

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

ENFORCEMENT NOTICE

To: NWR Limited

Of: Office 11, Innovation House, Ramsgate Road, Sandwich, Kent,
CT13 9ND

1. The Information Commissioner ("Commissioner") has decided to issue NWR Limited ("NWRL") with an enforcement notice under section 40 of the Data Protection Act 1998 ("DPA"). The notice is in relation to a contravention of Regulations 21 and 24 of the Privacy and Electronic Communications (EC Directive) Regulations 2003 ("PECR") by NWRL.
2. This notice explains the Commissioner's decision.

Legal framework

3. NWRL, whose registered office is given above (companies house registration number:09933503), is the person stated in this notice to have used a public electronic communications service for the purpose of making unsolicited calls for the purposes of direct marketing contrary to regulation 21 of PECR.
4. Regulation 21 applies to the making of unsolicited calls for direct marketing purposes. It means that if a company wants to make calls promoting a product or service to an individual who has a telephone

number which is registered with the Telephone Preference Service Ltd ("TPS"), then that individual must have given their consent to that company to receive such calls.

5. Regulation 21 paragraph (1) of PECR provides that:

"(1) A person shall neither use, nor instigate the use of, a public electronic communications service for the purposes of making unsolicited calls for direct marketing purposes where-

- (a) the called line is that of a subscriber who has previously notified the caller that such calls should not for the time being be made on that line; or
- (b) the number allocated to a subscriber in respect of the called line is one listed in the register kept under regulation 26."

6. Regulation 21 paragraphs (2), (3), (4) and (5) provide that:

"(2) A subscriber shall not permit his line to be used in contravention of paragraph (1).

(3) A person shall not be held to have contravened paragraph (1)(b) where the number allocated to the called line has been listed on the register for less than 28 days preceding that on which the call is made.

(4) Where a subscriber who has caused a number allocated to a line of his to be listed in the register kept under regulation 26 has notified a caller that he does not, for the time being, object to such calls being made on that line by that caller, such calls may be made by

that caller on that line, notwithstanding that the number allocated to that line is listed in the said register.

(5) Where a subscriber has given a caller notification pursuant to paragraph (4) in relation to a line of his—

(a) the subscriber shall be free to withdraw that notification at any time, and

(b) where such notification is withdrawn, the caller shall not make such calls on that line.”

7. Under regulation 26 of PECR, the Commissioner is required to maintain a register of numbers allocated to subscribers who have notified them that they do not wish, for the time being, to receive unsolicited calls for direct marketing purposes on those lines. The Telephone Preference Service Limited (“TPS”) is a limited company contracted by the Commissioner to carry out this role. Businesses who wish to carry out direct marketing by telephone can subscribe to the TPS for a fee and receive from them monthly a list of numbers on that register.
8. 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)).
9. Regulation 24 of PECR provides:

“(1) Where a public electronic communications service is used for the transmission of a communication for direct marketing purposes the person using, or instigating the use of, the service shall ensure that the following information is provided with that communication –

(b) in relation to a communication to which regulation 21 (telephone calls) applies, the particulars mentioned in paragraph (2)(a) and, if the recipient of the call so requests, those mentioned in paragraph 2(b).

(2) The particulars referred to in paragraph (1) are –

(a) the name of the person;

(b) either the address of the person or a telephone number on which he can be reached free of charge.”

10. 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.
11. 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, he 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.
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. NWRL is a company that describes itself on its website as a specialist supplier and installer of renewable energy products in homes and businesses across the UK.

14. NWRL first came to the attention of the Commissioner when she received a complaint from another similar company whose trading name was being used to secure business from call recipients. A particular call line identifier ("CLI") had been utilised in relation to which complaints had been received by the TPS, but were unable to be issued because the TPS were unable to identify the company involved.
15. Names given during complaints to the TPS attributed to this CLI included 'Energy Care' and 'Energy UK'; generic terms that did not allow the call recipient to identify the company making the call.
16. On 22 January 2018 an ICO investigating officer placed a call to the CLI and spoke to a member of staff who introduced the company as 'Energy Care' and stated (incorrectly) that it did not have a website.
17. Accordingly a third party information notice was issued to the CLI provider which identified a reseller of the number. Responses to two further third party information notices issued to the reseller revealed that NWRL was the subscriber to the number, corroborated by a copy contract, as well as providing a list of 25 numbers allocated to NWRL since 2016.
18. Using the 25 numbers identified as being allocated to NWRL a number of complaints were ascertained.
19. An initial analysis of those complaints made to the ICO online reporting tool regarding unsolicited calls from NWRL identified that a total of 34 complaints were received.
20. In addition, information provided to the ICO by the TPS showed that a further 57 complaints had been received by the TPS from individuals who were registered with the TPS but had received unsolicited direct

marketing calls from NWRL. Of these, only 25 correctly identified NWRL as the instigator of the call.

21. Issuing of complaints by the TPS in relation to those 25 complaints elicited 11 responses from NWRL, citing 'human error' as the cause and explaining that the numbers had been 'misdialled'. This explanation is at odds with call records, which demonstrate that for all but one of these numbers, each had been called on multiple occasions (in one case the number was called 49 times, and also after having been contacted by the TPS). The TPS received no response from NWRL in relation to the remaining complaints.
22. On 4 May 2018 a letter was sent to NWRL setting out the ICO's concerns about its compliance with PECR, and requesting an explanation for the complaints received by the TPS and the ICO's online reporting tool. On 25 May 2018 a request for additional information was also sent to NWRL.
23. NWRL's responses stated that it adhered to rules of live marketing and did not knowingly make calls to anyone who asked for their details to be suppressed, or who was registered with the TPS, unless it had their prior consent.
24. In relation to the recording of false company names by the TPS, NWRL stated: "We do not use false names. Our operatives may introduce them as the 'Energy Care Departments of either NWR Limited or EIC Limited'. We suggest the other names you quote are mis-spelt or the consumer has mis-heard the names of the companies NWR Ltd or Energy Innovation Company (EIC) Ltd as the names quotes are so similar to our actual company names".

25. NWRL detailed 30 CLIs which it used, 25 of which had been previously identified to the Commissioner by the reseller. In response to a request for call records, NWRL were only able to supply records for May 2017 which showed that during that month 605,219 calls had been made.
26. NWRL confirmed that the data used to make calls had been purchased for use by a third party company associated with, but distinct from NWRL (both companies shared the same directors), but which had since ceased trading. Upon liquidation of the associated company on 16 March 2016, approximately 30,000 data records were transferred to NWRL who then used the data to make live marketing calls. NWRL also itself purchased a further 20,000 data records on 17 May 2018, but confirmed that it only used data transferred from its associate company prior to this date.
27. The liquidated company purchased its latest batch of data in December 2015, prior to NWRL's incorporation. No evidence of consent to receive calls from NWRL has been provided to the Commissioner; given that NWRL were not incorporated at the point of receipt of consent it follows that such consent did not exist.
28. In relation to data purchased directly by NWRL it is apparent that NWRL has sought to place the emphasis for TPS screening, data quality and compliance with regulations firmly with its data supplier rather than itself, and has offered no form of due diligence checks on the data supplier. NWRL informed the Commissioner that TPS checks were not carried out as the data was purchased on 'the understanding that it was compliant'.
29. Whilst NWRL stated that it operated a suppression list, it is apparent that this was not effective given that many complainants received

marketing calls after registering with the TPS or requesting suppression of their details.

30. Using call logs provided by NWRL it was established that between May 2016 and May 2018 NWRL made a total of 1,242,521 calls. The TPS confirmed that of these, 865,663 (equating to 69.7%) were numbers registered with the TPS for more than 28 days. NWRL has estimated that out of the total calls made, 1,187,781 were unsolicited, with the remainder being solicited calls regarding customer enquiries, appointment booking, customer service and follow up calls. Having regard to the average number of calls to TPS registered numbers above (69.7%), this would equate to approximately 827,883 unsolicited calls being made to numbers registered with the TPS.
31. Given the amount of calls made by NWRL, it is apparent that each data record must have been used on multiple occasions.
32. Based on the information provided by NWRL regarding the additional CLIs it used (see paragraph 26 above), a further analysis of complaints received about NWRL revealed that in fact 44 complaints were made to the Commissioner's online reporting tool, and 94 to the TPS, totalling 138 complaints. Of these, only 35 complainants were correctly informed of the company identity. Examples of complaints received are:

"Battery systems for solar energy. They rang yesterday also & I asked them not to call back. They claimed that I qualified for a Green Levy Incentive."

"Called saying government scheme for my solar panels. Had several of these offering to upgrade etc. and the last two have become very abusive when I say not interested"

"They are calling several times a day asking to speak to someone who doesn't exist."

"Didn't get that far as I have received numerous calls from them virtually every day at lunch time."

"The young woman was very persistent and when told that we are not interested said she would keep on calling us and she has"

"Solar panels are mentioned, but the caller hangs up when questioned. This company have called me five times. Yesterday twice within a quarter of an hour."

"Said his name was Jason. I said we had reported NWR in the past and had asked them not to call, and that we are TPS. He then phoned back another 5 times within a few minutes. Really annoying and rude."

33. The Commissioner has made the above findings of fact on the balance of probabilities.
34. The Commissioner has considered whether those facts constitute a contravention of regulations 21 and 24 of PECR by NWRL.

The contravention

35. The Commissioner finds that NWRL contravened regulations 21 and 24 of PECR.
36. The Commissioner finds that the contravention was as follows:

37. Between May 2016 and May 2018 NWRL used a public telecommunications service for the purpose of making approximately 827,883 unsolicited calls for direct marketing purposes to subscribers where the number allocated to the subscriber in respect of the line called was a number listed on the register of numbers kept by the Commissioner in accordance with regulation 26, contrary to regulation 21(1)(b) of PECR.
38. The Commissioner is also satisfied for the purposes of regulation 21 that these calls were made to subscribers who had registered with the TPS at least 28 days prior to receiving the calls and had not given their prior consent to NWRL to receive calls.
39. In respect of those calls, the Commissioner is satisfied for the purposes of regulation 24 that whilst a valid CLI was presented, in the vast majority of cases it did not allow subscribers to identify the caller because an incomplete, misleading or false company name was provided.
40. The Commissioner is satisfied that NWRL was responsible for the contravention.
41. The Commissioner has considered, as she is required to do under section 40(2) of the DPA (as extended and modified by the Regulations) when deciding whether to serve an Enforcement Notice, whether any contravention has caused or is likely to cause any person damage. The Commissioner has decided that it is unlikely that actual damage has been caused in this instance.
42. The Commissioner has also considered whether, in the circumstances, she should exercise her discretion so as to issue an Enforcement Notice. She has taken into account representations dated 7 January

2019 made in response to the Preliminary Enforcement Notice and in other correspondence on this matter, however she is not dissuaded from her preliminary view. In its representations, NWRL explained that it used data purchased by a similar previous company operating using the same call centre. NWRL states it has adopted a new telephone call monitoring system, will ensure all staff introduce themselves by name and provide a Freephone number, and intends to check the data against its own suppression list. The Commissioner however is not persuaded that such steps will ensure compliance with the Regulations, as for example, it is not apparent that a TPS licence has been purchased to enable regular screening of numbers.

43. The Commissioner has concluded that it is appropriate for her to exercise her discretion in favour of issuing an Enforcement Notice in the circumstances.
44. The issuing of an Enforcement Notice 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 PECR compliance issues are not repeated elsewhere.
45. **In view of the matters referred to above the Commissioner hereby gives notice that, in exercise of her powers under section 40 of the Act, she requires that NWRL shall within 35 days of the date of this Notice:**
 - (1) Except in the circumstances referred to in paragraphs (3) & (4) of regulation 21 of PECR, neither make, nor instigate unsolicited calls for direct marketing purposes to subscribers where the number allocated to the subscriber in respect of the called line was a number listed on the register of numbers kept by the

Commissioner in accordance with regulation 26, contrary to regulation 21(1)(b) of PECR; and

- (2) Any communication to which regulation 21 of PECR applies must include the name of NWRL and if requested, either the address of NWRL or a telephone number on which NWRL can be reached free of charge.

46. 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 1.
47. Any Notice of Appeal should be sent so that it is received by the Tribunal within 28 days of the date on which this Notice is sent.

Dated the 21 January 2019

Signed

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

ANNEX 1

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 he ought to have exercised his 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 enforcement 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)).