

Are oral hearings in the ODPC's future?

Fintan Lawlor, Partner at Lawlor Partners Solicitors, highlights a current significant data protection complaint case and explains what it could mean for the DPC's power to conduct oral hearings

Lawlor Partners is currently acting for an aggrieved data subject in judicial review proceedings arising out of the Office of the Data Protection Commissioner's ('ODPC') refusal to conduct an oral hearing, in circumstances where it was unable to resolve a conflict of facts based on the documentary evidence submitted in connection with a complaint.

The applicant issued judicial review proceedings on foot of the Commissioner's refusal to conduct an oral hearing. The legal issue centred on whether there is an obligation on the ODPC to conduct an oral hearing to resolve an allegation of verbal disclosure. The argument put forward was that a full and proper investigation was not carried out.

Specifically, the applicant's argument was that the refusal to conduct an oral hearing was a breach of their right to fair procedures. The applicant also sought an 'order of mandamus' (forbearance command) directing that the ODPC conduct an oral hearing in relation to the applicant's complaint.

The applicant's position

Counsel for the applicant referred to the Data Protection Acts 1988 & 2003 ('DPAs'), the 1981 Convention, the Data Protection Directive (95/46/EC) and various case law in putting forward their argument. Section 10 of the 1988 Act, as amended by Section 11 of the 2003 Act, sets out the Commissioner's role in the investigation of data breaches. It states that the Commissioner may carry out such investigations as she considers appropriate in order to ensure compliance with the provisions of the DPAs.

Counsel for the applicant referred to the role of the authorised officer in the course of an investigation. It was submitted that in investigating complaints, the Commissioner has a discretion which includes a power to conduct oral hearings if the Commissioner forms the view that such oral hearings are necessary to perform its duties under data protection legislation. Section 10 (1) (a) of the 1988 Act bestows a wide discretion on the Commissioner in relation to the form and conduct of its investigations. The Commissioner may carry out such investigations as she considers appropriate.

Counsel for the applicant proposed that an oral hearing is still permissible even when the legislation is silent the issue. Supporting this perspective, courts have in the past imposed obligations beyond the scope of the relevant statutory regimes in order to satisfy the requirements of fair procedure.

Counsel for the applicant referred to *The State (Boyle) v The General Medical Services (Payment) Board* [1981] ILRM 14 which is authority for the proposition that an oral hearing may be required even in circumstances where the legislation governing the administrative process involved does not provide for oral hearings.

In *Mooney v AN Post* [1998] 4 R 288 the Supreme Court held that an oral hearing may be mandated in the absence of legislation requiring one if the requirements of natural and constitutional justice mandate it. Again, in *Greenstar Limited v Dublin City Council & Ors* [2009] 3 IR 510, the High Court held that an oral hearing may be required, notwithstanding that the legislation does not require one. In *Lyons & Murray v Financial Services Ombudsman & Bank of Scotland PLC* [2011] IHEC 454, Hogan J accepted that the appellants could not realistically hope to establish the underlying merits of their case without an oral hearing. The Court referred to the numerous decisions of the High Court involving challenges to the Financial Services Ombudsman's failure to hold oral hearings.

Counsel for the applicant submitted that an oral hearing will be required where:

- there are unresolved conflicts of fact in respect of any matter material to a ruling and if such ruling could adversely affect a party, those conflicts of fact should be resolved by an oral hearing; and
- in order for there to be an oral hearing, the conflict of fact must be a material conflict that could result in an adverse finding against the affected party.

The DPC's position

Counsel for the ODPC argued that the applicants had not exhausted all other options prior to issuing judicial review proceedings.

Prior to the High Court granting the applicant permission for judicial review, the Commissioner had already concluded that she could not make a finding on the basis of verbal disclosure (the basis on which the review procedure was granted). Counsel for the Commissioner argued that there was an alternative statutory route that the applicant could have pursued rather than issuing judicial review proceedings, namely an appeal under Section 26 of the DPAs.

Under section 26 of the DPAs, appeals can be made to the Circuit Court against:

- a requirement specified in an information notice;
- a requirement specified in an enforcement notice;
- a prohibition specified in a prohibition notice;
- a refusal by the Data Protection Commissioner to accept an application for registration, or for renewal of registration, or for an amendment of registration details; and
- a decision of the Data Protection Commissioner in relation to a complaint by an individual.

Appeals to the court must normally be made within 21 days from the service of the notice, or from the date of receipt of the refusal or decision. The decision of the court is final, although an appeal against the Court's decision may be brought to the High Court on a point of law.

Counsel for the applicant argued that the judicial review proceedings were not based on an appeal of the Commissioner's decision, but rather a question of law in relation to the Commissioner's refusal to hold an oral hearing in the course of an investigation. Counsel for the ODPC responded that there was no authority for the proposition that an oral hearing is still permissible even when the legislation is silent on the issue. In addition, they argued that even if there was power to hold an oral hearing, an oral hearing

was not necessary or appropriate in this situation.

Counsel for the ODPC sought to draw an analogy with the procedures employed by the Financial Services Ombudsman, which may decide of his own accord to call an oral hearing and/or either party to a complaint may request an oral hearing.

by this decision is insignificant. The majority of the complaints received by the ODPC deal with documentary breaches which have a paper trail, and can be investigated without the necessity to hold an oral hearing. It is only in circumstances where there has been a verbal breach and there are unresolved conflicts of fact that such a hearing would be required.

The decision of the court will provide some clarity in relation to the Commissioner's powers.

Breakdown of complaints as per Annual Report of DPC 2015, published 21st June 2016

	Percentages	Totals
Access Rights	62%	578
Electronic direct marketing	11%	104
Disclosure	10%	94
Unfair processing of data	5%	49
Internet search-result delisting	2%	23
Use of CCTV Footage	2%	16
Failure to secure data	2%	16
Excessive data	2%	15
Right of rectification	1%	13
Accuracy	1%	10
Postal direct marketing	1%	7
Use of biometrics	<1%	2
Totals	100%	932

Final note for data controllers

- Employees that are required to do house visits in the course of their employment should be adequately trained and advised to ensure that they have correctly identified the data subject before they speak to them about any personal matter/data they hold.
- They should retain contemporaneous attendance notes on all their visits and interactions with third parties

so they have a record of the communications between the parties. This is particularly relevant where the matter relates to any kind of debt collection or involved confidential financial information.

- Data controllers need to be aware that merely identifying themselves as belonging to a particular organisation may constitute a disclosure. For example, if they are from a lending institution, it is mostly likely they are making a house visit because a borrower is in arrears.

Outcome

The judge has reserved judgment and a written decision will be delivered in the new Trinity term.

Potential implications of the judgment

If the judge finds in favour of the applicant, the ODPC might be compelled to hold oral hearings to investigate complaints where there has been a verbal disclosure. We can only anticipate what form these hearings will take and whether the decision will require an amendment to the current legislation to include the holding of oral hearings. As with any adversarial hearing, they will need to be conducted in accordance with the principles of constitutional justice.

On an analysis of the Commissioner's latest Annual Report (see grey box), we have concluded that the number of complaints that would be affected

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