

# DATA PROTECTION ACT 1998

## SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

### ENFORCEMENT NOTICE

DATED 24 SEPTEMBER 2008

To: The Liberal Democrats

of: 4 Cowley Street  
London  
SW1P 3NB

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 The Data Protection Act 1998 (the "Act") came into force on 1 March 2000 and repealed the Data Protection Act 1984 (the "1984 Act").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 19 of the Regulations states –

*"(1) A person shall neither transmit, nor instigate the transmission of, communications comprising recorded matter for direct marketing purposes by means of an automated calling system, except in the circumstances referred to in paragraph (2).*

*(2) Those circumstances are where the called line is that of a subscriber who has previously notified the caller that for the time being he consents to such communications being sent by, or at the instigation of, the caller on that line.*

*(3) ....*

*(4) For the purposes of this regulation, an automated calling system is a system which is capable of –*

*(a) automatically initiating a sequence of calls to more than one destination in accordance with instructions stored in that system;  
and*

*(b) transmitting sounds which are not live speech for reception by persons at some or all of the destinations so called.”*

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”. The Commissioner considers that the term “direct marketing” includes approaches made by political parties making appeals for funds or support, or otherwise for the purpose of promoting the party.
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. On 5 April 2005 the Commissioner wrote to all the major political parties (including the Liberal Democrats) to remind them of the obligations under, and provide updated guidance on, the Act and the Regulations. On 18 October 2005, following complaints from members of the public and the Liberal Democrats, the Commissioner served an Enforcement Notice on the Scottish National Party in respect of a contravention of Regulation 19 of the Regulations which was subsequently upheld by the Information Tribunal in a decision promulgated on 15 May 2006.
8. On 17 September 2008 the Commissioner became aware through media reports that it was the Liberal Democrats intention to make 250,000 automated phone calls consisting of a recorded message from the Liberal Democrats Party Leader, Mr Nick Clegg. On the same date the Commissioner’s office (“ICO”) contacted the Liberal Democrats to clarify the nature of the calls and to establish who they were planning to contact. The Liberal Democrats did not put anything in writing but gave a verbal summary of the script that they would be using. In telephone discussions the ICO explained that, on the basis of that verbal summary of the script, they believed that this could constitute direct marketing for

the purposes of the Regulations. The Liberal Democrats said that the message would be sent to “likely supporters” and “not sures”, as identified from canvassing returns.

9. The ICO then sent a follow up email, at 12.36pm, to a Liberal Democrat official confirming the ICO’s views regarding political marketing, including calls made for the purposes of profiling to seek to identify potential supporters. The email included website links to relevant ICO guidance. The ICO sent a further email at 14.40pm seeking clarification of the Liberal Democrat’s intentions. Some time later, around 18.00pm, the ICO spoke to an official in the Media and Communications Department and confirmed that on the basis of the verbal summary of the script the messages were likely to constitute direct marketing and that, therefore, if sent to those who had not given prior consent, would be likely to involve a breach of the Regulations.
10. On 18 September 2008 the ICO received a copy of the script used. This confirmed our view that the message primarily promoted Nick Clegg and the Liberal Democrats. The ICO noted that those called were asked to indicate which party they would support if a general election were held the next day, whether they were thinking of voting Liberal Democrat next time, and whether they were prepared to help the Liberal Democrats win in their area. After carefully considering the actual script it is the Commissioner’s view that these automated calls were made for the purpose of promoting the Liberal Democrats and would, therefore, be in breach of the Regulations unless they were sent to those who had given consent.
11. The Commissioner has now received a number of complaints from individuals about automated calls they received from the Liberal Democrats during the evening of 17 September 2008. These calls apparently followed the script referred to in paragraph 10 above. At this stage six of the complainants have expressly identified themselves as subscribers in respect of the lines on which the calls were received and have stated that they had not previously given their consent to receiving such calls.
12. In the circumstances, the Commissioner is satisfied that the Liberal Democrats have contravened Regulation 19 in that it has used an automated calling system to transmit communications comprising recorded matter for direct marketing purposes to subscribers who have not previously notified the Liberal Democrats that they consent to such communications being sent to them.
13. 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 does not consider that any such damage has been caused in this instance.

14. 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 19. He is also mindful of the qualified right to freedom of expression as guaranteed under Article 10 of the ECHR.

**15. 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 the Liberal Democrats within 30 days of the date of service of this Notice shall, in accordance with Regulation 19 of the Regulations, cease using an automated calling system to transmit communications comprising recorded matter for direct marketing purposes to subscribers who have not previously notified the Liberal Democrats that they consent to such communications being sent to them.**

16. For the avoidance of doubt, the term “direct marketing” in paragraph 15 includes the promotion of, and appeals for funds or support by, the Liberal Democrats.

### **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 24<sup>th</sup> day of September 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).