

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

ENFORCEMENT NOTICE

DATED 19 December 2014

To: Optical Express (Westfield) Limited

of: The Ca'D'Oro
45 Gordon Street
Glasgow
G1 3PE

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 The Data Protection Act 1998 (the "Act") came into force on 1 March 2000 and repealed the Data Protection Act 1984 (the "1984 Act").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.
3. Regulation 22 of the Regulations 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. "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".
5. 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.
6. 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.
7. 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.
8. Between 10 September 2013 and 1 April 2014, the Commissioner received 4,609 complaints from individuals either directly, or via

the 7726 spam text reporting service, who allege that they have received unsolicited marketing text messages. The Commissioner is satisfied that these communications were sent or instigated by Optical Express (Westfield) Limited, marketing the company and its services.

9. In the circumstances, the Commissioner is satisfied that Optical Express (Westfield) Limited has contravened Regulation 22(2) of the Regulations by sending such communications to individual subscribers for direct marketing purposes without their prior consent.
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 has decided that it is unlikely that actual damage has been caused in this instance.

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 Optical Express (Westfield) Limited shall within 35 days of the date of this Notice:

- (1) Except in the circumstances referred to in paragraph (3) of Regulation 22 of the Regulations, 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 Optical Express (Westfield) Limited that he consents for the time being to such communications being sent by, or at the instigation of Optical Express (Westfield) Limited.

Right of Appeal

11. 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.
12. Any Notice of Appeal should be served on the Tribunal within 28 days of the date on which this Notice is sent.

Dated the 19th day of December 2014

Signed:

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

ANNEX 1

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 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
Leicester
LE1 8DJ

Tel: 0300 1234504
Fax: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

The notice of appeal should be served on the Tribunal within 28 days of the date on which the enforcement notice was sent.

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