

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

MONETARY PENALTY NOTICE

To: Pharmacy2U Ltd

Of: 1, Hawthorn Park, Coal Road, Leeds, LS14 1PQ

1. The Information Commissioner ("Commissioner") has decided to issue Pharmacy2U Ltd ("Pharmacy2U") with a monetary penalty under section 55A of the Data Protection Act 1998 ("DPA"). The penalty is being issued because of a serious contravention of the first data protection principle by Pharmacy2U.
2. This notice explains the Commissioner's decision.

Legal framework

3. Pharmacy2U is a data controller, as defined in section 1(1) of the DPA in respect of the processing of personal data. Section 4(4) of the DPA provides that, subject to section 27(1) of the DPA, it is the duty of a data controller to comply with the data protection principles in relation to all personal data in respect of which he is the data controller.
4. The relevant provision of the DPA is the first data protection principle which provides, at Part I of Schedule 1 to the DPA, that:

*"1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless -
(a) at least one of the conditions in Schedule 2 is met, and
(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met".*

5. Interpretative provisions in Part II of Schedule 1 to the DPA provide that:

"1.- (1) In determining for the purposes of the first principle whether personal data are processed fairly, regard is to be had to the method by which they are obtained, including in particular whether any person from whom they are obtained is deceived or misled as to the purpose or purposes for which they are to be processed.

(2)....

2. - (1) Subject to paragraph 3, for the purposes of the first principle personal data are not to be treated as processed fairly unless -

(a) in the case of data obtained from the data subject, the data controller ensures so far as practicable that the data subject has, is provided with, or has made readily available to him, the information specified in sub-paragraph (3), and

(b) in any other case, the data controller ensures so far as practicable that, before the relevant time or as soon as practicable after that time, the data subject has, is provided with, or has made readily available to him, the information specified in sub-paragraph (3).

(2) In sub-paragraph (1)(b) "the relevant time" means -

(a) the time when the data controller first process the data, or

(b) in a case where at that time disclosure to a third party within a reasonable period is envisaged -

(i) if the data are in fact disclosed to such a person within that period, the time when the data are first disclosed,

(ii) if within that period the data controller becomes, or ought to become, aware that the data are unlikely to be disclosed to such a person within that period, the time when the data controller does become, or ought to become, so aware, or

(iii) in any other case, the end of that period.

(3) The information referred to in sub-paragraph (1) is as follows, namely-

(a) the identity of the data controller,

(b) if he has nominated a representative for the purposes of this Act, the identity of that representative,

(c) the purpose or purposes for which the data are intended to be processed, and

(d) any further information which is necessary, having regard to the specific circumstances in which the data are or are to be processed, to enable processing in respect of the data subject to be fair.

3. - (1) Paragraph 2(1)(b) does not apply where either of the primary conditions in sub-paragraph (2), together with such further conditions as may be prescribed by the Secretary of State by order, are met.

(2) The primary conditions referred to in sub-paragraph (1) are -

(a) that the provision of that information would involve disproportionate effort, or

(b) that the recording of the information contained in the data by, or the disclosure of the data by, the data controller is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.

4. [...]

6. Under section 55A(1) of the DPA the Commissioner may serve a data controller with a monetary penalty notice if the Commissioner is satisfied that –

(a) there has been a serious contravention of section 4(4) of the DPA by the data controller,

(b) the contravention was of a kind likely to cause substantial damage or substantial distress, and

(c) subsection (2) or (3) applies.

(2) This subsection applies if the contravention was deliberate.

(3) This subsection applies if the data controller –

(a) knew or ought to have known –

(i) that there was a risk that the contravention would occur, and

(ii) that such a contravention would be of a kind likely to cause substantial damage or substantial distress, but

- (b) failed to take reasonable steps to prevent the contravention.
7. The Commissioner has issued statutory guidance under section 55C (1) of the DPA about the issuing of monetary penalties that has been published on the ICO's website. The Data Protection (Monetary Penalties) (Maximum Penalty and Notices) Regulations 2010 prescribe that the amount of any penalty determined by the Commissioner must not exceed £500,000.
 8. The DPA implements European legislation (Directive 95/46/EC) aimed at the protection of the individual's fundamental right to the protection of personal data. The Commissioner approaches the data protection principles so as to give effect to the Directive.

Background to the case

9. Pharmacy2U is the UK's largest NHS approved online pharmacy. It is registered with the General Pharmaceutical Council and the Care Quality Commission.
10. Pharmacy2U has a website (www.pharmacy2u.co.uk) through which it provides the following services:
 - (a) an electronic prescription service: NHS patients can register to have their NHS prescriptions sent to Pharmacy2U electronically and delivered to their home address;
 - (b) an online Doctor service, offering confidential online medical consultations with a UK registered GP; and

- (c) online retail of over the counter medicines and health and beauty products.
11. In order to access Pharmacy2U's services, individuals have to complete a registration form on its website. This requires users to provide their name, sex, date of birth, postal address, phone number and email address.
 12. The form contains a pre-ticked box which users can untick if they do not wish to receive marketing emails from Pharmacy2U. In order to submit the form, users have to click a button marked "Continue". Above the "Continue" button, under the heading "Terms and conditions", is the following statement: "By clicking continue you agree to our terms and conditions."
 13. Paragraph 15 of the terms and conditions states: "Your privacy is important to us. Please see our privacy policy [link] for details of what information we collect and how we will use and protect it."
 14. The privacy policy included the following wording: "Occasionally we make details available to companies whose products or services we think may interest our customers. If you do not wish to receive such offers please login to your account and change the setting to indicate "No" for "Selected company data sharing".
 15. On 13 October 2014, Pharmacy2U entered into a list management agreement with a company called Alchemy Direct Media (UK) Ltd ("Alchemy").
 16. Under this agreement, Alchemy agreed to provide various services to Pharmacy2U including: promotion of the specified Pharmacy2U

- database lists for list rental; vetting all database list rental requests and potential clients and submitting these to Pharmacy2U for approval and billing and collecting monies from clients and remitting those monies to Pharmacy2U.
17. The agreement stated that Pharmacy2U was the data controller for the data, that Alchemy would seek prior approval from Pharmacy2U in relation to any promotional materials it wished to use to promote the data and that all potential clients had to be approved by Pharmacy2U.
 18. The Pharmacy2U database lists were advertised for rental on the Alchemy website. The data card for Pharmacy2U states that the data includes 77,621 0-12 month "buyers" and 36,207 13-24 month "buyers". It also states that buyers include NHS patients, Pharmacy2U online patients and Pharmacy2U retail customers. It lists typical ailments that are treated including asthma, high blood pressure, diabetes, heart disease, high cholesterol, Parkinson's disease, epilepsy, erectile dysfunction, hair loss, weight loss, travel health, skin conditions, pain, migraine, cold and flu and nicotine replacement for smoking cessation. It also includes an age breakdown which shows that 82% of the buyers are over the age of 40. The cost is listed as £130 per 1000 records.
 19. In November and December 2014, Alchemy supplied a total of 21,500 Pharmacy2U customers' names and addresses to three organisations: Griffin Media Solutions, an Australian lottery company ("the lottery company") and Camphill Village Trust Ltd.
 20. On 20 November 2014, Griffin Media Solutions ordered 13,000 records on behalf of its client Woods Supplements (10,000 records plus a 30% oversupply to allow for duplicates). The data related to customers who

had used Pharmacy2U within the previous 12 months. The order was approved by a senior executive of Pharmacy2U.

21. Woods Supplements is a trading name of Healthy Marketing Ltd, a Jersey-based mail order company. It sells health supplements to the general public via its website (www.woodshealth.com) and through mail order catalogues. Users of the website can search for an ailment (e.g. high blood pressure, high cholesterol, erectile dysfunction) and receive a list of recommended products. Some of the product descriptions highlight the side effects of the commonly prescribed drugs whilst stating that their products have fewer or no side effects.
22. In February 2015, the Advertising Standards Authority ("ASA") issued an adjudication on Healthy Marketing Ltd in relation to breaches of the CAP Code, although this wouldn't have been known to Pharmacy2U at the time the order was approved.
23. The breaches related to a press advert which was found to contain misleading advertising and unauthorised health claims.
24. On 9 December 2014, the lottery company ordered 3,000 records relating to males aged 70 or over who had used Pharmacy2U within the previous 6 months. The lottery company provided a copy of the proposed mailer and a corporate profile pack to Pharmacy2U which included a copy of their mail order lottery licence and a letter from the Northern Territory Government.
25. The mailer was headed "Declaration of Executive Order" and went on to say that the recipient had been "specially selected" to "win millions of dollars". The mailer contained a form which recipients were asked to complete and return within seven days along with payment of an unspecified sum of money by cash, postal order, cheque or credit card.

The form also requested date of birth, email address, telephone number and mobile number.

26. A senior executive of Pharmacy2U approved the order with the words "OK but let's use the less spammy creative please, and if we get any complaints I would like to stop this immediately". The data was sent to Australia.
27. The mailer has been examined by the UK's National Trading Standards Scams Team, which has confirmed that if it was sent by a UK business it would be likely to breach the UK Consumer Protection from Unfair Trading Regulations.
28. The National Trading Standards Scams Team has also informed the Commissioner's office that the lottery company is the subject of an ongoing international criminal investigation into fraud and money laundering, although this wouldn't have been known to Pharmacy2U.
29. On 12 December 2014, Black Kite Media ordered 5,500 records on behalf of Camphill Village Trust Ltd, a UK registered charity that manages communities for people with disabilities. The data related to customers defined as "active donors" who had used Pharmacy2U within the previous 12 months. The data was used to send the customers a letter requesting donations. The order was approved by a senior executive of Pharmacy2U.
30. The Commissioner has made the above findings of fact on the balance of probabilities.
31. The Commissioner has considered whether those facts constitute a contravention of the DPA by Pharmacy2U and, if so, whether the conditions of section 55A DPA are satisfied.

The contravention

32. The Commissioner finds that Pharmacy2U contravened the following provisions of the DPA:
33. Pharmacy2U processed personal data unfairly and without having met a Schedule 2 condition for processing in contravention of the first data protection principle at Part I of Schedule 1 to the DPA.
34. The Commissioner finds that the contravention was as follows:
35. Pharmacy2U has obtained personal data unfairly because its online registration form and privacy policy did not inform its customers that it intended to sell their details to third party organisations, in addition to sending out its own marketing material. It would not be within a customer's reasonable expectation that this form of disclosure would occur, even if they were willing to agree to the receipt of marketing material from Pharmacy2U itself. If a customer wished to take up Pharmacy2U's offer to opt out of "Selected company data sharing", they also had to go to the trouble of logging into their account and changing the setting.
36. In addition, Pharmacy2U did not provide the further information that was necessary to enable the processing in respect of its customers to be fair.
37. In the circumstances, Pharmacy2U's customers did not give their informed consent to the sale of their personal data to third party organisations. Therefore Pharmacy2U did not have a lawful basis for processing the data under Part I of Schedule 2 to the DPA.

38. The Commissioner is satisfied that Pharmacy2U was responsible for this contravention of the first data protection principle.
39. The Commissioner has gone on to consider whether the conditions under section 55A DPA were met.

Seriousness of the contravention

40. The Commissioner is satisfied that the contravention identified above was serious due to the context in which the personal data was unfairly processed, the number of individuals affected (21,500) and the purposes for which the data was used.
41. The Commissioner is therefore satisfied that condition (a) from section 55A (1) DPA is met.

Contraventions of a kind likely to cause substantial damage or substantial distress

42. The relevant features of the kind of contravention are:
43. The data sold via Alchemy consisted of names and addresses of NHS patients who had used the electronic prescription service, Pharmacy2U online patients and Pharmacy2U retail customers.
44. It was advertised via a data card which included an age breakdown and a list of health conditions that customers were likely to suffer from such as asthma, high blood pressure, diabetes, heart disease, high cholesterol, Parkinson's disease, epilepsy, erectile dysfunction and hair loss. The data provided to Alchemy did not specify which customer

suffered from which condition, but selections were available based on age, sex and how recently the customer had used the service.

45. The data purchased by the three clients related to males aged 70 or over who had used Pharmacy2U within the previous 6 months and customers, some of whom were described as "active donors", who had used Pharmacy2U within the previous 12 months. As some of the data related to customers who had used the repeat prescriptions service, the data would have included people with chronic health conditions such as those listed on the data card. This would have been more likely due to the selection of customers aged 70 or over and the targeting of recent customers.
46. The Commissioner considers that the contravention identified above had the following potential consequences:
47. The disclosure of personal data relating to customers of an online pharmacy is likely to cause distress to individuals who have a reasonable expectation of confidentiality.
48. Pharmacy2U advertise their service as "discreet and confidential". Their website includes a section headed "embarrassing" which includes ailments such as erectile dysfunction, haemorrhoids and incontinence. They also sell contraceptives, pregnancy tests and tests for sexually transmitted diseases.
49. It is possible that some customers, who received marketing material from Woods Supplements, after being prescribed medication by a doctor, may have stopped taking their prescribed medication and spent money on products that were subject to the ASA adjudication in relation to misleading advertising and unauthorised health claims.

50. In the circumstances, the distress suffered by Pharmacy2U's customers is considered to extend beyond mere irritation.
51. It is likely that some customers will also have suffered financially as a result of their data being disclosed to the lottery company. Some customers would have spent money on lottery tickets as a result of data being disclosed to an organisation that is under investigation into fraud and money laundering. It is known that at least one individual, although not necessarily a Pharmacy2U customer, spent as much as £16,000 on this lottery.
52. The lottery company appears to have deliberately targeted elderly and vulnerable individuals who would be more likely to fall victim to lottery scams.
53. The Commissioner considers that the damage and/or distress described above were likely to arise as a consequence of this kind of contravention. In other words, the Commissioner's view is that there was a significant and weighty chance that a contravention of the kind described would have such consequences.
54. The Commissioner also considers that such damage and/or distress was likely to be substantial having regard to the context in which the personal data was unfairly obtained, the number of affected individuals and the purpose for which the data was used.
55. In the circumstances, the likely damage or distress was certainly more than trivial.

56. The Commissioner has also given weight to the number of affected individuals. The Commissioner considers that even if the damage or distress likely to have been suffered by each affected individual was less than substantial, the cumulative impact would clearly pass the threshold of "substantial". In addition, given the number of affected individuals, it was inherently likely that at least a small proportion of those individuals would have been likely to suffer substantial damage or substantial distress on account of their particular circumstances. For example, an individual might be extremely worried that a third party organisation could surmise that he was suffering from an embarrassing health condition.
57. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met.

Deliberate or negligent contraventions

58. The Commissioner has considered whether the contravention identified above was deliberate. In the Commissioner's view, this means that Pharmacy2U's actions which constituted the contravention were deliberate actions (even if Pharmacy2U did not actually intend thereby to contravene the DPA).
59. The Commissioner considers that in this case Pharmacy2U did not deliberately contravene the DPA in that sense.
60. The Commissioner has gone on to consider whether the contravention identified above was negligent. First, he has considered whether Pharmacy2U knew or ought reasonably to have known that there was a risk that this contravention would occur. He is satisfied that this condition is met, given that Pharmacy2U ought to have known that its customers had a reasonable expectation of confidentiality when using

an online pharmacy, especially as their own website describes the service as “discreet and confidential”.

61. Pharmacy2U is also registered with both the General Pharmaceutical Council and the Care Quality Commission. Pharmacy2U is run by qualified pharmacists and holds an NHS pharmacy contract.
62. Pharmacy2U submitted IG Toolkit self-assessments in 2009/10, 2010/11, 2011/12, 2013/14 and 2014/15. In the 2013/14 assessment, prior to entering into the contract with Alchemy, they achieved a score of 83%. One of the requirements of the IG Toolkit is that “Consent is appropriately sought before personal information is used in ways that do not directly contribute to the delivery of care services and objections to the disclosure of confidential personal information are appropriately respected”.
63. The senior executive of Pharmacy2U must have known that there was a risk that people may object to the sale of data to the lottery company because, when he was asked to approve the order, he replied “OK but let’s use the less spammy creative please, and if we get any complaints I would like to stop this immediately”. However, he still approved the order.
64. In the circumstances, Pharmacy2U ought reasonably to have known that there was a risk that this contravention would occur.
65. Second, the Commissioner has considered whether Pharmacy2U knew or ought reasonably to have known that the contravention would be of a kind likely to cause substantial damage or substantial distress. He is satisfied that this condition is met, given the nature of Pharmacy2U’s business and the fact that they were used to holding a large amount of customer data. Therefore, it should have been obvious to Pharmacy2U

that such a contravention would be of a kind likely to cause substantial damage or substantial distress to the affected individuals.

66. Third, the Commissioner has considered whether Pharmacy2U failed to take reasonable steps to prevent the contravention. Again, he is satisfied that this condition is met. Reasonable steps in these circumstances would have included displaying a fair processing notice in a prominent position on its website which provided its customers with a simple way to opt out of the sale of their personal data to third party organisations. Pharmacy2U failed to take any of those steps.
67. The Commissioner is therefore satisfied that condition (c) from section 55A (1) DPA is met.

The Commissioner's decision to issue a monetary penalty

68. For the reasons explained above, the Commissioner is satisfied that the conditions from section 55A(1) DPA have been met in this case. He is also satisfied that section 55A(3A) and the procedural rights under section 55B have been complied with.
69. The latter has included the issuing of a Notice of Intent dated 4 August 2015, in which the Commissioner set out his preliminary thinking. In reaching his final view, the Commissioner has taken into account the representations made in response to that Notice of Intent, as well as those made in other correspondence from Pharmacy2U.
70. The Commissioner is accordingly entitled to issue a monetary penalty in this case.
71. The Commissioner has considered whether, in the circumstances, he should exercise his discretion so as to issue a monetary penalty. He

has taken into account Pharmacy2U's representations made in response to the Notice of Intent and in other correspondence on this matter.

72. The Commissioner has also considered whether the contraventions identified above could be characterised as one-off events or attributable to mere human error. He does not consider that the contraventions could be characterised in those ways.
73. The Commissioner has decided that it is appropriate to issue a monetary penalty in this case, in light of the nature and seriousness of the contravention, Pharmacy2U's shortcomings in terms of its DPA duties and the risks posed to a number of individuals. He has also considered the importance of monetary penalties in dissuading future contraventions of the DPA and encouraging compliance, in accordance with his policy.
74. For these reasons, the Commissioner has decided to issue a monetary penalty in this case.

The amount of the penalty

75. The Commissioner has taken into account the following **mitigating features** of this case:
 - Pharmacy2U has now taken substantial remedial action.
 - Pharmacy2U has co-operated with the Commissioner's office.
 - There will be a significant impact on Pharmacy2U's reputation as a result of this contravention.
 - This contravention was publicised in the media.

76. The Commissioner has also taken into account the following **aggravating features** of this case:

- Pharmacy2U is a limited company so liability to pay a monetary penalty will not fall on any individual.

77. Taking into account all of the above, the Commissioner has decided that the appropriate amount of the penalty is **£130,000 (One hundred and thirty thousand pounds)**.

Conclusion

78. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by 16 November 2015 at the latest. The monetary penalty is not kept by the Commissioner but will be paid into the Consolidated Fund which is the Government's general bank account at the Bank of England.

79. If the Commissioner receives full payment of the monetary penalty by 13 November 2015 the Commissioner will reduce the monetary penalty by 20% to **£104,000 (One hundred and four thousand pounds)**. However, you should be aware that the early payment discount is not available if you decide to exercise your right of appeal.

80. There is a right of appeal to the First-tier Tribunal (Information Rights) against:

- a) the imposition of the monetary penalty and/or;

- b) the amount of the penalty specified in the monetary penalty notice.
81. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.
82. Information about appeals is set out in Annex 1.
83. The Commissioner will not take action to enforce a monetary penalty unless:
- the period specified within the notice within which a monetary penalty must be paid has expired and all or any of the monetary penalty has not been paid;
 - all relevant appeals against the monetary penalty notice and any variation of it have either been decided or withdrawn; and
 - the period for appealing against the monetary penalty and any variation of it has expired.
84. In England, Wales and Northern Ireland, the monetary penalty is recoverable by Order of the County Court or the High Court. In Scotland, the monetary penalty can be enforced in the same manner as an extract registered decree arbitral bearing a warrant for execution issued by the sheriff court of any sheriffdom in Scotland.

Dated the 14th day of October 2015

Signed

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

ANNEX 1

SECTION 55 A-E OF THE DATA PROTECTION ACT 1998

RIGHTS OF APPEAL AGAINST DECISIONS OF THE COMMISSIONER

1. Section 48 of the Data Protection Act 1998 gives any data controller upon whom a monetary penalty notice or variation 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 sent so it is received by the Tribunal within 28 days of the date of the notice.
 - b) If your notice of appeal is late the Tribunal will not admit it unless the Tribunal has extended the time for complying with this rule.
4. The notice of appeal should state:-
- a) your name and address/name and address of your representative (if any);
 - b) an address where documents may be sent or delivered to you;
 - c) the name and address of the Information Commissioner;
 - d) details of the decision to which the proceedings relate;
 - e) the result that you are seeking;
 - f) the grounds on which you rely;
 - d) you must provide with the notice of appeal a copy of the monetary penalty notice or variation notice;
 - e) if you have exceeded the time limit mentioned above the notice of appeal must include a request for an extension of time and the reason why the notice of appeal was not provided in time.

5. 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.

6. 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)).