

**DATA PROTECTION ACT 1998**

**SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER**

**ENFORCEMENT NOTICE**

**(varied pursuant to section 41(1) Data Protection Act 1998)**

To: Penny Appeal

Of: Penny Appeal Campus, Thornes Park, Wakefield, England, WF2 8QZ

1. The Information Commissioner ("the Commissioner") has decided to issue Penny Appeal with an enforcement notice under section 40 of the Data Protection Act 1998 ("DPA"). The notice is being issued because of a serious contravention of Regulation 22 of the Privacy and Electronic Communications (EC Directive) Regulations 2003 ("PECR").
2. This notice explains the Commissioner's decision.

**Legal framework**

3. Penny Appeal, whose registered office is given above (Companies House Registration Number: 06578382) is the organisation stated in this notice to have transmitted and instigated the transmission unsolicited communications by means of electronic mail to individual subscribers for the purposes of direct marketing contrary to regulation 22 of PECR.
4. Regulation 22 of PECR states:

- "(1) This regulation applies to the transmission of unsolicited communications by means of electronic mail to individual subscribers.*
- (2) Except in the circumstances referred to in paragraph (3), a person shall neither transmit, nor instigate the transmission of, unsolicited communications for the purposes of direct marketing by means of electronic mail unless the recipient of the electronic mail has previously notified the sender that he consents for the time being to such communications being sent by, or at the instigation of, the sender.*
- (3) A person may send or instigate the sending of electronic mail for the purposes of direct marketing where—*
- (a) that person has obtained the contact details of the recipient of that electronic mail in the course of the sale or negotiations for the sale of a product or service to that recipient;*
  - (b) the direct marketing is in respect of that person's similar products and services only; and*
  - (c) the recipient has been given a simple means of refusing (free of charge except for the costs of the transmission of the refusal) the use of his contact details for the purposes of such direct marketing, at the time that the details were initially collected, and, where he did not initially refuse the use of the details, at the time of each subsequent communication.*
- (4) A subscriber shall not permit his line to be used in contravention of paragraph (2)."*

5. Section 122(5) of the Data Protection Act 2018 "DPA18" defines direct marketing as *"the communication (by whatever means) of advertising or marketing material which is directed to particular individuals"*. This definition also applies for the purposes of PECR (see regulation 2(2) PECR and paragraphs 430 & 432(6) to Schedule 19 of the DPA18).
6. From 1 January 2021, consent in PECR has been defined by reference to the concept of consent in the UK GDPR as defined in section 3(10) of the DPA 2018<sup>[1]</sup>: see regulation 2(1) of PECR, as amended by Part 3 of Schedule 3, paragraph 44 of The Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019/419. Article 4(11) of the UK GDPR sets out the following definition: *"'consent' of the data subject means any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her"*.
7. "Individual" is defined in regulation 2(1) of PECR as *"a living individual and includes an unincorporated body of such individuals"*.
8. A "subscriber" is defined in regulation 2(1) of PECR as *"a person who is a party to a contract with a provider of public electronic communications services for the supply of such services"*.
9. "Electronic mail" is defined in regulation 2(1) of PECR as *"any text, voice, sound or image message sent over a public electronic communications network which can be stored in the network or in the"*

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<sup>[1]</sup> The UK GDPR is therein defined as Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 ("GDPR") as it forms part of the law of England and Wales, Scotland and Northern Ireland by virtue of section 3 of the European Union (Withdrawal) Act 2018.

*recipient's terminal equipment until it is collected by the recipient and includes messages sent using a short message service".*

10. The term "soft opt-in" is used to describe the rule set out in in Regulation 22(3) of PECR. In essence, an organisation may be able to send messages to its existing customers even if they haven't specifically consented to electronic mail. The soft opt-in rule can only be relied upon by the organisation that collected the contact details and does not apply to non-commercial promotions such as charity fundraising.
11. The DPA contains enforcement provisions at Part V which are exercisable by the Commissioner. Those provisions are modified and extended for the purposes of PECR by Schedule 1 PECR.
12. Section 40(1)(a) of the DPA (as extended and modified by PECR) provides that if the Commissioner is satisfied that a person has contravened or is contravening any of the requirements of the Regulations, he may serve him with an Enforcement Notice requiring him to take within such time as may be specified in the Notice, or to refrain from taking after such time as may be so specified, such steps as are so specified.
13. PECR were enacted to protect the individual's fundamental right to privacy in the electronic communications sector. PECR were subsequently amended and strengthened. The Commissioner will interpret PECR in a way which is consistent with the Regulations' overall aim of ensuring high levels of protection for individuals' privacy rights.

14. The provisions of the DPA remain in force for the purposes of PECR notwithstanding the introduction of the DPA18: see paragraph 58(1) of Schedule 20 to the DPA18.

### **The contravention**

15. The Commissioner finds that Penny appeal contravened regulation 22 of PECR.
16. The Commissioner finds that the contravention was as follows:
17. Between 22 April 2022 and 1 May 2022, a total of 461,650 direct marketing messages were received by subscribers. The Commissioner finds that Penny Appeal transmitted / instigated the transmission of those direct marketing messages, contrary to regulation 22 of PECR.
18. Penny Appeal could not provide details of the exact message volumes, therefore this figure is an estimate based on one text message being sent each day for a ten day period, to a database of 52,179 customers who had never provided consent.
19. Penny Appeal, as the sender and instigator of the direct marketing, is required to ensure that it is acting in compliance with the requirements of regulation 22 of PECR, and to ensure that valid consent to send those messages had been acquired.
20. For consent to be valid it is required to be "freely given", by which it follows that if consent to marketing is a condition of subscribing to a service, the organisation will have to demonstrate how the consent can be said to have been given freely. Penny Appeal has been unable to evidence that it held consent to send marketing messages to the

52,179 individuals in its database.

21. Consent is also required to be "specific" as to the type of marketing communication to be received, and the organisation, or specific type of organisation, that will be sending it. In this case, as previously noted, messages were sent to donors who had specifically opted out of receiving marketing messages from Penny Appeal.
22. Consent will not be "informed" if individuals do not understand what they are consenting to. Organisations should therefore always ensure that the language used is clear, easy to understand, and not hidden away in a privacy policy or small print. Consent will not be valid if individuals are asked to agree to receive marketing from "similar organisations", "partners", "selected third parties" or other similar generic description. In this instance, no consent was obtained.
23. The Commissioner is therefore satisfied from the evidence he has seen that Penny Appeal did not have the necessary valid consent for the 461,650 direct marketing messages received by individual subscribers.
24. The Commissioner has considered, as he is required to do under section 40(2) of the DPA (as extended and modified by PECR) when deciding whether to serve an Enforcement Notice, whether any contravention has caused or is likely to cause any person damage. The Commissioner has decided that it is unlikely that damage has been caused in this instance.
25. The Commissioner is accordingly minded to exercise his powers under section 40 of the Act to serve an Enforcement Notice requiring Penny Appeal to take specified steps to comply with regulation 22 of PECR. The terms of such Notice are set out in Annex 1 of this Notice.

**Right of Appeal**

26. There is a right of appeal against this Notice to the First-tier Tribunal (Information Rights), part of the General Regulatory Chamber. Information about appeals is set out in the attached Annex 2.

Dated the 18th day of April 2024

Signed  .....

Andy Curry  
Head of Investigations  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF

**ANNEX 1**

**TERMS OF THE ENFORCEMENT NOTICE**

Penny Appeal shall within 30 days of the date of this notice:

- Cease to transmit and shall cease to instigate the transmission of unsolicited communications by means of electronic mail to individual subscribers for direct marketing purposes, except for (1) in the circumstances referred to in paragraph (3) of Regulation 22 PECR and/or any other exemption provided for by law, and/or (2) where the recipient of the electronic mail has previously notified Penny Appeal that they consent for the time being to such communications being sent by, or at the instigation of, Penny Appeal.