

It has come to the attention of the Information Commissioner's Office (ICO) that a large number of potentially unsolicited text messages (SMS) promoting online gaming sites have been sent by affiliate organisations including yours . These SMS messages were, it is believed, sent in breach of regulations 22 and 23 of the Privacy and Electronic Communications Regulations (PECR).

The ICO's opinion is that where an affiliate sends an SMS on behalf of or promoting the website of, a gaming company, then that affiliate is the sender of that communication and must comply with regulations 22 and 23 of the Privacy and Electronic Communications (EC Directive) Regulations 2003.

Regulation 22¹ of PECR concerns the sending of unsolicited communications by electronic mail to individual subscribers for direct marketing purposes.

Regulation 23 of PECR concerns the information that must be included in the communications.

The ICO has published detailed guidance on PECR. This can be found on our website (www.ico.org.uk) by following the links for 'For organisations', 'Privacy and electronic communications' and 'The Guide'.

Failure to comply with these regulations can lead to enforcement action being taken by the ICO which could, by virtue of section 55A to 55E of the Data Protection Act 1998 (as amended) lead to the imposition of a civil monetary penalty, up to a maximum of £500,000 for a serious breach of any of this regulation.

You may also be aware of the Government's intention to change the law in April 2017, to allow the ICO to issue penalties, of up to £500,000, against directors of organisations involved in unsolicited marketing. The proposed change in the law will make those directors personally liable for unlawful electronic marketing.

The Information Commissioner's powers

It is important for you to understand that there are a number of powers available to the Information Commissioner's Office (ICO) in respect of breaches of PECR or the Data Protection Act 1998 (DPA). They include criminal prosecution and non-criminal enforcement and audit. The Information Commissioner also has the power to serve a monetary penalty notice on a data controller.

Our powers are not mutually exclusive. We will use them in combination where justified by the circumstances.

The main options are to:

- provide practical **advice** to organisations on how they should handle data protection matters;

- serve **enforcement notices** where there has been a breach, requiring organisations to take (or refrain from taking) specified steps in order to ensure they comply with the law;
- conduct **consensual assessments** (audits) to check organisations are complying;
- issue **monetary penalty notices** requiring organisations to pay up to £500,000 for serious breaches of the Data Protection Act occurring on or after 6 April 2010 or serious breaches of the Privacy and Electronic Communications Regulations occurring after 26 May 2011;
- **prosecute** those who commit criminal offences under the Data Protection Act.

In relation to monetary penalty notices under PECR, the Commissioner will use this power where:

- there has been a serious contravention of PECR; and
- the contravention was deliberate or the person responsible knew or ought to have known that there was a risk that the contravention would occur, but failed to take reasonable steps to prevent it.

This means that there is the potential for imposing a monetary penalty for sending large numbers of unsolicited communications for the purposes of direct marketing.

Your co-operation in providing full and detailed answers to our questions and establishing the facts is therefore important.

Your organisation's compliance with PECR

As stated at the beginning of this letter it has come to the attention of the Commissioner that your organisation has an affiliate association with [REDACTED] with regards to the promotion of gaming websites.

In light of this I would be grateful if you could provide me with the following:

- The volume of messages sent over the period 6 April 2015 to 1 November 2016
- The volume of messages which resulted in a visit to a gaming website over the period 6 April 2015 to 1 November 2016.
- the source of data that you use to promote your business (i.e. obtained directly from customers or purchased from third parties);
- if information is obtained directly from customers, how do you ensure that they have consented to receiving marketing calls;

- if information is purchased from third parties, what contractual obligation do you rely on in relation to the use of that information and do you carry out any due diligence checks in relation to the list providers to establish whether the product is as described (e.g. opt-in data where the subscriber has consented to third party use);
- confirmation as to whether or not you operate an internal suppression list of numbers where you have been advised that the subscriber, individual or corporate, does not want to receive any marketing communications from you;
- copies of your training procedures used to inform staff about lawful contact with customers;
- any policies and procedures regarding your responsibilities under PECR;
- if you engage in email affiliate marketing linked to [REDACTED] copies of any creative or merchant material
- a copy on any contract that was in place between your organisation and [REDACTED], and
- any additional information which you think may be useful to the ICO in order for it to understand the process that you operate.

First Tier Tribunal Decision: Optical Express (Westfield) Limited v ICO

The recent Tribunal decision in Optical Express (Westfield) Limited v ICO clarified the issue of third party consent under Regulation 22 and can be found at http://informationrights.decisions.tribunals.gov.uk//DBFiles/Decision/I1628/EA-2015-0014_31-08-2015.pdf

This decision makes it clear that in almost all cases third party consent will not be sufficient to rely upon in order to send marketing SMS

Notification under the Data Protection Act 1998

The Commissioner is also under the opinion that any organisation that engages in electronic advertising marketing or public relations for others should have an entry on the Data Protection Register and failure to do so is an offence under section 17 of the Act (for further information on this go to <https://ico.org.uk/for-organisations/register/>). If you do not have a register entry or it has expired you are at risk prosecution if you do not register.

It is important that you respond to this letter in writing **within 21 days** of the above date as any information received may influence how the ICO responds to you/your organisations marketing practices. Response should be in an electronic format and be sent to sweep@ico.org.uk

Yours sincerely

Anti-Spam Investigation Team
Email: sweep@ico.org.uk

The full texts of Regulations 22 and 23 are as follows:

Use of electronic mail for direct marketing purposes

22.—(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).

Use of electronic mail for direct marketing purposes where the identity or address of the sender is concealed

23. A person shall neither transmit, nor instigate the transmission of, a communication for the purposes of direct marketing by means of electronic mail—

(a) where the identity of the person on whose behalf the communication has been sent has been disguised or concealed; or .

(b) where a valid address to which the recipient of the communication may send a request that such communications cease has not been provided.