

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

ENFORCEMENT NOTICE DATED 6 February 2008

To: Recovery Services Limited

of: Unit 12
Trident Business Park
Whitebirk Drive
Blackburn
BB1 3HT

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 The Data Protection Act 1998 (the "Act") came into force on 1 March 2000 and repealed the Data Protection Act 1984 (the "1984 Act").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 20 of the Regulations states –

- "(1) A person shall neither transmit, nor instigate the transmission of, unsolicited communications for direct marketing purposes by means of a facsimile machine where the called line is that of -*
- (a) an individual subscriber, except in the circumstances referred to in paragraph (2);*
 - (b) a corporate subscriber who has previously notified the caller that such communications should not be sent on that line; or*
 - (c) a subscriber and the number allocated to that line is listed in the register kept under regulation 25.*
- (2) The circumstances referred to in paragraph (1)(a) are that the individual subscriber has previously notified the caller that he consents for the time being to such communications being sent by, or at the instigation of, the caller.*
- (3) ...*

- (4) *A person shall not be held to have contravened paragraph (1)(c) where the number allocated to the called line has been listed on the register for less than 28 days preceding that on which the communication is made.*
 - (5) *Where a subscriber who has caused a number allocated to a line of his to be listed in the register kept under regulation 25 has notified a caller that he does not, for the time being, object to such communications being sent on that line by that caller, such communications may be sent by that caller on that line, notwithstanding that the number allocated to that line is listed in the said register.*
 - (6) *Where a subscriber has given a caller notification pursuant to paragraph (5) 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 send such communications on that line...”*
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. Regulation 25 of the Regulations states –
- “(1) For the purposes of regulation 20 OFCOM shall maintain and keep up-to-date,...a register of the numbers allocated to subscribers, in respect of particular lines, who have notified them (notwithstanding, in the case of individual subscribers, that they enjoy the benefit of regulation 20(1)(a) and (2)) that they do not for the time being wish to receive unsolicited communications for direct marketing purposes by means of facsimile machine on the lines in question...”*
5. A list under regulation 25 is that held by the Fax Preference Service (“FPS”), a service maintained by Telephone Preference Service Limited on behalf of OFCOM.
6. 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.
7. 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.

8. 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.
9. The Commissioner has received a number of complaints from individual and corporate subscribers, who are subscribers to specific fax lines. They allege that they have received unsolicited marketing faxes on those lines, from or on behalf of Recovery Services Limited ("Recovery Services"), marketing the company and its services. Each complainant states that they have registered their number with the FPS and/or have previously notified Recovery Services that such faxes should not be sent on that line and/or are an individual subscriber who has not provided prior consent to receive such communications.
10. The Commissioner is satisfied that Recovery Services has contravened regulation 20 in sending or instigating the sending of such faxes for direct marketing purposes to subscribers.
11. The Commissioner served a preliminary enforcement notice dated 8 January 2008 on Recovery Services. This notice indicated that the Commissioner was minded to serve an enforcement notice requiring that steps be taken to comply with regulation 20 of the Regulations. Recovery Services was given the opportunity to make representations to the Commissioner as to why he should not serve an enforcement notice. No representations were received.
12. 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. He has considered the costs incurred by the recipients and is of the view that although damage has been caused it is a token sum.
13. The Commissioner has further taken into 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 20. He is also mindful of the qualified right to freedom of expression as guaranteed under Article 10 of the ECHR.
14. **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 Recovery Services within 35 days of the date of this notice shall, in accordance with regulation 20 of the Regulations, cease transmitting or instigating the transmission of unsolicited**

communications for direct marketing purposes by means of a facsimile machine where the line called is that of:

- i) an individual subscriber who has not provided prior consent to receive such communications (Regulation 20(1)(a));**
- ii) a corporate subscriber who has previously notified Recovery Services that such communications should not be sent on that line (Regulation 20(1)(b)); or**
- iii) any subscriber who has registered their number with the Fax Preference Service (FPS) (Regulation 20(1)(c)).**

Right of Appeal

There is a right of appeal against this notice to the Information Tribunal. 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 6th day of February 2008

Signed:

David Smith
Deputy Information Commissioner
Information Commissioner's Office
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 Information Tribunal (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 Secretary to the Information Tribunal, Arnhem House Support Centre, PO Box 6987, Leicester, Leicestershire, LE1 6ZX.
 - 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 Information Tribunal are contained in sections 48 and 49 of, and Schedule 6 to, the Data Protection Act 1998, and the Information Tribunal (Enforcement Appeals) Rules 2005 (Statutory Instrument 2005, No. 14).