

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

ENFORCEMENT NOTICE

DATED 4 FEBRUARY 2010

To: The Labour Party
of: 39 Victoria Street
London
SW1H 0HA

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 The Data Protection Act 1998 (the "Act") came into force on 1 March 2000 and repealed the Data Protection Act 1984 (the "1984 Act").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.”*

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”. 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 Labour Party) to remind them of the obligations under, and provide updated guidance on, the Act and the Regulations.
8. On 18 October 2005, following complaints from members of the public and the Liberal Democrat Party, the Commissioner served Enforcement Notices on the Scottish National Party and the Conservative Party in respect of automated calls made in contravention of regulation 19 of the Regulations. The Enforcement Notice served on the Scottish National Party was subsequently appealed to and upheld by the Information Tribunal in a decision promulgated on 15 May 2006.
9. On 24 September 2008, following reports in the media and complaints from members of the public, the Commissioner also served an Enforcement Notice on the Liberal Democrat Party in respect of automated calls in contravention of regulation 19 of the Regulations.
10. On 19 July 2007, the Commissioner received a complaint from a member of the public that he had received an automated marketing call from the Labour Party despite not consenting to the receipt of such communications. The call allegedly consisted of a recorded message from the actress Liz Dawn.
11. Following correspondence, the Labour Party provided the Commissioner's office with a transcript of the script used. The Labour Party was advised that the recorded message would be likely to constitute direct marketing due to the celebrity endorsement and the targeting of a particular group of voters. On 17 November 2007, the Labour Party confirmed that it would not make any further automated calls using the Liz Dawn or another similar script.
12. On 4 June 2009, the Commissioner's office received a complaint from the Scottish National Party that automated calls had been made, featuring the voice of Liz Dawn, encouraging recipients to vote Labour in the local government and European elections. On the same day, the Commissioner's office received a complaint from a member of the public that he had received an automated call from the Labour Party on 3 June 2009 consisting of a recorded message from Liz Dawn, despite not consenting to the receipt of such communications.
13. On 30 July 2009, the Commissioner's office wrote to the Labour Party requesting a transcript of the recorded message and an explanation as to how the message came to be transmitted. On 6 August 2009, the Commissioner's office received a copy of the script used. The Labour

Party confirmed that the calls were made to approximately 495,000 recipients in what were believed to be Labour supporting areas and that the majority of numbers were obtained using commercially purchased lists. This confirmed the Commissioner's view that the message was intended to promote the Labour Party's electoral cause by encouraging Labour Party supporters to vote and, as such, the message did fall within the definition of marketing.

14. In the circumstances, the Commissioner is satisfied that the Labour Party has contravened regulation 19 of the Regulations in that it has used an automated calling system to transmit communications comprising recorded matter for direct marketing purposes to a subscriber who has not previously notified the Labour Party that he consents to such communications being sent to him.
15. The Commissioner is further satisfied that the Labour Party has contravened regulation 24 of the Regulations in that the automated call did not provide the name of the Labour Party and an address or telephone number on which the Labour Party could be contacted.
16. 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.
17. 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.
18. **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 Labour Party shall, within 30 days of the date of service of this Notice:**

(1) 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 Labour Party that they consent to such communications being sent to them.

(2) in accordance with regulation 24 of the Regulations, cease using, ,a public communications service for the

transmission of a communication to which regulation 19 of the Regulations applies unless the particulars mentioned in paragraph (2)(a) and (b) of regulation 24 of the Regulations are provided with that communication.

19. For the avoidance of doubt, the term “direct marketing” in paragraph 18 includes the promotion of, and appeals for funds or support by, the Labour Party.

Right of Appeal

There is a right of appeal against this Notice to the First-tier Tribunal (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 4th day of February 2010

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).