



## **STANDARD OPERATING PROCEDURE MONETARY PENALTY NOTICES**

### **Introduction**

Under section 55A to E of the Data Protection Act 1998 (the "Act") the Information Commissioner (the "Commissioner") may, in certain circumstances, serve a monetary penalty notice on a data controller.

In addition, the Privacy and Electronic Communications (EC Directive) (Amendment) Regulations 2011 inserted section 55A to E of the Act into the Privacy and Electronic Communications (EC Directive) Regulations 2003 (the "2003 Regulations"), enabling the Commissioner to serve a monetary penalty notice on a person who breaches the 2003 Regulations.

A monetary penalty notice is a notice requiring a data controller or person to pay a monetary penalty of an amount determined by the Commissioner and specified in the notice. The amount of the monetary penalty determined by the Commissioner must not exceed £500,000.

The Commissioner intends to use his power to serve monetary penalty notices to deal with serious contraventions of the data protection principles and the 2003 Regulations. It will be used as both a sanction and a deterrent against a data controller or person who deliberately or negligently disregards the law. The Commissioner is required to prepare and issue Guidance about how he proposes to exercise his power to serve monetary penalty notices which is available on our website.

The Commissioner's Guidance deals with the circumstances in which the Commissioner would consider it appropriate to serve a monetary penalty notice and how he will determine the amount of the monetary penalty. It should be read in conjunction with the Data Protection (Monetary Penalties) (Maximum Penalty and Notices) Regulations 2010 and the Data Protection (Monetary Penalties) Order 2010.

An important point about using these powers is that we have to demonstrate that the data controller has seriously contravened the data protection principles or that any person has seriously contravened the 2003 Regulations and that in both cases the contravention was of a kind likely to cause substantial damage or substantial distress. In addition, the contravention must either have been deliberate or the data controller or person must have

known or ought to have known that there was a risk that a contravention would occur and failed to take reasonable steps to prevent it. The Commissioner may still serve an enforcement notice or an undertaking in relation to the same contravention if he is satisfied that positive steps need to be taken either by a data controller to achieve compliance with the data protection principle(s) in question or by a person to achieve compliance with the requirement(s) of the 2003 Regulations in question. Any decision to serve a monetary penalty notice on a data controller or person must also be in accordance with the Data Protection Regulatory Action Policy which is available on our website. See link below.

## **Procedure**

In terms of how work is handled within the office the following procedures should be followed:

1. The Team manager will regularly review the CMEH work queue for the Enforcement team with a view to identifying any matter which involves a serious contravention of a data protection principle(s) or the 2003 Regulations and which may be appropriate for the consideration of a monetary penalty notice using the Commissioner's new powers.
2. If such a matter is identified, the Team manager will inform the Group manager and refer the matter to a "case owner". As a first step the case owner will carry out an information gathering exercise. On completion of this exercise, if the case owner is satisfied that the matter is well founded on the face of it, the Team and Group managers should be informed and provided with a case summary. See link below for template.
3. In order to take a matter forward using the Commissioner's new powers, the Group manager will then convene a Case Working Group comprising of the Head of the Enforcement department, the Group manager, the case owner and a lawyer.
4. As a starting point the Case Working Group will consider whether the matter is suitable for regulatory action involving a monetary penalty notice. In such event, the case owner will be asked to investigate whether, in the circumstances, the Commissioner has the power to impose a monetary penalty. The case owner will be provided with advice and assistance on a continuing basis by the Case Working Group as to the manner and scope of any investigation.
5. Once the preliminary investigation is complete, the Case Working Group will reconvene to consider whether there is sufficient evidence that the Commissioner has the power to impose a monetary penalty in that there has been a serious contravention of the data protection principles or the 2003 Regulations by a data controller or person and that the other statutory requirements apply.

6. At this point the Case Working Group will either decide not to proceed with the matter; request the case owner to carry out a further investigation as directed or proceed to the next stage if the Case Working Group is satisfied that there is sufficient evidence based on the criteria set out in the Commissioner's Guidance.

7. Once it has been decided that a monetary penalty should be imposed, the Case Working Group will then consider what would be the appropriate amount given the circumstances of the case. At this stage it may be necessary to request the case owner to carry out a further investigation as directed. Once any secondary investigation is complete, the Case Working Group will reconvene to make a preliminary determination of the appropriate and proportionate level of monetary penalty within the prescribed limit of £500,000 based on the criteria set out in the Commissioner's Guidance and in accordance with the 5-step framework for determining the amount of a monetary penalty. See link below.

8. The case owner will then be asked to draft, or add to a Monetary Penalty Notice Recommendation Report based on the decision of the case Working Group. See link below for template Once the Report is completed it will be passed to the Case Working Group for further consideration. When the Report has been agreed it will be signed by the Head of the Enforcement department and the lawyer. The Report will be placed before the Deputy Commissioner (Data Protection) for him to consider whether or not to proceed and/or whether the preliminary determination of the case working group on the amount of the monetary penalty is appropriate and proportionate. If so, the lawyer will draft a Notice of Intent containing the prescribed information for consideration by the Case Working Group. Once agreed by the Case Working Group the Notice of Intent will be referred to the Deputy Commissioner (Data Protection) for his approval and signature.

9. The case owner will then send the Notice of Intent to the data controller or person by Special Delivery who will be given 28 calendar days from the date of receipt of the notice to make representations to the Commissioner which must be considered. Following expiry of the 28 day period the Case Working Group and the Deputy Commissioner (Data Protection) will reconvene to reconsider the amount of the monetary penalty generally, and whether it is a reasonable and proportionate means of achieving the objective(s) which the Commissioner seeks to achieve by this imposition.

10. The Case Working Group and the Deputy Commissioner (Data Protection) will also ensure that the monetary penalty is within the prescribed limit of £500,000 and that the Commissioner is not, by imposing a monetary penalty, acting inconsistently with any of his statutory or public law duties and that a monetary penalty notice will not impose undue financial hardship on an otherwise responsible data

controller or person. The Case Working Group will also consider whether to obtain the advice of the Head of Finance about any representations made in relation to the data controller or person's financial status.

11. Having taken full account of any representations the data controller or person has made, any other circumstances relevant to the case and the discussions of the case working group, the Deputy Commissioner (Data Protection) will make a final decision on whether or not to impose a monetary penalty and, if so, determine an appropriate and proportionate monetary penalty. The monetary penalty should not be substantially different to the amount proposed in the Notice of Intent unless circumstances revealed since the issuing of the Notice of Intent, which the data controller or person has been given the opportunity to contradict, justify such a change.

12. Depending on the final decision of the Deputy Commissioner (Data Protection), the case owner will either write to the data controller or person advising that no further action is to be taken in regard to the contravention specified in the notice of intent, although this does not affect the Commissioner's power to use other enforcement powers such as issuing an enforcement notice, if the case merits it.

13. Alternatively, the lawyer will draft a Monetary Penalty Notice containing the prescribed information for consideration by the Case Working Group. Once agreed by the Case Working Group the Monetary Penalty Notice will be referred to the Deputy Commissioner (Data Protection) for his approval and signature. The case owner will then send the Monetary Penalty Notice to the data controller or person by Special Delivery. The Commissioner may not serve a monetary penalty notice if a period of 6 months has elapsed after the service of the notice of intent.

14. The monetary penalty notice will be published on our website with any confidential or commercially sensitive information redacted in accordance with the "Communicating our enforcement and regulatory activities policy". The monetary penalty must be paid to the Commissioner within 28 calendar days of the monetary penalty notice being served on the data controller or person either by BACS transfer or cheque. On receipt of the monetary penalty it must be paid into the Consolidated Fund. If the Commissioner receives full payment of the monetary penalty within 28 calendar days of the monetary penalty notice being served on the data controller or person, the Commissioner will reduce the monetary penalty by 20%.

15. A data controller or person on whom a monetary penalty notice is served may appeal to the First-tier Tribunal (Information Rights) against a monetary penalty notice within 28 calendar days of the monetary penalty notice being served on the data controller or person. If a data controller or

person either fails to pay the monetary penalty to the Commissioner or lodge an appeal at the Tribunal within 28 calendar days of the monetary penalty notice being served on the data controller or person, the matter should be referred to the lawyer for enforcement.

Data Protection Regulatory Action Policy

[http://www.ico.gov.uk/~media/documents/library/Data\\_Protection/Detailed\\_specialist\\_guides/DATA\\_PROTECTION\\_REGULATORY\\_ACTION\\_POLICY.pdf](http://www.ico.gov.uk/~media/documents/library/Data_Protection/Detailed_specialist_guides/DATA_PROTECTION_REGULATORY_ACTION_POLICY.pdf)

Framework for determining the appropriate amount of a monetary penalty

[http://www.ico.gov.uk/~media/documents/library/Data\\_Protection/Detailed\\_specialist\\_guides/ico\\_framework\\_to\\_determine\\_amount\\_penalty.pdf](http://www.ico.gov.uk/~media/documents/library/Data_Protection/Detailed_specialist_guides/ico_framework_to_determine_amount_penalty.pdf)

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