

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

MONETARY PENALTY NOTICE

To: Basildon Borough Council

Of: The Basildon Centre, St. Martin's Square, Basildon, Essex SS14 1DL

1. The Information Commissioner ("Commissioner") has decided to issue Basildon Borough Council ("Basildon") 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 seventh data protection principle by Basildon.
2. This notice explains the Commissioner's decision.

Legal framework

3. Basildon 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 relevant provision of the DPA is the seventh data protection principle which provides, at Part I of Schedule 1 to the DPA, that:

"Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and

against accidental loss or destruction of, or damage to, personal data”.

5. Paragraph 9 at Part II of Schedule 1 to the DPA provides that:

“Having regard to the state of technological development and the cost of implementing any measures, the measures must ensure a level of security appropriate to –

(a) the harm that might result from such unauthorised or unlawful processing or accidental loss, destruction or damage as are mentioned in the seventh principle, and

(b) the nature of the data to be protected”.

6. 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) of the DPA 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.

- 7. The Commissioner has issued statutory guidance under section 55C (1) of the DPA about the issuing of monetary penalties that has been published on the ICO's website. 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.
- 8. 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.

Background to the case

- 9. Basildon is a local planning authority which is required to make decisions on planning applications. This involves its planning department uploading planning applications to its website in order to consult with the public.

10. On 16 July 2015, an administrator in Basildon's business services department received a planning statement ("the statement") in support of a householder's application for proposed works in a green belt.
11. Such statements are only required where proposed works fall within certain designated areas such as green belt, a national park or an area of outstanding natural beauty. Basildon receives approximately 1500 planning applications each year, but only 2 to 3% of those applications relate to these designated areas.
12. The statement contained sensitive personal data relating to a static traveller family ("the family") that had been living on the relevant site for many years. In particular, the statement referred to the family's disability requirements, including mental health issues, the names of all the family members, their age and the location of the site. It was therefore possible to identify each family member, together with the location of their home. These details comprised the personal data – including sensitive personal data – of the members of that family.
13. This monetary penalty concerns Basildon's processing of that personal data, as follows.
14. In July 2015, Basildon's policy and established approach was that personal data (and in particular sensitive personal data) would be redacted from documents such as the statement before they were published as part of the electronic register of planning applications which Basildon made available through a web-based portal.
15. The statement was passed to a planning technician who was responsible for validating the planning application and checking that personal data had been appropriately redacted before it was published

on Basildon's website.

16. That planning technician, however, was inexperienced in checking the contents of documents relating to planning applications which contained sensitive information. He did not notice the information about the family that was embedded in the statement and therefore did not make any redactions.
17. No procedure was in place for a second person to check such documents before they were uploaded onto the portal.
18. The planning technician then returned the statement to the administrator, asking him to upload the planning application to Basildon's website. In the absence of any guidance on what information should not be published, the administrator quite reasonably relied on the planning technician who had specialist knowledge in planning matters.
19. Consequently, the administrator uploaded the planning application, and sensitive information relating to the family was inadvertently published online via Basildon's planning portal website on 16 July 2015. This information was removed on 4 September 2015 when the data protection concerns addressed in this monetary penalty came to light.
20. The Commissioner has made the above findings of fact on the balance of probabilities.
21. The Commissioner has considered whether those facts constitute a contravention of the DPA by Basildon and, if so, whether the conditions of section 55A DPA are satisfied.

The contravention

22. The Commissioner finds that Basildon contravened the following provisions of the DPA.
23. Basildon failed to take appropriate organisational measures against the unauthorised processing of personal data in contravention of the seventh data protection principle at Part I of Schedule 1 to the DPA.
24. Basildon did not have in place appropriate organisational measures for ensuring so far as possible that such an incident would not occur, i.e. for ensuring that statements containing sensitive personal data would not be published on Basildon's website. In particular:
 - (a) Basildon had in place no adequate procedure governing the redaction of statements by planning technicians. For example, the importance of identifying and redacting sensitive personal data does not appear to have been conveyed through Basildon's procedures.
 - (b) Basildon did not provide any (or any adequate) training to planning technicians on the redaction of statements.
 - (c) Basildon had in place no guidance or procedures for a second planning technician or senior officer to check statements for unredacted data (and specifically sensitive personal data) before they were returned to the administrator.
 - (d) Basildon had in place no guidance for the administrator to check statements for unredacted data before they were

uploaded to its website.

25. The Commissioner is satisfied that Basildon was responsible for this contravention. This was an ongoing contravention until the security breach (i.e. the publication of the personal data and sensitive personal data referred to above) was discovered on 4 September 2015.
26. In considering whether there was a contravention at all, the Commissioner has considered Basildon's submissions based on the Town and Country Planning (Development Management Procedure) (England) Order 2015 ("the 2015 Order"). Basildon has explained that, notwithstanding its established procedure (and the procedure adopted by other local authorities), it now considers – based on external legal advice – that it was not legally permissible to redact any information from the statement which Basildon decided to publish online.
27. In particular, Basildon submitted that:
 - (a) It was obliged under the 2015 Order to include the full contents of any application – including unredacted planning statements of the kind at issue here – as part of its local authority planning register. Basildon would therefore have been obliged to show the full contents of the planning application and accompanying statement to any member of the public who asked to see it.
 - (b) Basildon had a power, though not a duty, to make its planning register available to the public by means of a website. If it chose to do so, then it had no power to redact any details from that register.

28. The Commissioner does not accept those submissions, for the following reasons:

- (a) The Commissioner's view is that the 2015 Order cannot be construed so as to oust individuals' rights under the DPA, Directive 95/46/EC or Article 8 of the European Convention on Human Rights ("ECHR").
- (b) The Commissioner acknowledges that Basildon was under a duty to make the "planning application" available to members of the public. She is not persuaded, however, that this duty encompassed *every single item of information* which an individual includes in any document he or she submits in support of a planning application. The Commissioner is not persuaded that Parliament would have intended such a publication duty to be so far-reaching as to admit of no exceptions. The Commissioner is therefore not persuaded that Basildon was precluded by law from redacting any information from the statement in the planning register which was available for public inspection.
- (c) In any event, disclosure on a website is materially different to the right of inspection. Even on Basildon's legal analysis, it *chose* to make its planning register available online. That choice cannot override individuals' rights under the DPA, Directive 95/46/EC or Article 8 ECHR.
- (d) In any event, if – as Basildon now contends – every single item of information submitted with a planning application should have been made publicly available on its website, this should have been made clear to applicants, so that

they could make informed decisions about what personal and sensitive personal data they wished to adduce in support of their applications. A failure to provide such information may render the resultant publication unfair, contrary to the first data protection principle. The Commissioner has not, however, considered whether that principle was breached here. This is because the publication of the sensitive personal data in the statement occurred due to a shortcoming in Basildon's organisational measures, as explained above.

29. The Commissioner is accordingly satisfied that Basildon contravened the seventh data protection principle in the manner outlined above.

Seriousness of the contravention

30. The Commissioner has gone on to consider whether the conditions under section 55A DPA were met. The Commissioner is satisfied that the contravention identified above was serious due to the number of affected individuals, the sensitive nature of the personal data that was contained in the statement, the period of time for which this sensitive personal data was available online and the potential consequences for the affected individuals.
31. In those circumstances, it was important to ensure that appropriate procedures were in place to safeguard against accidental publication. Basildon's failure to take such steps was serious.
32. The Commissioner has considered Basildon's submission that, because of an earlier published decision of a Planning Inspector relating to the same site and family, the affected individuals can have had no

reasonable expectation of privacy in respect of the contents of the statement. The Commissioner does not accept that submission. She considers published decisions of Planning Inspectors to be materially different to the publication of sensitive personal data submitted to a local authority in support of a planning application. Basildon's publication in this case constituted a distinct, renewed and materially different act of processing. In any event, as Basildon has accepted, the Planning Inspector's decision did not contain all of the sensitive personal data at issue in this case.

33. The Commissioner does accept that the likely consequences for this family of Basildon's contravention were to some extent mitigated by the previous publication of the Planning Inspector's decision. That factor, however, is relevant to the likely *consequences* of this specific breach. It does not materially reduce the seriousness of Basildon's shortcomings under the seventh data protection principle.
34. In all the circumstances, the Commissioner is therefore satisfied that condition (a) from section 55A (1) DPA is met.

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

35. The relevant features of the kind of contravention are:
- (a) The contravention occurred in the context of one of Basildon's core function as a local planning authority. Its publication of information relating to planning applications is likely to attract attention in the local community. In that context, contraventions of this kind are likely to cause

substantial damage or substantial distress because they involve public disclosure in a prominent forum.

- (b) The sensitivity of the relevant personal data is a central feature of this contravention. Contraventions involving the public disclosure of such sensitive personal data are likely to cause substantial damage and/or substantial distress to at least some affected data subjects.
- (c) Contraventions involving the publication of sensitive personal data about contentious issues such as traveller communities are likely to cause substantial distress and/or damage. In such cases, affected data subjects may legitimately fear how their data may be used by hostile third parties.
- (d) Contraventions which result in sensitive personal data being published online for a period of some six weeks are likely to cause substantial distress and/or damage.
- (e) This case concerns a failure to have appropriate procedures in place for identifying and redacting sensitive personal data prior to publication on a public authority's website. In cases involving such data, such a contravention is likely to result in inappropriate disclosures at some point (as happened here). Such disclosures are likely to cause substantial distress. They may also cause damage, for example to mental health.
- (f) In assessing the likely consequences of this kind of contravention, it is also important to take into account that Basildon published this sensitive personal data in

contravention of its own practice of redacting such data from published documents. Individuals are likely to be distressed by a failure to process their data in accordance with their reasonable expectations.

36. As indicated above, she has taken into account Basildon's submission that the consequences for this particular family were to some extent mitigated by what appeared in the previously published decision of the Planning Inspector. The Commissioner does not, however, consider that this happenstance is material to the likely consequences of this kind of contravention.
37. In all the circumstances, the Commissioner is satisfied that condition (b) from section 55A (1) DPA is met.

Deliberate or foreseeable contravention

38. The Commissioner has considered whether the contravention identified above was deliberate. In the Commissioner's view, this means that Basildon's actions which constituted those contraventions were deliberate actions (even if Basildon did not actually intend thereby to contravene the DPA).
39. The Commissioner considers that in this case Basildon did not deliberately contravene the DPA in that sense. She considers that the inadequacies outlined above were matters of serious oversight rather than deliberate intent to ignore or bypass the provisions of the DPA.
40. The Commissioner has gone on to consider whether Basildon 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 Basildon was aware that between 30 to 45 planning applications each year were submitted with statements containing sensitive personal data that would be published on its website. This is evidenced by the fact that Basildon's planning technicians had been given the task of redacting such applications. Basildon had also taken previous decisions not to publish neighbour objection letters because they identified third parties.

41. In the circumstances, Basildon ought reasonably to have known that there was a risk that this contravention would occur unless it ensured that the process was governed by adequate written procedures, undertaken by staff with appropriate experience and supervision and the statement was physically checked prior to publication, in line with the practice employed in its finance department.
42. Second, the Commissioner has considered whether Basildon knew or ought reasonably to have known that the contravention would be of a kind likely to cause substantial damage or substantial distress. She is satisfied that this condition is met, given that Basildon was aware that such statements may contain sensitive personal data and that, without adequate procedures in place, such data could be made publicly available online. Basildon ought to have known that it would cause substantial distress if the information was used in ways the family did not envisage, including by online publication.
43. Basildon should also have known that if the data has in fact been accessed by hostile third parties then it would cause further distress and also damage to the family.
44. Therefore, it should have been obvious to Basildon that such a contravention would be of a kind likely to cause substantial damage or substantial distress to the affected individuals.

45. Third, the Commissioner has considered whether Basildon failed to take reasonable steps to prevent the contravention. Again, she is satisfied that this condition is met. Reasonable steps in these circumstances would have entailed putting in place adequate written procedures governing the redaction of statements, ensuring that appropriately experienced staff undertook the redaction process and that the outcome of their work was physically checked by someone else before any disclosure was undertaken. Basildon did not take those steps. The Commissioner considers there to be no good reason for that failure.
46. The Commissioner is therefore satisfied that condition (c) from section 55A (1) DPA is met.
47. For the above reasons, the Commissioner considers there to have been a serious contravention of the seventh data protection principle on the part of Basildon with respect to the unredacted statement that was published on its website. The contravention was of a kind likely to cause substantial damage or substantial distress. Basildon knew or ought to have envisaged those risks and it did not take reasonable steps to prevent the contravention. The conditions for issuing a monetary penalty are met in this case.

The Commissioner's decision to impose a monetary penalty

48. The Commissioner has concluded that the conditions for issuing a monetary penalty are in place. She has considered whether it is appropriate for her to exercise her discretion in favour of issuing a monetary penalty in this case. Her conclusion is that it is appropriate to do so in all the circumstances. The contravention is serious in terms of

both Basildon's deficiencies and the impact such deficiencies were likely to have on affected individuals in this case and cases like it.

49. 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.

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

- Basildon referred this incident to the Commissioner, removed the relevant data from its website and was co-operative during the Commissioner's investigation.
- A monetary penalty may have a significant impact on Basildon's reputation.
- Some of the personal data and sensitive personal data which Basildon should have redacted was otherwise available in a public document, namely the previously published report of a Planning Inspector.
- The affected individuals do not appear to have become aware of or complained about this contravention. The Commissioner is not aware of the affected individuals actually suffering any damage or distress in this case.

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

- Basildon did not notify the affected individuals.
- Basildon has not taken sufficient remedial action.

52. The Commissioner has considered the likely impact of a monetary penalty on Basildon. She has decided that Basildon has access to sufficient financial resources to pay the proposed monetary penalty without causing undue financial hardship.
53. The Commissioner's underlying objective in imposing a monetary penalty notice is to promote compliance with the DPA and this is an opportunity to remind data controllers to ensure that appropriate and effective security measures are applied to personal data.

Conclusion and amount of penalty

54. The Commissioner confirms that she has taken account of Basildon's submissions in response to her Notice of Intent. The most important of those submissions are referred to above.
55. Notwithstanding those submissions, the Commissioner has decided that she can and should issue a monetary penalty in this case, for the reasons explained above.
56. Taking into account all of the above, the Commissioner has decided that a penalty in the sum of **£150,000 (One hundred and fifty thousand pounds)** is reasonable and proportionate given the particular facts of the case and the underlying objective in imposing the penalty.
57. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **22 June 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.

58. If the Commissioner receives full payment of the monetary penalty by **21 June 2017** the Commissioner will reduce the monetary penalty by 20% to **£120,000 (One hundred and twenty thousand pounds)**. However, you should be aware that the early payment discount is not available if you decide to exercise your right of appeal.
59. 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.
60. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.
61. Information about appeals is set out in Annex 1.
62. 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.

63. 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 22nd day of May 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 (Information Rights) 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)).