the purpose of its estimate take account only of the costs it reasonably expects to incur in relation to the request in (a) determining whether it holds the information, (b) locating the information or a document which may contain the information, (c) retrieving the information or a document which may contain the information, and (d) extracting the information from a document containing it. Under Regulation 4 there is provision that to the extent to which any costs which a public authority takes into account or attributable to the time which persons undertaking any of the activities mentioned in paragraph 3 on behalf of the authority are expected to spend on those activities, those costs are to be estimated at the rate of £25 per hour.

47. From this it is quite clear that on the basis of Mr Potts' evidence the cost of the Defendant in complying with the Claimant's subject access request would far exceed the maximum of £450. Accordingly the Defendant as the data controller for the Metropolitan Police Force would not be required to provide the information to the Claimant requested in the subject access request.

48. I now turn to the main thrust of the Defendant's case which is that the provisions of Section 8 (2) of the 1998 Act apply and that the supply of the information requested by the Claimant would involve disproportionate effort. I have already set out the various steps that would be required to be taken by the Defendant in order to comply with the Claimant's subject access request. This matter was considered by His Honour Higginbottom sitting as an additional judge of the High Court in the case of **Ezsias v The Welsh Ministers** where he dealt with the matter in paragraphs 95 to 97 of his judgment in which he held that the steps taken by the National Assembly in response to the Claimant's request for access to data were eminently reasonable and proportionate. It is right to note that the Claimant in that case accepted that the documents that he sought in his action against the Welsh ministers for the purpose of progressing his employment claim in the Employment Tribunal would be discloseable in the course of that claim in any event and the decision must be considered in that context.

49. In this case the Office of the Information Commissioner has expressed a view that the Defendant has failed to comply with his obligation under Section 7 (4) of the Act and clearly does not consider the steps taken to date by the Defendant to ascertain in broad terms the nature of the information on the HOLMES computers together with the steps that will be required if the information is to be provided to the Claimant in a redacted form. The Claimant relies upon this view in bringing these proceedings before the court. In expressing that view the Information Commissioner's office has relied upon the legal guidance referred to in the emails dealt with in the early part of this judgment. However it is right that the court should note that the guidance issued by the Information Commissioner's office is only guidance and is not binding on the court. This was a point taken by and accepted by His Honour Judge Behrens sitting in the Leeds County Court in a decision of **Keith Martin Elliott v Lloyds TSB Bank PLC trading as Lloyds TSB Corporate Markets and Another [2012] 2 Info LR** at page 69. In that judgment His Honour Judge Behrens relied upon the decision of Judge Higginbottom in **Ezsias** and in particular in a passage starting at paragraph 95 of that judgment in which Judge Higginbottom held that 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.

50. In paragraph 95 of his judgment Judge Higginbottom dealt with Section 8 (2) of the 1998 Act and set out the then guidance of the Information Commissioner on the meaning of disproportionate effect. That guidance was amended in the light of the decision of Judge Higginbotttom but Judge Behrens found in paragraph 17 of his judgment that he had some difficulty in following the final paragraph which he cited from that guidance. He remarked that the obligation was to supply information (Section 7 (2) and 8 (2) and to be informed (Section 7(1)). He said no doubt the data controller will have to carry out searches in order to comply with the obligation but to his mind the obligation to carry out

searches is part and parcel of the obligation to supply the information or to inform the individual. In those circumstances it would seem to him that the reference to disproportionate effort in Section 8 (2) includes a reference to the search.

51. When applied to the facts of this present case, the emphasis is actually slightly different. In this case the Commissioner has carried out sufficient work to ascertain the nature, level and extent of the information held on the HOLMES database but had confirmed that in order to provide the information to Mr Mulcahy would involve the Defendant in undertaking disproportionate effort which is reflected in the amount of time that would be required to deal with the matter.

52. I accept that on the facts of this particular case, the balance between the time spent in conducting the search and the time spent in complying with the request and the provision of redacted materials is very different from that in the position of Ezsias. In this case it is not the conducting of the search which has required disproportionate effort but the supplying of the data subject with a copy of the information in permanent form. I am satisfied that for the Commissioner to comply with the request on the facts of this particular case would involve disproportionate effort to a very substantial degree. It must follow that the Defendant is not obliged to comply with the request and accordingly is not in breach of his obligations under Section 7 of the 1998 Act.

53. That leaves that issue as to whether, if I am wrong about that and the Defendant has failed to comply with the request in contravention of the provisions of Section 7 of the Act, the court should order him to comply with the request. This is governed by the provisions of Section 7(9) of the Act which provides that:

> "If a court is satisfied on the application of any person who has made a request under the foregoing provisions of this Section that the data controller in question has failed to comply with the request in contravention of those provisions, the court may order him to comply with the request."

The issue as to the extent of the court's discretion under Section 7 subSection 9 has been the subject of consideration by the courts in paragraph 4 of the decision of Lord Justice Auld in **Durrant** who referred to the observations of Munby J, as he then was, in **R (Lord) v Secretary of State for the Home Department [2011] 1 Info LR** at page 239 that the discretion conferred by the provision under Section 7 (9) is general and untrammelled. Lord Justice Auld also considers that view is supported by the observation of the European Court at paragraphs 83 and 88 of its decision in criminal proceedings against Lindquist.

54. In Elliott, His Honour Judge Behrens concluded that having determined that the Defendant had carried out a reasonable and proportionate search, he declined to order a further search as requested by the Claimant.

55. I was referred to a recent decision by Mr Justice Dingemans in the case of **Kololo v Commissioner of Police for the Metropolis** the neutral citation for which is **[2015] EWHC 600 (QB)** judgment having been delivered on 9 March 2015. In that case Mr Kololo had been convicted on 29 July 2013 of robbery with violence and kidnapping after a trial at Lamou Magistrates' Court in Kenya. He was sentenced to death but it seemed there was a de facto moratorium on the carrying out of the death penalty in Kenya. Mr Kololo was appealing against his conviction and sentence on a number of grounds. As the kidnapping had been of British nationals, the Metropolitan Police Service deployed police officers and others to Kenya and Detective Superintendant Hibbert made a witness statement dated 19 June 2012 in the course of proceedings and gave evidence at Mr Kololo's trial.

56. Mr Kololo then acting through his lawyer in Kenya, instructed lawyers to act on his behalf in London. Data subject access requests were made to the Home Office, Foreign and Commonwealth Office and the Metropolitan Police Service in connection with proposed judicial review proceedings. The Home Office and the Foreign and Commonwealth Office provided data pursuant to those requests but the Metropolitan Police Service refused to do so. No judicial review proceedings were pursued against the Metropolitan Police Service. A further subject access request was made and received by the Metropolitan Police Service on 14 August 2014. The request sought all records relating to Mr Kololo and made clear the information was urgently required as it could prove crucial to his case and be used to avoid a death sentence being carried out. The main issue in that case was whether the making of the subject access request is an abuse of process and whether the court ought, as a matter of discretion pursuant to Section 7(9) of the Data Protection Act, refuse to direct the Commissioner to comply with the subject access request because it was made for an improper purpose. The learned judge held that the making of the subject access request in that case was not an abuse of process. He confirmed that had he found it to be an abuse of process by reason of the Crime (International Cooperation) Act 2003, he would have refused to order compliance as an exercise of discretion. The learned judge accepted that the purpose for which Mr Kololo made the subject access request is to determine whether there are inaccuracies in the data and, if the data is not accurate, he or his legal representatives may seek to correct any inaccuracies in the data. The judge held that that might, depending on the inaccuracies, be of assistance to Mr Kololo for his other purposes. He also held that correcting inaccuracies in data is a proper statutory purpose which appears from the statutory rights set out in Section 14 of the Act to rectification of data. He also held that given that Mr Kololo had been sentenced to death, ordering the Commissioner to comply with the subject access request was proportionate.

57. The facts of that case are so specific that they do not assist in the determination of this case save to confirm that the court's discretion under Section 7(9) of the Act is general and untrammelled but also that it

should be exercised to give effect to the statutory purposes of the Data Protection Act and to be proportionate.

58. In this case I am satisfied that the provision of the data requested by Mr Mulcahy would be disproportionate both as to its amount and as to the disproportionate effort that would be required to obtain it and put it in permanent form to provide to Mr Mulcahy. As such it would not be in accordance with the purpose of the Data Protection Act in that the data controller is relieved from complying with the subject access request where the provisions of Section 8(2) of the Act apply.

59. It must follow from the findings made above that the Claimant's claim cannot succeed. If I am wrong about that, I will deal very briefly with the issue of damages. The claim is limited to £5,000 in order to bring it within the then small claims limit in the county court. In view of the sentence which Mr Mulcahy is serving, it cannot be said that he would be entitled to recover anything more than nominal damages and indeed he has not sought to do so. The fact that he has placed no evidence other than what is in the claim form and the attachments to it before the court results in their being no evidence of any actual damage suffered by the Claimant and so the court could only award nominal damages.

60. Accordingly the claim will be dismissed.

Dated this day of 2015

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DISTRICT JUDGE LANGLEY