DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

MONETARY PENALTY NOTICE

To: Battersea Dogs' and Cats' Home

Of: 4 Battersea Park Road, London, SW8 4AA

Introduction

1. The Information Commissioner ("the Commissioner") has decided to issue the Battersea Dogs' and Cats' Home ("BDCH") with a monetary penalty under section 55A of the Data Protection Act 1998 ("DPA").

2. The amount of the monetary penalty is £9,000.

3. During 2015 and 2016 the Commissioner corresponded with BDCH about aspects of its data protection, privacy and marketing practices. This correspondence formed part of investigations by the Commissioner into the practices of a number of charities. Those investigations commenced following media articles about how certain charities had used the personal information of their donors.

4. The penalty is based on serious contraventions by BDCH of the first and second data protection principles under Schedule 1 of the DPA.

5. Those contraventions are set out below. The Commissioner explains the findings of fact which she has reached on the balance of

probabilities; why there has been a contravention of the DPA; and why the conditions for issuing a monetary penalty are satisfied. The Commissioner then explains why, in all the circumstances of the case, it is appropriate for a monetary penalty to be issued and why she considers the amount of £9,000 to be appropriate.

Legal framework

6. BDCH is a data controller, as defined in section 1(1) of the DPA. 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.

7. 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 DPA must be applied so as to give effect to that Directive.

8. Schedule 1 of the DPA contains the eight data protection principles. In the present case, the relevant principles are the first and second, which stipulate as follows:

> *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.*
>
> *2. Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.*

9. As regards the first data protection principle ("DPP1"), the 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. [....]

10. As regards the second data protection principle ("DPP2"), the interpretative provisions in Part II of Schedule 1 to the DPA provide that:

5. The purpose or purposes for which personal data are obtained may in particular be specified—
(a) in a notice given for the purposes of paragraph 2 by the data controller to the data subject, or
(b) in a notification given to the Commissioner under Part III of this Act.

6. In determining whether any disclosure of personal data is compatible with the purpose or purposes for which the data were obtained, regard is to be had to the purpose or purposes for which the personal data are intended to be processed by any person to whom they are disclosed.

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

12. 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.

Tele-matching

13. Tele-matching is the use of personal data to obtain and use telephone numbers which data subjects may have chosen not to provide to the data controller.

14. BDCH used the services of external companies to undertake tele-matching on its behalf between November 2010 and July 2015. The Commissioner understands that in the period between January 2011 to July 2015 BDCH processed a total of 740,181 records containing personal data for this purpose. This resulted in 385,709 records being matched and 229,476 individuals being contacted.

15. The Commissioner has considered BDCH's privacy notices in place at the relevant time. She considers that these notices do not indicate that personal data will be used for tele-matching purposes.

16. Based on the findings of fact set out above, the Commissioner is satisfied that BDCH has contravened DPP1 – in particular, the requirement to process personal data fairly, including because it was unfair for BDCH to use the data for tele-matching purposes without the consent of the data subjects.

17. The Commissioner is also satisfied that BDCH has contravened DPP2. The use of personal data for tele-matching is incompatible with the purposes explained in BDCH's privacy notices.

18. The Commissioner is satisfied that these contraventions were serious. This is in particular because of (a) the length of time over which the above contraventions took place, (b) the number of data subjects whose rights were infringed, and (c) the fact that those data subjects were likely to have been affected by the contraventions in significant practical ways, including by receiving additional marketing communications from BDCH and/or marketing communications using contact details which the data subjects may have declined to provide.

19. The Commissioner is satisfied that the contravention was of a kind likely to cause substantial damage or substantial distress.

    a) At least some proportion of data subjects are likely to be distressed if BDCH uses personal data they have chosen to provide in order to obtain and use data which they have chosen not to provide, in order to contact them for direct marketing purposes. They are also likely to be distressed by not being told in advance that their personal data may be used in this way.
    b) At least some proportion of data subjects are likely to suffer a financial impact and a diversion of time and resources in dealing with additional marketing approaches from the BDCH arising from its tele-matching practices.
    c) Given the scale and duration of the contravention, it is likely that such distress and/or damage would be substantial. At least some of the affected data subjects would have been likely to suffer substantial distress and/or damage.

Alternatively, the cumulative levels of damage and/or distress of this kind of contravention would have been likely to be substantial.

20. The Commissioner is satisfied that these contraventions were deliberate, in the sense that BDCH's actions as described above were deliberate. In other words, while BDCH may not have deliberately set out to contravene the DPA, it deliberately acted in such a way that it did so.

21. Alternatively, BDCH ought reasonably to have known that there was a risk of these contraventions occurring, and that they would be of a kind likely to cause substantial damage or distress. BDCH obviously knew the terms of its own privacy notices. It ought reasonably to have known that data subjects would be unlikely to infer from the terms of those notices that their personal data would be used for the purposes tele-matching.

22. Further, BDCH failed to take reasonable steps to prevent this contravention from occurring. It did not amend its privacy notices adequately, or obtain consent from the data subjects to the processing of data for these purposes.

23. The Commissioner is therefore satisfied that, as regards BDCH's tele-matching activities, the conditions for issuing a monetary penalty under section 55A DPA are satisfied.

The Commissioner's decision to issue a monetary penalty

24. For the reasons explained above, the Commissioner is satisfied that the conditions from section 55A(1) DPA have been met in this case.

25. Her reasons for reaching that preliminary view include (a) the contravention for which BDCH is liable, (b) the seriousness of that contravention, including the number of affected data subjects, the number of instances of the same contravention and the period of time over which the contravention took place, (c) the likely impacts of this kind of contravention, (d) the deficiency in BDCH's data protection compliance this contravention demonstrates, and (e) the importance of deterring future contraventions of this kind. The Commissioner considers that the latter objective would be furthered by the issuing of a monetary penalty notice in this case.

26. She is also satisfied that section 55A(3A) and the procedural rights under section 55B have been complied with. This has included the issuing of a Notice of Intent, in which the Commissioner set out her provisional thinking. In reaching her final view, the Commissioner has taken into account all of the representations made by BDCH.

27. The Commissioner is accordingly entitled to issue a monetary penalty in this case.

28. The Commissioner has considered whether, in the circumstances, she should exercise her discretion so as to issue a monetary penalty. She has taken into account the representations made in response to the Notice of Intent. The Commissioner has concluded that it is appropriate for her to exercise her discretion in favour of issuing a monetary penalty in the circumstances.

29. The issuing of a monetary penalty in this case would be fair and just. It would accord with the Commissioner's statutory guidance and regulatory objectives. It would act as an encouragement to ensure that

such deficiencies are not repeated elsewhere, particularly in the charity sector.

The amount of the penalty

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

- BDCH co-operated with the Commissioner's investigations.
- BDCH is a charity that seeks to further its objectives in the public interest, rather than for purely private interests or mere financial gain.
- BDCH has taken remedial action.
- BDCH's practice may to an extent have reflected commonplace – albeit mistaken and unlawful – approaches in the charitable sector.
- The intended monetary penalty may have negative reputational consequences for BDCH

31. The Commissioner has also taken into account the following **aggravating features** of this case:

- BDCH followed the unlawful practice described above over a period of several years.
- BDCH's practice appears to have been driven by financial gain. The fact that it is a charity is not an excuse in this respect. In fact, the public is arguably entitled to expect charities to be especially vigilant in complying with their legal obligations.
- BDCH has contravened the fundamental rights of very large numbers of individuals to have their personal data processed in accordance with the DPA and Directive 95/46/EC.

- By failing adequately to explain to data subjects how their personal data would be used, BDCH has deprived them of control and informed decision-making about their personal data to a significant extent.
- BDCH's activity as described above has exposed the relevant data subjects to substantially distressing and/or damaging consequences, including: intrusions into their privacy due to increased direct marketing communications from BDCH. It is likely that many individuals will have been persuaded to increase their financial support. Those financial consequences will to a significant extent have flowed from BDCH's unlawful data protection practice.

32. The Commissioner has also taken into account her underlying objective in imposing a monetary penalty notice, namely to promote compliance with the DPA.

33. Given the seriousness, nature and extent of the contraventions described above, the penalty imposed could have been significantly higher. However, in determining the amount of the penalty in this case the Commissioner has taken into account the circumstances of the contravention in the context of similar investigations into other charities. The Commissioner is mindful of the risk of adding to any distress that could be caused to donors by the contraventions. However, this should not be taken as an indication that the Commissioner will always reduce a penalty in such circumstances.

34. In all the circumstances, the Commissioner has decided that a penalty in the sum of **£9,000 (nine thousand pounds)** is reasonable and proportionate given the particular facts of the case and the underlying objective in imposing the penalty.

Conclusion

35. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **4 May 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.

36. If the Commissioner receives full payment of the monetary penalty by **3 May 2017** the Commissioner will reduce the monetary penalty by 20% to **£7,200 (seven thousand two hundred pounds)**. However, this early payment discount is not available if the right of appeal described below is exercised.

37. 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.

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

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

40. 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.

41. 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 3rd day of April 2017

Signed [redacted]

Stephen Eckersley
Head of Enforcement
Information Commissioner's Office
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SK9 5AF

Information Commissioner's Office

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) General Regulatory Chamber (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)).