

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

ENFORCEMENT NOTICE

DATED 10 JUNE 2014

To: DC Marketing Limited

of: 302 St Vincent Street
Glasgow
G2 5RZ

1. The Data Protection Act 1998 (the "Act") came into force on 1 March 2000 and repealed the Data Protection Act 1984 (the "1984 Act"). By virtue of section 6(1) of the Act, the office of Data Protection Registrar originally established by section 3(1)(a) of the 1984 Act became known as the Data Protection Commissioner. Since 30 January 2001, by virtue of Section 18(1) of the Freedom of Information Act 2000, the Data Protection Commissioner became known instead as the Information Commissioner (the "Commissioner").
2. The Privacy and Electronic Communications (EC Directive) Regulations 2003 (the "Regulations") came into force on 11 December 2003.

Regulation 21 of the Regulations states –

"(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.

(2) ...

(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.*

(2) *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.*

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b) *where such notification is withdrawn, the caller shall not make such calls on that line.”*

Regulation 24 of the Regulations states –

“(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 –

(a) in relation to a communication to which regulations 19 (automated calling systems) and 20 (facsimile machines) apply, the particulars mentioned in paragraph (2)(a) and (b);

(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.”

3. “Direct marketing” is not defined in the Regulations. By

virtue of Regulation 2(2), "direct marketing" is to have the same meaning as in the Act. "Direct marketing" is defined in section 11(3) of the Act as "the communication (by whatever means) of any advertising or marketing material which is directed to particular individuals".

4. The Act contains enforcement provisions at Part V which are exercisable by the Commissioner. Those provisions are modified and extended for the purposes of the Regulations by Schedule 1 of the Regulations.
5. Section 40(1)(a) of the Act (as extended and modified by the Regulations) 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.
6. Regulation 32 of the Regulations provides that either OFCOM or a person aggrieved by an alleged contravention of any of the requirements of the Regulations may request the Commissioner to exercise his enforcement functions in respect of that contravention. The Commissioner may also exercise his enforcement functions in the absence of any such requests.
7. The Commissioner has received numerous complaints via the TPS and from individuals directly who are subscribers to specific telephone lines. The individuals allege that they have received unsolicited marketing calls on those lines, from various individuals acting on behalf of DC Marketing Limited, marketing the company and its goods and/or services. Each individual states that they have previously notified DC Marketing Limited that such calls should not be made on that line and/or have registered their number with the TPS. Many of the individuals allege that they have continued to receive such calls despite complaints to, the Commissioner and/or the TPS.
8. In the circumstances, the Commissioner is satisfied that DC Marketing Limited have contravened Regulation 21 of the Regulations in making such calls for direct marketing purposes to subscribers.

9. The Commissioner is further satisfied that DC Marketing Limited have contravened Regulation 24 of the Regulations in that the call did not provide the name of the DC Marketing Limited.
10. The Commissioner has considered, as he is required to do under section 40(2) of the Act (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 is of the view that a contravention of Regulation 24 of the Regulations is likely to cause damage because, to identify the caller, further expenses will be incurred by the person such as telephone charges and postage.
11. The Commissioner has further taken account of the effect of the incorporation in English law of the European Convention on Human Rights ("ECHR"), by virtue of the Human Rights Act 1998, in deciding whether or not to serve an Enforcement Notice. In particular, the Commissioner is mindful of the provisions of Article 8 of the ECHR in that individual subscribers have a qualified right to respect for private and family life, home and correspondence which may have been infringed by the contravention of Regulation 21. He is also mindful of the qualified right to freedom of expression as guaranteed under Article 10 of the ECHR.

In view of the matters referred to above the Commissioner hereby gives notice that, in exercise of his powers under section 40 of the Act, he requires that DC Marketing Limited shall within 35 days of the date of this Notice:

(1) Neither use, nor instigate the use of, a public electronic communications service for the purposes of making unsolicited calls for direct marketing purposes where the called line is that of:

(a) a subscriber who has previously notified DC Marketing Limited that such calls should not be made on that line; and/or

(b) a subscriber who has registered their number with the TPS at least 28 days previously and who has not notified DC Marketing Limited that they do not object to such calls being made.

(2) In accordance with Regulation 24 of the Regulations, cease using a public communications service for the transmission of a communication to which Regulation 21 of the Regulations applies

unless the particulars mentioned in paragraph (2)(a) of Regulation 24 of the Regulations are provided with that communication.

Right of Appeal

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.

Any Notice of Appeal should be served on the Tribunal within 28 days of the date on which this Notice is served. If the Notice of Appeal is served late the Tribunal will not accept it unless it is of the opinion that it is just and right to do so by reason of special circumstances.

Dated the 10th day of June 2014

Signed:

David Smith
Deputy Information Commissioner
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

ANNEX 1

THE DATA PROTECTION ACT 1998 (PART V, SECTION 40)

RIGHTS OF APPEAL AGAINST DECISIONS OF THE COMMISSIONER

1. Section 48 of the Data Protection Act 1998 gives any person upon whom an enforcement notice or an information notice has been served a right of appeal to the First-tier Tribunal (General Regulatory Chamber) (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 served on the Tribunal within 28 days of the date on which notice of the Commissioner's decision was served on or given to you.
- b) If your notice of appeal is late the Tribunal will not accept it unless it is of the opinion that it is just and right to do so by reason of special circumstances.
- c) If you send your notice of appeal by post to the Tribunal, either in a registered letter or by the recorded delivery service, it will be treated as having been served on the

Tribunal on the date on which it is received for dispatch by the Post Office.

4. The notice of appeal should state:
 - a) your name and address;
 - b) the decision which you are disputing and the date on which the notice relating to such decision was served on or given to you;
 - c) the grounds of your appeal;
 - d) whether you consider that you are likely to wish a hearing to be held by the Tribunal or not;
 - e) if you have exceeded the 28 day time limit mentioned above the special circumstances which you consider justify the acceptance of your notice of appeal by the Tribunal; and
 - f) an address for service of notices and other documents on you.

In addition, a notice of appeal may include a request for an early hearing of the appeal and the reasons for that request.

5. By virtue of section 40(7), an enforcement notice may not require any of the provisions of the notice to be complied with before the end of the period in which an appeal can be brought and, if such an appeal is brought, the notice need not be complied with pending the determination or withdrawal of the appeal.

However, section 40(7) does not apply where the notice contains a statement that the Commissioner considers that the notice should be complied with as a matter of urgency.

Section 48(3) provides that where an enforcement notice contains a statement that the notice should be complied with as a matter of urgency then, whether or not you intend to appeal against the notice, you may appeal against –

- (a) the Commissioner's decision to include the statement in the notice, or
 - (b) the effect of the inclusion of the statement as respects any part of the notice.
6. 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.

7. 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 the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 Statutory Instrument 2009 No. 1976 (L.20).