

THE CIRCUIT COURT

RECORD NO: 1316/2011

BETWEEN

BUS ÁTHA CLIATH/DUBLIN BUS

APPELLANT

AND

DATA PROTECTION COMMISSIONER

RESPONDENT

Judgment of Her Honour Judge Jacqueline Linnane delivered this 5th day of July, 2011

This is an appeal by Dublin Bus (DB) under s. 26 of the Data Protection Acts (DPA) 1998-2003 against a decision of the Data Protection Commissioner (DPC) made on 25th January, 2011 following an investigation to issue an Enforcement Notice regarding the failure by Dublin Bus to comply with an access request made by a Data Subject (Mrs. McGarr) in relation to CCTV footage which it held and had recorded on a bus on which the Data Subject was travelling in October, 2008.

The background here is as follows:

The Data Subject was travelling on a bus on 3rd October, 2008 and she claims that she fell down the steps of the bus while going upstairs. An application to PIAB was made on 19th October, 2009 which was required before the institution of any proceedings for personal injury. Dublin Bus was informed of such an application and following a request by her solicitor, Dublin Bus arranged for her solicitor to view the CCTV

footage on 29th January, 2010. This was followed up by an access request from the Data Subject received on 12th February, 2010 and the response of CIE Group Investigation Department on 16th February, 2010 was that all documents and records in the office are prepared in contemplation of litigation and their files fall within legal professional privilege.

Her solicitor then made a complaint to the DPC on her behalf on 13th April, 2010 and the DPC investigated the matter. The response of Dublin Bus to the DPC on 31st May, 2010 was that an application had been made to PIAB and that the CCTV footage was preserved/downloaded solely for the purpose of the defence of any litigation arising from the incident which had taken place on its bus on 3rd October, 2008 and accordingly was privileged even if no proceedings had been issued at that stage. A Plenary Summons was issued on behalf of the Data Subject against DB on 23rd June, 2010 and a Defence was delivered on 1st October, 2010. By letter of 14th April, 2011 Mrs. McGarr's solicitor sought discovery from DB of various documents, including the CCTV footage in question.

It is not disputed that the CCTV footage would come within an application for discovery of documents in the litigation. It was also not disputed by DB in the course of the investigation of the complaint by the DPC that the CCTV footage constituted personal data within the meaning of the DP Acts. In this regard s.1 (1) defines "*personal data*" as meaning data relating to a living individual who is or can be identified either from the data or from the data in conjunction with other information that is in, or is likely to come into, the possession of the data controller. Moreover Kelleher's book on Privacy and Data Protection Law in Ireland at pp. 146 and 147 would confirm this wherein reference is made to the view of the Article 26 Working Party and the case of *Campbell v. MGN 2002 EWHC 499* – at para 8.50 of Kelleher's book it states:

“Only if a controller cannot identify an individual caught on CCTV and it is not likely that he will come into possession of information that would enable him to make that identification can it be said that data derived from the CCTV is not personal data.”

The DPC took into account the argument advanced by DB before making his decision- namely the question of privilege, the clear intention by virtue of the application to PIAB of bringing a personal injuries action by the Data Subject and the subsequent issuing of a Plenary Summons and that the Data Subject was trying to usurp the function of the Court by obtaining documents for the purpose of her litigation through the DPA when this should more appropriately be dealt with by the Court.

These are the grounds set out in the Affidavit supporting the Notice of Appeal but Dublin Bus sought to broaden the grounds of its appeal before this Court and this Court ruled that as Dublin Bus is claiming that the decision of the DPC was wrong, it was confined to the grounds it advanced to the DPC during the course of his investigation and before the DPC made its decision resulting in the Enforcement Notice which issued.

The Enforcement Notice was issued as the DPC decided that Dublin Bus was in contravention of s. 4(1) of the Acts in failing to comply with an access request made by the Data Subject. The DPA were enacted to give effect to Directive 95/46/EC and the primary purpose was to protect fundamental rights- being the right to privacy regarding the processing of personal data and to check the accuracy of one’s personal data held by others.

Section 4 deals with the right of an individual to access to personal data processed by a data controller relating to the individual. However, s.s. 9 of s. 4 provides that the obligations imposed by s.s. (1)(a)(iii) inserted by the Act of 2003 of this section shall be complied with by

supplying the Data Subject with a copy of the information concerned 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.

This provision does not apply in this instance and no argument has been advanced that it does. Accordingly Counsel for the DPC argues that the *Durant* case hereinafter referred to and upon which Dublin Bus relies is irrelevant as the UK Data Protection Act of 1998 gives the Court discretion as to whether to direct access to such data.

Section 5(1) provides certain exceptions to the right of access given in s. 4 in that it does not apply inter alia to personal data (g) in respect of which a claim of privilege could be maintained in proceedings in a court in relation to communications between a client and his professional legal advisers or between those advisers.

Counsel for the DPC argues that DB by allowing an inspection of the CCTV footage to the data subject/her solicitor thereby waived any privilege it claimed and in addition even if it was not waived DB does not come within the exception provided at s. 5(1)(g) referred to above. Mr. O' Herlihy on behalf of DB argues that the CCTV footage is a document for discovery, it exists in anticipation of litigation and was prepared with a view to communicating with him (although not yet communicated or transmitted to him) and that as the Data Subject's request is tied in with her litigation if this Court finds in favour of the DPC the whole concept of litigation will change and it will constitute an interference by the DPC with the role of the court in dealing with litigation, and that the High Court by reason of the litigation has seisen.

Counsel for the DPC makes the point that there is no provision in the DPA which precludes a Data Subject from exercising their right to access personal data thereunder to which they are entitled to because they are litigating before the Court. In relation to the *Durant* case relied upon by DB, Counsel for the DPC points out there is a distinction between the legislation here and the English legislation, which in respect of the latter applies a test of reasonableness and gives the Court a statutory discretion as to whether to direct access to such data.

In the case of *Durant v. Financial Services Authority 2003 EWCA Civ 174* Mr. Durant sought information relating to an investigation by the Financial Services Authority (FSA) of his complaints against Barclays Bank. He sought disclosure of information he claimed to be personal data relating to him held by the FSA under s. 7 of the Data Protection Act, 1998. He had been provided with some disclosure but sought more. He had litigated against Barclays but this had been dismissed in 1993. He made his requests in 2001. As stated he obtained disclosure of some information but his further requests for information held on manual files were refused on the basis that it was not personal data as defined by the Act. As the judgment indicates he did not get to first base in his claim against the FSA. In the Court of Appeal Auld LJ stated:-

“It is information about his complaints and the objects of them, Barclays Bank and the FSA respectively. His claim is 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.”

In addition s. 7(9) of that Act gives the Court discretion as to whether to grant an order for access under that section.

With regard to the other case relied upon by Counsel for Dublin Bus- *Ezsias v. The Welsh Ministers 2007 EWHC B15 QB*. In that case Mr. Ezsias brought tribunal proceedings against his former employer, the NHS Trust, claiming unfair dismissal. During the course of that case he made a number of access requests for documents from the National Assembly of Wales. Some documents were released but others were withheld. It was clear his access requests were tied to and were to be employed for his separate ongoing legal proceedings and to assist him in same. At the time judgment was given he had sought disclosure of the same documents in the course of his tribunal proceedings and these would be available to him in those proceedings. An enormous amount of documents had been generated related to his complaints, not to him. It was held that the information generated by the complaint was not personal data as defined by the Act. Mr. Ezsias also had complained to the Ombudsman about the manner in which the National Assembly responded to his complaints.

In referring to the *Durant* case Hickinbottom J. in his lengthy judgment states that the information generated by these complaints is no more Mr. Ezsias's personal data than the information generated by the complaints made by Mr. Durant and access to that material could not possibly be necessary for or even relevant to any protection of the complainer's privacy. Paragraph 66 "*The purpose of the Act is to protect that privacy. To use the provisions of the Act to seek disclosure of documents generated as the result of the applicant's own complaint, in order to further a legal claim of the applicant against a third party is a legal abuse.*"

It is clear therefore that the decisions reached in the above cases held that the information sought was not personal data as defined by the Act and that the legislation in the UK gives the court discretion as to

whether to order access. Furthermore, Counsel for the DPC makes the point that there are no exemptions from the right of access where civil legal proceedings are contemplated or ongoing. This mirrors a document entitled “*Data Protection Technical Guidance- subject access requests and legal proceedings*” issued by the Information Commissioner’s Office in the UK. It goes on to state that in practice, subject access rights are often used by individuals who are in dispute with the data controller.

“In many cases, they may intend to begin or have already begun legal proceedings against the data controller and see s. 7 as a way of obtaining additional information to assist in such proceedings.

*It has been suggested that recent case law, and in particular *Durant v. FSA 2003 EWCA Civ 1746*, provides authority for data controllers to refuse to comply with a subject access request where the applicant is contemplating or has already begun legal proceedings.*

The Commissioner does not accept this proposition. He takes the view that failing to comply with a subject access request in such circumstances will, unless an exemption under the Act applies, amount to a breach of the Sixth Data Protection principle. The right of subject access is one of the cornerstones of Data Protection legislation. If a data controller were able to avoid complying with a subject access request in circumstances where the data subject was contemplating or had begun legal proceedings it would seriously undermine this fundamental right.

However the courts do have discretion as to whether to grant an order under s.7 (9) and may be reluctant to exercise that discretion where it is clear that the purpose of the request is to fuel separate legal proceedings and, importantly, where the discovery

rules under the Civil Procedure Rules would provide a more appropriate route to obtaining the information sought.”

In summary therefore it is clear in this case DB does not come within the privilege exception provided for in Section 5(1)(g) of the DPA and the U.K. DPA of 1998 is distinct from our legislation in that it confers a discretion on the Court as to whether to grant an order for access. Accordingly, in all the circumstances here I am dismissing this appeal.

*Jacqueline
Kane*