

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

MONETARY PENALTY NOTICE

To: Grove Pension Solutions Limited

Of: Grove House, London Road, Halstead, Sevenoaks, Kent TN14 7DS

1. The Information Commissioner ("Commissioner") has decided to issue Grove Pension Solutions Limited ("Grove") 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. Grove, whose registered office is given above (Company House Reference: 06045836), 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. The term "soft opt-in" is used to describe the rule set out in in Regulation 22(3) of PECR. In essence, an organisation may be able to contact its existing customers by electronic mail even if they haven't specifically consented to electronic mail. The soft opt-in rule can only be relied upon by the organisation that collected the contact details.
10. 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.”

11. 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.
12. 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.
13. 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

14. Grove came to the attention of the Commissioner following intelligence received from the Financial Conduct Authority ("FCA") regarding concerns around the organisation's use of electronic mail for the purposes of direct marketing.
15. Subsequent internal investigations carried out by the Commissioner suggested that there had in fact been two separate complaints made by subscribers via the ICO's Online Reporting Tool in respect of unsolicited marketing emails promoting the services of Grove.
16. In light of these findings the Commissioner, on 2 October 2017, sent an initial investigation letter to Grove asking questions as to their direct marketing practices, and setting out her concerns regarding their compliance with PECR.
17. A substantive response was provided by Grove on 25 October 2017 which advised that they utilised the services of a third party marketing agent to carry out a range of marketing functions on their behalf, including lead generation. Grove, by extension through this marketing agent, would work with 'email providers', who essentially provided a hosted marketing service by sending out "pre-approved emails" to opted-in subscribers contained within data sets which they themselves supplied.
18. The 'email providers' would obtain the consents of subscribers through a number of websites. For the purposes of the Commissioner's investigation the consents obtained through the following websites were of particular relevance: www.testing12free.co.uk; www.soapboxsurvey.co.uk; and www.prizereactor.co.uk.

19. The intended recipients of these emails would not have had a previous relationship with Grove.
20. The Commissioner has examined the information which each of the websites used by the 'email providers' would provide to subscribers at the point of consent; including the terms and conditions, and the privacy policies of those sites. She has found that at no point are Grove specifically named as an organisation from, or about, whom recipients may receive direct marketing.
21. On 31 January 2018 the Commissioner contacted Grove to request details of the due diligence carried out in respect of the 'email providers'. In response Grove confirmed that they, in conjunction with their marketing agent, had sought the advice of a recognised specialist data protection consultancy regarding the use of hosted email for lead generation purposes; furthermore they had checked this advice with an independent data protection solicitor. Grove then instructed their marketing agent to contractually engage the services of the 'email providers' for the purposes of carrying out hosted marketing campaigns advertising the services of Grove.
22. Grove confirmed to the Commissioner that between the dates of 31 October 2016 and 31 October 2017, there were a total of 2,108,924 direct marketing emails sent to subscribers advertising the products of Grove, of which 1,942,010 were delivered.
23. The Commissioner has made the above findings of fact on the balance of probabilities.
24. The Commissioner has considered whether those facts constitute a contravention of regulation 22 of PECR by Grove and, if so, whether the conditions of section 55A DPA are satisfied.

The contravention

25. The Commissioner finds that Grove has contravened regulation 22 of PECR.
26. The Commissioner finds that between the dates of 31 October 2016 and 31 October 2017, Grove instigated the transmission of 1,942,010 direct marketing emails to subscribers contrary to regulation 22 of PECR.
27. Organisations cannot generally send marketing emails unless the recipient has notified the sender that they consent to such emails being sent by, or at the instigation of, that sender. This principle applies equally to organisations who seek to utilise the services of third parties to send direct marketing on their behalf.
28. As the instigator of the direct marketing emails, it is incumbent on Grove to ensure that it is compliant with the requirements of regulation 22 of PECR, and to ensure that valid consent to send those messages had been acquired.
29. It is the case that to be valid, consent must be freely given, specific and informed, and involve a positive indication signifying the individual's agreement.
30. The Commissioner's direct marketing guidance says "organisations need to be aware that indirect consent (i.e. where a subscriber tells one organisation that they consent to receive marketing from other organisations) 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."

31. However, the guidance goes on to say that indirect consent can be valid but only if it is clear and specific enough, reference to 'general third parties' will not be sufficient to demonstrate valid consent. The key issue is what the subscriber is told at the point consent is obtained.
32. 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.
33. From review of the relevant privacy policies it is clear to the Commissioner that Grove are not specifically named, or identified in such a way that would suggest they could lawfully instigate direct marketing to subscribers. Further, the privacy policies referred to list a wide range of sectors about which subscribers may receive marketing, and also fail to provide subscribers with the option to specify the types of marketing they would wish to receive.
34. Whilst it is acknowledged by the Commissioner that Grove obtained external advice regarding the legality of their hosted marketing campaign, a simple review of the customer journey would have exposed the issues apparent with the consents being relied upon.
35. Therefore the Commissioner is satisfied that, notwithstanding the steps taken by Grove to ensure the veracity of the consents being relied upon, those consents were not sufficiently informed, specific, or freely

given and therefore did not amount to valid consent for the purposes of regulation 22 PECR.

36. Since it does not appear that Grove have had a prior relationship with the subscribers who received marketing for their products, they would also not be able to rely on the 'soft opt-in' exception provided under regulation 22(3) of PECR.
37. For the reasons explained above, the Commissioner finds that Grove did not have the necessary valid consent for the 1,942,010 direct marketing emails for which it instigated transmission to subscribers.
38. The Commissioner is satisfied that Grove was responsible for this contravention and has gone on to consider whether the conditions under section 55A DPA were met.

Seriousness of the contravention

39. The Commissioner is satisfied that the contravention identified above was serious. This is because between the dates of 31 October 2016 and 31 October 2017 a total of 1,942,010 direct marketing emails were transmitted at the instigation of Grove and received by subscribers advertising marketing material for which they had not provided consent.
40. The Commissioner is therefore satisfied that condition (a) from section 55A(1) DPA is met.

Deliberate or negligent contraventions

41. The Commissioner has considered whether the contravention identified above was deliberate.

42. The Commissioner considers that in this case Grove did not deliberately contravene regulation 22 of PECR. That is to say that whilst Grove did seek to instigate direct marketing to subscribers, there appears to have been no deliberate intention on the part of Grove to breach PECR.
43. The Commissioner has therefore gone on to consider whether the contraventions identified above were negligent. First, she has considered whether Grove 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 emails have 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 to ensure compliance when engaging in the instigation of direct marketing.
44. Second, the Commissioner considered whether Grove 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 gives clear advice regarding the requirements of consent for direct marketing and 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, or instigate, marketing emails to individuals if that person has specifically consented to receiving them from the sender.
45. Reasonable steps to be expected of Grove could also have included for instance carrying out due diligence checks to ensure that they were specifically named within the privacy policies of the websites from which the consents had been obtained.

46. In the circumstances, the Commissioner is satisfied that Grove failed to take reasonable steps to prevent the contraventions.
47. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met.

The Commissioner's decision to issue a monetary penalty

48. The Commissioner has taken the following mitigating factors into account:
- Grove say that they engaged in "extensive consultation" with a recognised specialist data protection consultancy regarding the use of hosted email for lead generation purposes. This is accepted by the Commissioner, and demonstrates that Grove had at least an awareness of their obligations under the legislation, and of a generally positive and pro-active approach to data protection;
 - The number of complaints received was minimal. Although the Commissioner would maintain that the seriousness of the contravention is dictated by the number of unlawful messages received by subscribers, rather than the amount of complaints which arose as a result of the contravention;
 - There is no evidence to suggest that Grove has engaged in unlawful direct marketing beyond the period set out within this Notice;

- Grove has co-operated with the Commissioner's investigation throughout.
49. The mitigating factors outlined above allowed the Commissioner to impose a lower penalty than a contravention of this size might usually attract.
50. The Commissioner has considered the likely impact of a monetary penalty on Grove and has decided on the information that is available to her, that Grove has access to sufficient financial resources to pay the proposed monetary penalty without causing undue financial hardship.
51. 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.
52. 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 Grove on this matter.
53. The Commissioner is accordingly entitled to issue a monetary penalty in this case.
54. The Commissioner has considered whether, in the circumstances, she should exercise her discretion so as to issue a monetary penalty
55. The Commissioner's underlying objective in imposing a monetary penalty notice is to promote compliance with PECR. The sending of

unsolicited marketing emails 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.

56. For these reasons, the Commissioner has decided to issue a monetary penalty in this case

The amount of the penalty

57. Taking into account all of the above, the Commissioner has decided that a penalty in the sum of **£40,000 (forty thousand pounds)** is reasonable and proportionate given the particular facts of the case and the underlying objective in imposing the penalty.

Conclusion

58. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **24 April 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.
59. If the Commissioner receives full payment of the monetary penalty by **23 April 2019** the Commissioner will reduce the monetary penalty by 20% to **£32,000 (thirty two thousand pounds)**. However, you should be aware that the early payment discount is not available if you decide to exercise your right of appeal.

60. 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.
61. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.
62. Information about appeals is set out in Annex 1.
63. 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.
64. 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 March 2019

Signed ..

A black rectangular box redacting the signature of Andy White.

Andy White
Director of High Profile 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)).