

## **DATA PROTECTION ACT 1998**

### **SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER**

#### **ENFORCEMENT NOTICE**

To: Studios MG Limited

Of: 3 Shortlands, Shortlands, Hammersmith, London W6 8DA

1. The Information Commissioner ("Commissioner") has decided to issue Studios MG Limited ("SMG") with an enforcement notice under section 40 of the Data Protection Act 1998 ("DPA"). The Notice is in relation to 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. SMG, whose registered office is given above (Companies House Registration Number: 09417715) is the organisation stated in this notice to have transmitted 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. Regulation 22(3) of PECR states:

- “(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.
6. Section 11(3) of the DPA defines “direct marketing” as “the communication (by whatever means) of any advertising or marketing material which is directed to particular individuals”. This definition also applies for the purposes of PECR (see regulation 2(2))
7. Consent is defined in the European Directive 95/46/EC as *“any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed”*.
8. “Individual” is defined in regulation 2(1) of PECR as “a living individual and includes an unincorporated body of such individuals”.

9. 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”.
10. “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 recipient’s terminal equipment until it is collected by the recipient and includes messages sent using a short message service”.
11. PECR implements European legislation (Directive 2002/58/EC) aimed at the protection of the individual’s fundamental right to privacy in the electronic communications sector. PECR was amended for the purpose of giving effect to Directive 2009/136/EC which amended and strengthened the 2002 provisions. The Commissioner approaches PECR so as to give effect to the Directives.
12. 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.
13. 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, she 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.
14. The provisions of the DPA remain in force for the purposes of PECR notwithstanding the introduction of the Data Protection Act 2018 (see paragraph 58(1) of Part 9, Schedule 20 of that Act).

### **The contravention**

15. The Commissioner finds that SMG contravened regulation 22 of PECR.
16. The Commissioner finds that the contravention was as follows:
17. The Commissioner finds that on 30 April 2020 there was one direct marketing email received by a subscriber, capable of being evidenced by a complaint. The Commissioner finds that SMG transmitted the direct marketing message, contrary to regulation 22 of PECR.
18. SMG has confirmed however that between 8,000 to 9,000 such direct marketing emails were sent on 30 April 2020, but has failed to provide precise figures for those direct marketing messages that were received by subscribers.
19. SMG, as the sender 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. In this instance SMG has stated only that it does not hold any evidence of consent for the individuals to whom it engaged in its one-day direct marketing campaign.
21. SMG has indicated that the data it used had been gathered over a number of years from various sources, including but not limited to "LinkedIn connections, events, [and] people who had emailed [the director]". It is apparent to the Commissioner that SMG's direct marketing campaign was therefore made possible by using data which had been scraped from various vaguely defined sources. SMG made no

apparent effort to obtain consent for the direct marketing that it sent on 30 April 2020, and indeed it would appear from the account given by the complainant in this instance that data could have been harvested from sources which had previously sought to provide services as wide ranging as tennis tuition.

22. The Commissioner is further satisfied that SMG cannot rely on the 'soft opt-in' exemption provided by Regulation 22(3) PECR for the purposes of the messages sent. Whilst SMG state that data was obtained from several sources, it is itself a 'software design and build consultancy', and this would appear to bear no relation to the sale of personal protective equipment which SMG sought to conduct with its direct marketing messages on 30 April 2020.
23. In short, SMG has provided no evidence to support a reliance on Regulation 22(3) PECR, or any evidence to demonstrate valid consent whatsoever.
24. The Commissioner would also note that, upon receiving the Commissioner's initial investigation letter, SMG advised her that it had deleted its database, and its platform provider account, essentially removing any chance of accurately relaying to the Commissioner the total volume of messages delivered to affected subscribers. As such it is impossible to determine the total number of individuals whose privacy had been impacted by the actions of SMG.
25. The Commissioner has considered, as she 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 or distress. The Commissioner has decided that, given the ongoing

pandemic, and the nature of the direct marketing which took place, it is likely that damage or distress has been caused in this instance.

26. **In view of the matters referred to above the Commissioner hereby gives notice that, in exercise of her powers under section 40 of the DPA, she requires SMG to take the steps specified in Annex 1 of this Notice.**

**Right of Appeal**

27. 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 6th day of October 2020

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

## **ANNEX 1**

### **TERMS OF THE ENFORCEMENT NOTICE**

SMG shall within 30 days of the date of this notice:

- Except in the circumstances referred to in paragraph (3) of regulation 22 of PECR, 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 SMG that he clearly and specially consents for the time being to such communications being sent by, or at the instigation of, SMG.



## **ANNEX 2**

### **DATA PROTECTION ACT 1998**

#### **REPRESENTATIONS IN RESPONSE TO A PRELIMINARY NOTICE**

1. Section 48 of the Data Protection Act 1998 gives any person upon whom an enforcement 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:

General Regulatory Chamber  
HM Courts & Tribunals Service  
PO Box 9300  
Leicester

LE1 8DJ

Telephone: 0300 123 4504

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

- The notice of appeal should be served on the Tribunal within 28 days of the date on which the enforcement notice was sent
4. 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)).