

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

MONETARY PENALTY NOTICE

To: Hall and Hanley Limited

Of: 1st Floor, Building 4, Universal Square, Devonshire Street North,
Manchester M12 6JH

1. The Information Commissioner ("Commissioner") has decided to issue Hall and Hanley Limited ("H&H") with a monetary penalty under section 55A of the Data Protection Act 1998 ("DPA"). The penalty 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. H&H, whose registered office is given above (Company House Reference: 07851228), is the organisation stated in this notice to have instigated the transmission of 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. 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)).
6. "Individual" is defined in regulation 2(1) of PECR as "a living individual and includes an unincorporated body of such individuals".
7. "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".
8. 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".
9. Section 55A of the DPA (as amended by the Privacy and Electronic Communications (EC Directive)(Amendment) Regulations 2011 and the Privacy and Electronic Communications (Amendment) Regulations 2015) states:

"(1) The Commissioner may serve a person with a monetary penalty if the Commissioner is satisfied that –

 (a) there has been a serious contravention of the requirements of the Privacy and Electronic Communications (EC Directive) Regulations 2003 by the person,

 (b) subsection (2) or (3) applies.

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

- (3) This subsection applies if the person –
- (a) knew or ought to have known that there was a risk that the contravention would occur, but
 - (b) failed to take reasonable steps to prevent the contravention.”
10. 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.
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 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).

Background to the case

13. 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 and this data is incorporated into a Monthly Threat Assessment (MTA) used to ascertain organisations in breach of PECR.

14. Subscribers are also able to report complaints of unsolicited direct marketing text messages to the Commissioner directly using the ICO's online reporting tool.
15. H&H first came to the attention of the Commissioner following a large number of complaints being received about unsolicited direct marketing messages advertising the services of H&H on the 7726 service, together with a quantity of complaints being made to the ICO's own online reporting tool.
16. In total the Commissioner notes that there were 1,257 complaints made via the 7726 service; with a further 96 complaints being made directly to the Commissioner.
17. Some of the complaints include the following:

"I have checked and I do not have PPI. Hall & Hanley did not have my consent to send me this message";

"I have not consented to these types of messages and it is very concerning and worrying how this company has got hold of my mobile number";

"I have not given this company ANY of my personal information. I have never had any contact with this company. Receiving text messages like this is very concerning as I don't know what other information they have on me, or where they got this information".

18. An initial investigation letter was sent by the Commissioner on 12 July 2018 asking questions as to H&H's practices, and setting out her concerns regarding the organisation's compliance with the DPA and PECR. Copies of the complaints received were also sent to H&H.
19. The substantive response provided to the Commissioner's initial investigation letter on 7 August 2018 indicated that H&H had engaged the services of third parties, which acted in succession over the period of the alleged contravention, to send direct marketing text messages on its behalf and that between 1 January 2018 and 26 June 2018 3,560,211 such messages were sent. It was subsequently confirmed on 21 September 2018 that the 3,560,211 messages said to have been sent, had in fact been received by subscribers, and that 4,833,167 messages had actually been sent in total.
20. It was the case that H&H did not itself obtain the data or consent of the individuals to which it intended to advertise its products. Rather, it engaged the third parties to obtain the data and consent of the individuals; these third parties would then also act as the senders of the direct marketing messages which form the basis of the Commissioner's investigation.
21. The data used was obtained from four websites: getyaoffers.co.uk; petesdeals.co.uk; prizereactor.co.uk; and myloanoffers.co.uk. The Commissioner has reviewed the privacy policies for those sites.
22. In respect of getyaoffers.co.uk, H&H do not appear to be named within the Privacy Policy. Rather, the website, whilst naming some other organisations, primarily details a wide range of sectors about which subscribers may receive marketing.
23. In respect of myloanoffers.co.uk, H&H do not appear to be named within the Privacy Policy. Rather, there is a short list of Third Party

Partners, and an exhaustive list of sectors about which subscribers may receive direct marketing.

24. In respect of the Privacy Policies for prizereactor.co.uk and petesdeals.co.uk, it appears that H&H were named towards the end of a list of third parties, however it does not appear that potential subscribers were provided with an option to select which of the many listed third parties they may wish to receive marketing about, or the method by which they would wish to receive any marketing. It also appears to be the case that consent to third party marketing was a necessary condition of subscribing to the services offered by these sites.
25. The Commissioner has made the above findings of fact on the balance of probabilities.
26. The Commissioner has considered whether those facts constitute a contravention of regulation 22 of PECR by H&H and, if so, whether the conditions of section 55A DPA are satisfied.

The contravention

27. The Commissioner finds that H&H has contravened regulation 22 of PECR.
28. The Commissioner finds that the contravention was as follows:
29. Between the dates of 1 January 2018 and 26 June 2018, H&H instigated the transmission of 3,560,211 unsolicited communications by means of electronic mail to individual subscribers for the purposes of direct marketing contrary to regulation 22 of PECR.

30. This led to a total of 1,353 complaints being made by subscribers who had not previously consented to receiving such marketing.
31. "Consent" within the meaning of regulation 22(2) requires that the recipient of the electronic mail has notified the sender that he consents to messages being sent by, or at the instigation of, that sender. Indirect, or third party, consent can be valid but only if it is clear and specific enough. Furthermore, the European Directive 95/46/EC defines consent as "any freely given specific and informed indication of his wishes by which a data subject signifies his agreement to personal data relating to him being processed".
32. Whilst H&H did not send the text messages itself, it had an agreement with two third parties, which acted in succession over the period of contravention, to send the messages on its behalf. The aim of the messages was to promote H&H's services. The Commissioner is therefore satisfied that H&H was the instigator of the direct marketing text messages.
33. As the instigator of the direct marketing text messages, it was the responsibility of H&H to ensure that valid, albeit indirect, consent to send those messages had been acquired.
34. The Commissioner's direct marketing guidance says "organisations need to be aware that indirect consent will not be enough for texts, emails or automated calls. This is because the rules on electronic marketing are stricter, to reflect the more intrusive nature of electronic messages."
35. It goes on to say that indirect consent can be valid but only if it is clear and specific enough. Moreover, "the customer must have anticipated that their details would be passed to the organisation in question, and that they were consenting to messages from that organisation. This will

depend on what exactly they were told when consent was obtained”.

This principle applies equally in cases where the “organisation” engages a third party to send messages on its behalf.

36. Consent will not be “informed” if individuals do not understand what they are consenting to. Organisations should therefore always ensure that the language used is clear, easy to understand, and not hidden away in a privacy policy or small print. Consent will not be valid if individuals are asked to agree to receive marketing from “similar organisations”, “partners”, “selected third parties” or other similar generic description. Further, consent will not be valid where an individual is presented with a long, seemingly exhaustive list of general categories of organisations. In two of the four Privacy Policies disclosed to the Commissioner, H&H were not named and the Commissioner has been provided with no proof that they were named at the time of the alleged contravention. As such, they appear instead to rely on reference to a wide range of marketing sectors which the Commissioner finds would not be sufficient to enable “informed” consent.
37. Of those Policies that did name H&H, the Commissioner found that H&H was not immediately visible to subscribers, and that in any event there was no option for the subscriber to specifically select which third parties they would like to receive marketing about, or to specify the type and method of marketing they would like to receive.
38. It was further confirmed to the Commissioner during the investigation that acceptance of the “T&C’s and privacy policy” was necessary and formed a condition of subscription for the websites which further suggests that subscribers have been denied the ability to give free and specific consent.

39. The Commissioner is therefore satisfied that H&H did not have the necessary valid consent for the 3,560,211 direct marketing messages which were sent to subscribers at its instigation.
40. The Commissioner is satisfied that H&H was responsible for this contravention and has gone on to consider whether the conditions under section 55A DPA were met.

Seriousness of the contravention

41. The Commissioner is satisfied that the contravention identified above was serious. This is because between the dates of 1 January 2018 and 26 June 2018, a total of 3,560,211 direct marketing text messages were delivered at the instigation of H&H to subscribers without their consent.
42. This resulted in a total of 1,353 complaints being made via the 7726 service and to the Commissioner.
43. The Commissioner is therefore satisfied that condition (a) from section 55A(1) DPA is met.

Deliberate or negligent contraventions

44. The Commissioner has considered whether the contravention identified above was deliberate.
45. The Commissioner considers that in this case H&H did not deliberately contravene regulation 22 of PECR. That is to say that whilst H&H did seek to instigate the sending of direct marketing to subscribers, there appears to have been no deliberate intention on the part of H&H to

breach PECR.

46. The Commissioner went on to consider whether the contraventions identified above were negligent. First, she has considered whether H&H knew or ought reasonably to have known that there was a risk that these contraventions would occur. She is satisfied that this condition is met, given that the issue of unsolicited text messages has been widely publicised by the media as being a problem. Furthermore, it would be reasonable to expect an organisation who is registered with the ICO to be aware of their obligations under PECR and to carry out steps of due diligence to ensure compliance when engaging in direct marketing via third parties.
47. It is therefore reasonable to suppose that H&H knew or ought reasonably to have known that there was a risk that these contraventions would occur.
48. Second, the Commissioner has considered whether H&H failed to take reasonable steps to prevent the contraventions. The Commissioner has published detailed guidance for those carrying out direct marketing explaining their legal obligations under PECR. This guidance explains the circumstances under which organisations are able to carry out marketing over the phone, by text, by email, by post, or by fax. In particular it states that organisations can generally only send marketing texts to individuals if that person has specifically consented to receiving them from the sender. It also makes it clear that particular care must be taken when relying on indirect consent and that it is not acceptable to rely on assurances given by third party suppliers without undertaking proper due diligence. Whilst the Commissioner has been provided with copies of 'Opted in Data Supply Agreements' between H&H and its third party senders, the terms appear to be insufficient in that it is not appropriate for H&H to seek to absolve itself

of culpability under data protection legislation by transferring its duties of due diligence in respect of the data to the third party. Had H&H completed the customer journey they would have seen the deficiencies in the consents on which they were to rely.

49. The Commissioner is therefore satisfied that H&H failed to take reasonable steps to ensure that the consents obtained were clear, freely given, specific and valid.
50. In the circumstances, the Commissioner is satisfied that H&H failed to take reasonable steps to prevent the contraventions.
51. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met.

The Commissioner's decision to issue a monetary penalty

52. 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 the procedural rights under section 55B have been complied with.
53. 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 H&H on this matter.
54. The Commissioner is accordingly entitled to issue a monetary penalty in this case.

55. The Commissioner has considered whether, in the circumstances, she should exercise her discretion so as to issue a monetary penalty
56. The Commissioner has considered the likely impact of a monetary penalty on H&H. She has decided on the information that is available to her, that H&H has access to sufficient financial resources to pay the proposed monetary penalty without causing undue financial hardship.
57. The Commissioner's underlying objective in imposing a monetary penalty notice is to promote compliance with PECR. The sending of unsolicited marketing text messages is a matter of significant public concern. A monetary penalty in this case should act as a general encouragement towards compliance with the law, or at least as a deterrent against non-compliance, on the part of all persons running businesses currently engaging in these practices. The issuing of a monetary penalty will reinforce the need for businesses to ensure that they are only messaging those who specifically consent to receive marketing.
58. For these reasons, the Commissioner has decided to issue a monetary penalty in this case.

The amount of the penalty

59. Taking into account all of the above, the Commissioner has decided that a penalty in the sum of **£120,000 (one hundred and twenty thousand pounds)** is reasonable and proportionate given the particular facts of the case and the underlying objective in imposing the penalty.

Conclusion

60. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **5 June 2019** 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.
61. If the Commissioner receives full payment of the monetary penalty by **4 June 2019** the Commissioner will reduce the monetary penalty by 20% to **£96,000 (ninety six thousand pounds)**. However, you should be aware that the early payment discount is not available if you decide to exercise your right of appeal.
62. 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.
63. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.
64. Information about appeals is set out in Annex 1.
65. 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.

66. 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 May 2019

Signed

Stephen Eckersley
Director of Investigations
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 55B(5) of the Data Protection Act 1998 gives any person upon whom a monetary penalty 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

- 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 section 55B(5) 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)).