

27<sup>th</sup> January 2021

Ms Helen McEntee TD,  
Minister for Justice and Equality,  
Dept of Justice and Equality,  
51 St. Stephen's Green,  
Dublin 2.

Dear Ms McEntee,

Firstly, may I express the hope that your recovery from recent infection is going well, and that you are suffering no lingering ill-effects.

I am following up my submission to you of 9<sup>th</sup> December, and would appreciate some feedback from your officials on the content. However, in unrelated correspondence with the Deputy Data Protection Commissioner (DDPC), which is appended below, I also raised the data protection issue in the context of the proposed Integrated Insurance Fraud Database, which was officially referred to in the 10<sup>th</sup> progress update<sup>1</sup> of the CIWG last March.

While we are disappointed with the responses of the DDPC to the issue of the “gaming” of subject access requests in Ireland by personal injury litigants, he very clearly elucidates the legal position of the DPC.

Nevertheless, it is very difficult for us to understand what precisely are the issues impeding the expansion of access to an extant database that has not, to our knowledge, fallen foul of the GDPR.

Of great concern to us is the response of the DDPC to this issue. He states that “*scant justification for the necessity and proportionality of the proposal or the identification and mitigation of risks to individuals has been presented to us.*” We would have thought it self-evident that abundant justification for the Fraud Database is available from your Department, An Garda Síochána, and from the Personal Injuries Commission.

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<sup>1</sup> [Cost of Insurance Working Group 10th Progress Update March 2020](#)

We must take the DDPC at his word when he advises that the DPC is *“available for further consultation once the necessary data protection assessments have been carried out,”* as we would have assumed this had long ago taken place.

This all feeds the concerns of insurance policy holders, and the victims of exaggerated and fraudulent claims, that no material progress is being contemplated, let alone achieved, in addressing the cost of insurance.

Can your Department advise (a) which of the stakeholders is responsible for carrying out these assessments; and (b) when will they be carried out?

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Neil McDonnell', with a long horizontal flourish extending to the right.

Neil McDonnell  
Chief Executive

CC Tánaiste Leo Varadkar TD, DETE  
Minister of State Robert Troy TD, DETE  
Dr Orlaigh Quinn, Secretary General, DETE  
Mr Declan Hughes, Assistant Secretary General, DETE  
Mr John Newham, Assistant Secretary General, DETE  
Ms Oonagh McPhillips, Secretary General, Department of Justice  
Ms Oonagh Buckley, Deputy Secretary General, Department of Justice

17 Kildare St.,  
Dublin 2.  
5<sup>th</sup> November 2020

Graham Doyle,  
Deputy Commissioner,  
Data Protection Commission,  
21 Fitzwilliam Square South,  
Dublin 2.

Dear Graham,

I refer to your telephone call on 31<sup>st</sup> October, where you requested that ISME take down a tweet which referred to the facilitation of personal injuries claims; which request was immediately actioned by us.

Firstly, a semantic but important point. You clearly misunderstood our use of the word 'facilitate,' to refer to an act of commission by the DPC. This was not the intent, and we used the word in a passive sense, i.e. a passive act, or one of omission. Facilitate means *to make easier; to help bring about; to make something possible*; it does not require a positive act by the DPC, nor was there any implication that this was the case. It was in this sense the word was used.

Nonetheless, we have several reservations about the manner in which the DPC issues guidance in respect of those persons who are, or are about to become, defendants in personal injuries litigation. For example, the current guidance on retention of CCTV states:

As an example, Section 8 of the Civil Liability and Courts Act 2004 requires that where a letter of claim in a personal injuries action is served one month after the accident, the court shall draw such inferences as appear proper. A 30-day retention period may thus be deemed reasonable, proportionate and balanced for CCTV footage for the purpose of defending a potential personal injury action. For a normal security system, it would be difficult to justify retention beyond one month, except where the images identify an issue – such as a break-in or theft – and is retained specifically in the context of the investigation of that issue.

Despite the relatively recent commencement of Section 8, we are already aware of several cases where the one-month rule is not being observed by plaintiffs. A business or individual who follows the guidance above in cases where an evident incident took place but who has not been advised of action within 30 days, is thus potentially depriving themselves of the opportunity to mount a fair defence where they follow the DPC's guidance. We believe this is legally problematic for the DPC.

Similarly, we have seen numerous examples of dashcam footage from motorists where pedestrians or cyclists deliberately threw themselves into impacts with motor vehicles. It is impossible for these motorists to know if an injury claim will ensue afterwards, but we have no doubt that the presence of a dashcam has discouraged many fraudulent claims.

We fully support the right of persons to make subject access requests, and we are also aware that High Court rulings have established a right of access even where litigation has issued. However, for the reasons set out above, we do not believe that it is fair or reasonable to require a defendant to accede to a subject access request until Sections 8 and 14 of the Civil Liability and Courts Act 2004 have been fully complied with by the plaintiff.

The advice to potential claimants in the link below is quite typical of that from personal injuries litigation solicitors:

<https://personalinjuryaccidentsolicitor.ie/requesting-data-personal-injury-claim/>

While ISME imputes no ill-motive to this (or any other) personal injury solicitor, we have been appraised by members of efforts to 'game' the privacy legislation by some solicitors. For example:

- One member operating a café told us of a family who complained that a waitress spilled tea on the arm of an infant strapped into a high-chair. CCTV revealed that the father of the child spilled the tea on the infant after the waitress departed the table. Five weeks after this incident, the café owner received a telephone call from a person who stated they were representing the father of the child, and asking if the CCTV had been erased, in line with the requirements of GDPR. The owner erased the CCTV. A statement of claim arrived subsequently, stating the waitress poured the tea on the child. The café owner has engaged IT specialists to try to retrieve the deleted video file.
- One member operating a licensed premises has been in prolonged correspondence with the legal representatives of a plaintiff seeking CCTV in the absence of a statement of claim for an alleged fall. The premises owner says he will do so once the statement of claim arrives, the plaintiff's solicitor says it is not possible to produce the statement of claim without it, and is threatening to forward the matter to your office.

These examples are not unusual in the context of the general feedback we receive from members on the insurance (motor, EL and PL) issue. While we acknowledge that in some exceptional circumstances, legitimate reasons might exist for a person to make a subject access request for CCTV while formulating a statement of claim, we see no lawful, legitimate reason why the vast majority of plaintiffs could hesitate to comply with Section 8 and 14 before making their statement of claim.

You will also be aware that at least two solicitor firms are under investigation by the National Economic Crime Bureau of An Garda Síochána for the alleged deliberate lodgement of false personal injury claims. ISME, and other parties representing the victims of this type of criminality, have long sought the formation of a broad database of personal injuries litigants, with a view to identifying serial claimants. Yet we note from the progress report of the Cost of Insurance Working Group the following:

Rec. 25

ESTABLISH A FULLY FUNCTIONING INTEGRATED INSURANCE FRAUD DATABASE FOR INDUSTRY TO DETECT PATTERNS OF FRAUD

Recommendation DELAYED

Update: As previously outlined, the Insurance Fraud Database Working Group, chaired by the Crime Division of the Department of Justice and Equality (D/Justice), met in June 2019 to discuss the establishment of a fraud database, following consideration of data protection issues over the past year. The proposal centres on expanding the scope of Insurance Ireland's Insurance Link database – i.e. putting in new criteria to improve the potential for detecting fraudulent claim patterns and transferring its administration to an independent third party. This consideration included preliminary consultations with the Data Protection Commission (DPC), followed by more detailed consultations with D/Justice's Data Protection Support and Compliance Office (DPSCO) in the context of Insurance Ireland's Data Protection Impact Assessment (DPIA) on its Insurance Link database. This DPIA was submitted to DPC in accordance with Article 36 of the GDPR by D/Justice on 14 June 2019. The DPC advised that a consultation under Article 36 of the GDPR was not possible until the project was at a more advanced stage. However, it did offer some preliminary views.

Having regard to the views expressed by the DPC that a greater level of detail would be required in order to make the case for an extended insurance fraud database, it was proposed to continue engagement between the Department of Finance (D/Finance), D/Justice, and Insurance Ireland. In this regard, D/Finance has had separate bilateral meetings with Insurance Ireland and with D/Justice. However, it is important to note that based on the response of the DPC to date (looking for a much stronger justification for inclusion of additional criteria), it appears it will be difficult to expand out the scope of the existing Insurance Link to make it more useful in detecting fraudulent patterns of claims. In summary, *there is a view that the additional benefit that these new criteria may generate from a fraud detection perspective may not be sufficient to justify the impact upon the privacy of those third parties who may be drawn within the scope of the database.* [Italics ISME]

We fail to see how impacts upon the privacy of some individuals through the formation of a closed or restricted-access database of personal injuries claimants outweighs the rights of vast numbers of motorists and premises-owners to protect themselves from criminality. Setting privacy as an absolute in this instance is, in our view, demonstrably unjust. We believe it is incumbent upon your office to advise Government of how privacy rights can be balanced against crime detection and prevention in the context of the formation of an insurance fraud database. If the DPC is of the considered view that such a database has unacceptably adverse privacy impacts, we believe it is incumbent upon the DPC to publish its data protection impact assessment in this case.

While no doubt you may consider the foregoing as critical of the Commission, please note that ISME fully and unequivocally supports the DPC in its roles as the national independent authority responsible for upholding the fundamental right of individuals to have their personal data protected, and as the Irish supervisory authority for the General Data Protection Regulation (GDPR).

Neither ISME nor its members expect the DPC to be 'on their side.' However, in cases where citizens or businesses are subject to personal injuries litigation, we believe it is imperative for the DPC to maintain a disinterested and objective posture towards the parties. This is especially important in circumstances where the plaintiff is not compliant with sections of the Civil Liability and Courts Act 2004, or where defendants have reason to believe an indictable offence under this Act may have occurred.

A handwritten signature in black ink, appearing to read 'Neil McDonnell', followed by a long horizontal line and a circular flourish at the end.

Neil McDonnell  
Chief Executive

Neil McDonnell,  
Chief Executive  
ISME,  
17 Kildare Street,  
Dublin 2.

18 December, 2020.

Dear Neil,

I hope that you're keeping well.

I refer to your letter of 5 November 2020 concerning the application of data protection law to the retention of, and access to, CCTV footage in the context of personal injuries litigation.

At the outset, I should emphasise that the purpose and functions of the Data Protection Commission (DPC) are established by EU law – Article 57 of the General Data Protection Regulation (GDPR). The primary and overarching responsibility of the Commission is to monitor and ensure the proper application of the GDPR, in the context of the individual's right to data protection being enumerated in the EU's Charter of Fundamental Rights and with reference to the case law of the Court of Justice of the EU (CJEU). It should be understood from this that any guidance published by the DPC or views expressed on the processing of personal data in any particular context is with the sole purpose of ensuring the correct and fair application of the law, consistent with the Charter Right and the jurisprudence of the CJEU.

The DPC's guidance on CCTV aims to inform organisations' understanding of the implications of collecting and processing CCTV footage and sets out generally applicable guidelines on how to comply with data protection law. Concerning CCTV retention periods, the guidance seeks to assist organisations to put in place technical and administrative arrangements that respect the GDPR's foundational principles. Those principles are that personal data is kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data is processed; that data is processed lawfully, fairly and in a transparent manner; that personal data is collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes; and that personal data is processed in a manner that ensures appropriate security of the data including protection against unauthorised or unlawful processing.

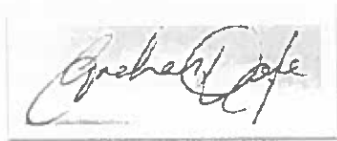
I understand that you consider, that the requirement to retain personal data for no longer than is necessary, militates against the ability of data controllers to defend themselves adequately if civil proceedings are issued against them.

statutory restrictions set out in law. Such is its importance it cannot be restricted for the reasons advanced, as I trust I have explained adequately herein.

In your letter you also refer to the proposal to establish an enhanced insurance fraud database. As you will be aware, the insurance sector already operates an insurance claim database "Insurance Link" under the operation and control of Insurance Ireland. The DPC understands that it is proposed to give effect to the Cost of Insurance Working Group recommendation by either expanding the functionality of the Insurance Link database or by creating a new database. Very limited details of how this might be achieved have been shared with the DPC and scant justification for the necessity and proportionality of the proposal or the identification and mitigation of risks to individuals has been presented to us. Accordingly, to date the DPC has not given a definitive or final view on the proposal. We have advised the stakeholders concerned that we are available for further consultation once the necessary data protection assessments have been carried out as required by the GDPR. I should emphasise that the obligation under the law to complete a data protection impact assessment lies with the entities who will be responsible for the processing of personal data, i.e. the data controller(s).

I trust the above clarifies the position.

Yours sincerely,



Graham Doyle  
Deputy Commissioner,  
Data Protection Commission.

