

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

MONETARY PENALTY NOTICE

To: The Data Supply Company Ltd

Of: 2 Church Close, Wythall, Birmingham, B47 6JQ

1. The Information Commissioner ("Commissioner") has decided to issue The Data Supply Company Ltd ("the Company") with a monetary penalty under section 55A of the Data Protection Act 1998 ("DPA"). The penalty is being issued because of a serious contravention of the first data protection principle by the Company.
2. This notice explains the Commissioner's decision.

Legal framework

3. The Company is a data controller, as defined in section 1(1) of the DPA in respect of the processing of personal data. Section 4(4) of the DPA provides that, subject to section 27(1) of the DPA, it is the duty of a data controller to comply with the data protection principles in relation to all personal data in respect of which he is the data controller.
4. The DPA implements European legislation (Directive 95/46/EC) aimed at the protection of the individual's fundamental right to the protection of personal data. The Commissioner approaches the data protection

principles so as to give effect to the Directive.

5. The relevant provision of the DPA is the first data protection principle which provides, at Part I of Schedule 1 to the DPA, that:

*1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless -
(a) at least one of the conditions in Schedule 2 is met, and
(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.*

6. Interpretative provisions in Part II of Schedule 1 to the DPA provide that:

1 - (1) In determining for the purposes of the first principle whether personal data are processed fairly, regard is to be had to the method by which they are obtained, including in particular whether any person from whom they are obtained is deceived or misled as to the purpose or purposes for which they are to be processed.

(2)....

*2 - (1) Subject to paragraph 3, for the purposes of the first principle personal data are not to be treated as processed fairly unless -
(a) in the case of data obtained from the data subject, the data controller ensures so far as practicable that the data subject has, is provided with, or has made readily available to him, the information specified in sub-paragraph (3), and
(b) in any other case, the data controller ensures so far as practicable that, before the relevant time or as soon as practicable after that time, the data subject has, is provided with, or has made readily available to him, the information specified in sub-paragraph (3).*

*(2) In sub-paragraph (1)(b) "the relevant time" means -
(a) the time when the data controller first process the data, or
(b) in a case where at that time disclosure to a third party within a reasonable period is envisaged -*

- (i) if the data are in fact disclosed to such a person within that period, the time when the data are first disclosed,*
- (ii) if within that period the data controller becomes, or ought to become, aware that the data are unlikely to be disclosed to such a person within that period, the time when the data controller does become, or ought to become, so aware, or*
- (iii) in any other case, the end of that period.*

(3) The information referred to in sub-paragraph (1) is as follows, namely-

- (a) the identity of the data controller,*
- (b) if he has nominated a representative for the purposes of this Act, the identity of that representative,*
- (c) the purpose or purposes for which the data are intended to be processed, and*
- (d) any further information which is necessary, having regard to the specific circumstances in which the data are or are to be processed, to enable processing in respect of the data subject to be fair.*

3. – (1) Paragraph 2(1)(b) does not apply where either of the primary conditions in sub-paragraph (2), together with such further conditions as may be prescribed by the Secretary of State by order, are met.

(2) The primary conditions referred to in sub-paragraph (1) are –

- (a) that the provision of that information would involve disproportionate effort, or*
- (b) that the recording of the information contained in the data by, or the disclosure of the data by, the data controller is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.*

4. - [...]

7. Under section 55A(1) of the DPA the Commissioner may serve a data controller with a monetary penalty notice if the Commissioner is satisfied that –

(a) there has been a serious contravention of section 4(4) by the data controller,

*(b) the contravention was of a kind likely to cause substantial damage or substantial distress, and
(c) subsection (2) or (3) applies.*

(2) This subsection applies if the contravention was deliberate.

(3) This subsection applies if the data controller –

(a) knew or ought to have known –

(i) that there was a risk that the contravention would occur, and

(ii) that such a contravention would be of a kind likely to cause substantial damage or substantial distress, but

(b) failed to take reasonable steps to prevent the contravention.

8. The Commissioner has issued statutory guidance under section 55C (1) of the DPA about the issuing of monetary penalties.

9. The Data Protection (Monetary Penalties) (Maximum Penalty and Notices) Regulations 2010 prescribe that the amount of any penalty determined by the Commissioner must not exceed £500,000.

Background to the case

10. The Company is a list or data broker. It obtains personal data about individuals from various sources and sells this information as marketing leads to organisations for the purpose of sending direct marketing to those individuals.

11. Mobile phone users can report the receipt of unsolicited marketing text messages to the GSMA's Spam Reporting Service by forwarding the message to 7726 (spelling out "SPAM"). The GSMA is an organisation that represents the interests of mobile operators worldwide. The Commissioner is provided with access to the data on complaints made to the 7726 service. Individuals can also make such complaints direct to the Commissioner.

12. Between 19 June 2015 and 21 September 2015, 174 complaints were made to the 7726 service or direct to the Commissioner about the receipt of unsolicited direct marketing text messages about pay day loans. Following an investigation, the Commissioner established that the person responsible for sending those text messages had obtained its data from the Company. The Company had provided 580,302 records containing personal data.
13. In correspondence with the Commissioner, the Company claimed that it obtained customer data from financial institutes that had declined or were unable to assist with the individuals' requests for financial products.
14. The Company identified a number of third party websites from which the complainants' personal data had been obtained. These were not all, as suggested, the websites of financial institutions but included, for example, competition websites.
15. Many of the privacy notices given on the identified websites were generic and unspecific, for example:

“We may share your information with carefully selected third parties where they are offering products or services that we believe will interest you”.
16. Others provided a long list of general categories of organisations to whom the data would be disclosed, including for example organisations in the automotive sector, broadband sector, charity sector, competition sites, daily deals, debt and finance, education, gambling sector, gardening, general marketing, health and beauty, home and lifestyle,

lottery, pension, personal injury, sport, telecommunications, travel and utilities.

17. None of the privacy notices identified the Company, or those organisations it subsequently provided the data to, as potential recipients of the data.
18. The Commissioner has made the above findings of fact on the balance of probabilities.
19. The Commissioner has considered whether those facts constitute a contravention of the DPA by the Company and, if so, whether the conditions of section 55A DPA are satisfied.

The contravention

20. The Commissioner finds that the Company contravened the first data protection principle.
21. Whether an organisation is collecting personal data for its own use, or to sell marketing leads on to others, it must always process that data fairly and lawfully.
22. Data controllers buying marketing lists from third parties must make rigorous checks to satisfy themselves that the third party obtained the personal data fairly and lawfully, that the individuals understood their details would be passed on for marketing purposes, and that they have the necessary consent.
23. Data controllers must take extra care if buying or selling a list that is to be used to send marketing texts, emails or automated calls. The

Privacy and Electronic Communications Regulations 2003 specifically require that the recipient of such communications has notified **the sender** that they consent to receive direct marketing messages **from them**. Indirect consent (ie consent originally given to another organisation) may be valid if that organisation sending the marketing message was specifically named. But more generic consent (eg marketing 'from selected third parties') will not demonstrate valid consent to marketing calls, texts or emails.

24. Data controllers buying in lists must check how and when consent was obtained, by whom, and what the customer was told. It is not acceptable to rely on assurances of indirect consent without undertaking proper due diligence. Such due diligence might, for example, include checking the following:

- How and when was consent obtained?
- Who obtained it and in what context?
- What method was used – eg was it opt-in or opt-out?
- Was the information provided clear and intelligible? How was it provided – eg behind a link, in a footnote, in a pop-up box, in a clear statement next to the opt-in box?
- Did it specifically mention texts, emails or automated calls?
- Did it list organisations by name, by description, or was the consent for disclosure to any third party?
- Is the seller a member of a professional body or accredited in some way?

25. Data controllers wanting to sell a marketing list for use in text, email or automated call campaigns must keep clear records showing when and how consent was obtained, by whom, and exactly what the individual was told (including copies of privacy notices), so that it can give proper

assurances to buyers. Data controllers must not claim to sell a marketing list with consent for texts, emails or automated calls if it does not have clear records of consent. It is unfair and in breach of the first data protection principle to sell a list without keeping clear records of consent, as it is likely to result in individuals receiving noncompliant marketing.

26. In this case the individuals whose data was traded by the Company were not informed that their personal data would be disclosed to the Company, or the organisations to which the Company sold the data on to, for the purpose of sending direct marketing text messages. Nor would that disclosure be within those individuals reasonable expectations. The processing of the personal data by the Company was therefore unfair and in breach of the first data protection principle.
27. The Commissioner has gone on to consider whether the conditions under section 55A DPA were met.

Seriousness of the contravention

28. The Commissioner is satisfied that the contravention identified above was serious.
29. The Company failed to ensure that it was processing personal data in compliance with the DPA, resulting in 580,302 records containing personal data being disclosed without the data subjects' knowledge or consent.
30. It is reasonable to assume that the Company, which was incorporated in 2005, has been trading in personal data for a considerable period of

time and therefore significantly more individuals' personal data is likely to have been processed unfairly by the Company.

31. The Commissioner is therefore satisfied that condition (a) from section 55A (1) DPA is met.

Contraventions of a kind likely to cause substantial damage or substantial distress

32. The unlawful trade in personal data leads directly to the wholesale sending of unsolicited direct marketing texts and the making of nuisance calls. The individuals whose data was traded by the Company would have been unaware of who their data would be passed on to and for what purpose. The Company traded 580,302 records containing personal data. This resulted in 21,045 unsolicited direct marketing text messages being received by individuals who had not consented to the receipt of those communications, which lead to 174 complaints being made.
33. In the circumstances, the Commissioner is satisfied that the contravention was of a kind likely to cause substantial distress.
34. Although the distress in every individual complainant's case may not always have been substantial, the cumulative amount of distress suffered by the large numbers of individuals affected, coupled with the distress suffered by some individuals, means that overall the level was substantial.
35. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met.

Deliberate or negligent contraventions

36. The Commissioner has considered whether the contravention identified above was deliberate. In the Commissioner's view, this means that the Company's actions which constituted the contravention were deliberate actions (even if the Company did not actually intend thereby to contravene the DPA).
37. The Commissioner considers that in this case the Company did not deliberately contravene the DPA in that sense.
38. The Commissioner has gone on to consider whether the contravention identified above was negligent. First, she has considered whether the Company knew or ought reasonably to have known that there was a risk that this contravention would occur. She is satisfied that this condition is met, given that the Company had been engaged in the data broking industry for some time, and should have been aware of the DPA's requirements in relation to the processing of personal data.
39. In the circumstances, the Company ought reasonably to have known that there was a risk that this contravention would occur.
40. Second, the Commissioner has considered whether the Company knew or ought reasonably to have known that those contraventions would be of a kind likely to cause substantial damage or substantial distress. She is satisfied that this condition is met, given the nature of the Company's business and the fact that they traded large volumes of personal data.

41. Third, the Commissioner has considered whether the Company failed to take reasonable steps to prevent the contravention. Again, she is satisfied that this condition is met. The Company failed to undertake proper due diligence when both buying and selling personal data to ensure that the processing was fair.
42. The Commissioner is therefore satisfied that condition (c) from section 55A (1) DPA is met.

The Commissioner's decision to issue a monetary penalty

43. For the reasons explained above, the Commissioner is satisfied that the conditions from section 55A (1) DPA have been met in this case. She is also satisfied that section 55A (3A) and the procedural rights under section 55B have been complied with.
44. The latter has included the issuing of a Notice of Intent, in which the Commissioner set out her preliminary thinking. In reaching her final view, the Commissioner has taken into account the representations made by the Company on this matter.
45. The Commissioner is accordingly entitled to issue a monetary penalty in this case.
46. The Commissioner has considered whether, in the circumstances, she should exercise her discretion so as to issue a monetary penalty.
47. The Commissioner's underlying objective in imposing a monetary penalty notice is to promote compliance with the DPA and this is an opportunity to reinforce the need for data controllers, particularly those

in the list broking industry, to ensure that they have complied with the first data protection principle before they buy and sell personal data.

48. For these reasons, the Commissioner has decided to issue a monetary penalty in this case.

The amount of the penalty

The Commissioner has taken into account the following **mitigating features** of this case:

- The Company has informed the Commissioner that it is no longer trading in personal data.
49. Taking into account all of the above, the Commissioner has decided that a penalty in the sum of **£20,000 (twenty thousand pounds)** is reasonable and proportionate given the particular facts of the case and the underlying objective in imposing the penalty.

Conclusion

50. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **1 March 2017** at the latest. The monetary penalty is not kept by the Commissioner but will be paid into the Consolidated Fund which is the Government's general bank account at the Bank of England.
51. If the Commissioner receives full payment of the monetary penalty by **28 February 2017** the Commissioner will reduce the monetary penalty by 20% to **£16,000 (sixteen thousand pounds)**. However,

you should be aware that the early payment discount is not available if you decide to exercise your right of appeal.

52. There is a right of appeal to the First-tier Tribunal (Information Rights) against:

(a) the imposition of the monetary penalty

and/or;

(b) the amount of the penalty specified in the monetary penalty notice.

53. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.

54. Information about appeals is set out in Annex 1.

55. The Commissioner will not take action to enforce a monetary penalty unless:

- the period specified within the notice within which a monetary penalty must be paid has expired and all or any of the monetary penalty has not been paid;
- all relevant appeals against the monetary penalty notice and any variation of it have either been decided or withdrawn; and
- the period for appealing against the monetary penalty and any variation of it has expired.

56. In England, Wales and Northern Ireland, the monetary penalty is recoverable by Order of the County Court or the High Court. In Scotland, the monetary penalty can be enforced in the same manner as

an extract registered decree arbitral bearing a warrant for execution
issued by the sheriff court of any sheriffdom in Scotland.

Dated the 27th day of January 2017

Signed

Stephen Eckersley
Head of Enforcement
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

ANNEX 1

SECTION 55 A-E OF THE DATA PROTECTION ACT 1998

RIGHTS OF APPEAL AGAINST DECISIONS OF THE COMMISSIONER

1. Section 48 of the Data Protection Act 1998 gives any person upon whom a monetary penalty notice or variation notice has been served a right of appeal to the First-tier Tribunal (information Rights) (the 'Tribunal') against the notice.

2. If you decide to appeal and if the Tribunal considers:-
 - a) that the notice against which the appeal is brought is not in accordance with the law; or
 - b) to the extent that the notice involved an exercise of discretion by the Commissioner, that she ought to have exercised her discretion differently,

the Tribunal will allow the appeal or substitute such other decision as could have been made by the Commissioner. In any other case the Tribunal will dismiss the appeal.

3. You may bring an appeal by serving a notice of appeal on the Tribunal at the following address:

GRC & GRP Tribunals
PO Box 9300
Arnhem House
31 Waterloo Way
Leicester
LE1 8DJ

 - a) The notice of appeal should be sent so it is received by the Tribunal within 28 days of the date of the notice.

- b) If your notice of appeal is late the Tribunal will not admit it unless the Tribunal has extended the time for complying with this rule.
4. The notice of appeal should state: -
- a) your name and address/name and address of your representative (if any);
 - b) an address where documents may be sent or delivered to you;
 - c) the name and address of the Information Commissioner;
 - d) details of the decision to which the proceedings relate;
 - e) the result that you are seeking;
 - f) the grounds on which you rely;
 - g) you must provide with the notice of appeal a copy of the monetary penalty notice or variation notice;
 - h) if you have exceeded the time limit mentioned above the notice of appeal must include a request for an extension of time and the reason why the notice of appeal was not provided in time.
5. Before deciding whether or not to appeal you may wish to consult your solicitor or another adviser. At the hearing of an appeal a party may conduct his case himself or may be represented by any person whom he may appoint for that purpose.
6. The statutory provisions concerning appeals to the First-tier Tribunal (General Regulatory Chamber) are contained in sections 48 and 49 of, and Schedule 6 to, the Data Protection Act 1998, and Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (Statutory Instrument 2009 No. 1976 (L.20)).