

## PENALTY NOTICE

Given to: **Department of Home Affairs**

DHA Headquarters

Drill Hall

Tromode Road

DOUGLAS

Isle of Man

IM2 5PA

Date: **20 March 2020**

1. This penalty notice is given pursuant to Regulation 112(1) of, and Paragraph 2 of Schedule 5 to, the GDPR and LED Implementing Regulations 2018.
2. In this penalty notice:
  - a. "Article" means an article of the Applied GDPR
  - b. "Applied GDPR" means the Annex to the Data Protection (Application of GDPR) Order 2018
  - c. "Regulation" means a regulation of the Implementing Regulations
  - d. "Implementing Regulations" mean the GDPR and LED Implementing Regulations 2018
3. The Information Commissioner ("*the Commissioner*") has decided to give the Department of Home Affairs ("*the DHA*") a penalty notice under Regulation 112 and Schedule 5 to the Implementing Regulations.
4. The DHA is the 'controller' as defined in Article 4(7).
5. This penalty notice ("*Notice*") imposes an administrative penalty on the DHA, in accordance with the Commissioner's powers under Article 83.

6. The amount of the penalty is **£12,250.00** (twelve thousand, two hundred and fifty pounds).
7. This Notice explains the Commissioner's reasons for imposing the penalty and the amount of the penalty, including any aggravating or mitigating factors taken into account.

### **Reasons for imposing the penalty**

8. This Notice relates to the Commissioner's investigation into a complaint and the subsequent issue of an Enforcement Notice to the DHA on 19 December 2019 (EN2019/0002) (*"the 2019 EN"*).
9. In summary, the DHA failed to comply with provisions of the Applied GDPR relating to the right of access to personal data and the 2019 EN details the circumstances of the failures by the DHA. The 2019 EN is attached as Annex 1 to this Notice.
10. The 2019 EN was issued in accordance with the powers of the Commissioner provided by Article 58(2). Article 58(2)(i) states that the Commissioner may impose an administrative fine *"in addition to, or instead of measures referred to in this paragraph [58(2)] ... "*
11. The penalty is being imposed due to infringements by the DHA of:
  - a. Article 15 – the right of access by the data subject; and
  - b. Article 12 - transparent information, communication and modalities for the exercise of the rights of data subjects.

in that the DHA failed to comply with a request exercising the right of access to personal data in accordance with the requirements of those Articles.

12. The DHA was, in addition, subject to an extant Enforcement Notice, ordering the DHA to comply with the right of access to personal data issued under section 36 of the Data Protection Act 2002.
13. Paragraph 8 of Schedule 11 to the Implementing Regulations states: *"If, immediately before the coming into operation of these Regulations, an enforcement notice is served under section 36 of the 2002 Act, that notice has effect after such coming into operation as if it were an enforcement notice made under regulation 106 of these Regulations."*
14. The penalty is also being imposed due to non-compliance with that extant order as if it had been issued by the Commissioner in accordance with Article 58(2)(c).
15. The Commissioner issued a notice of intent to give the penalty notice (*"Notice of Intent"*) to the DHA on 20 February 2020, in accordance with Regulation 112(4) and Schedule 5 to the Implementing Regulations. The Notice of Intent is attached as Annex 2 to this Notice.
16. The Commissioner has carefully considered the written representations made by the DHA on 06 March 2020 in respect of the Notice of Intent and, where appropriate, this Notice explains what account has been taken of those representations.

### **Aggravating factors**

#### *The nature of the Request*

17. The DHA received a straightforward, specific, focussed and precise request exercising the right of access to personal data undergoing processing by the DHA on 7 August 2019 (*"the Request"*).
18. The personal data sought was readily available to the DHA.

*Compliance with the Request and investigation by the Commissioner*

19. On 6 September 2019, the DHA provided a copy of some personal data to the data subject.
20. On 25 September 2019, the data subject queried the extent of the personal data that had been provided by the DHA and requested the DHA to revisit its decision. Within one hour, the DHA advised the data subject that all personal data had been disclosed to them.
21. On 18 October 2019, the data subject lodged a complaint with the Commissioner, in accordance with Article 77, and the Commissioner sought the co-operation of the DHA in his investigation into that complaint.
22. On 29 October 2019, the DHA stated to the Commissioner that no restrictions on the right of access had been applied, but third party personal data had been redacted.
23. However, the Commissioner identified that the data subject had not been provided with all the personal data undergoing processing to which their request related. Therefore, on 6 November 2019, the Commissioner requested the DHA to take action and, subject to the application of any restriction on the right of access, provide the personal data to the data subject.
24. On 20 November 2019, the DHA provided some further personal data to the data subject but advised the data subject that no other personal data was to be provided as it was applying the restriction set out in paragraph 8 of Schedule 9 to the Implementing Regulations to that personal data.
25. The Commissioner did not agree that the DHA was entitled to rely on that restriction with regard to all the personal data and therefore issued an Enforcement Notice to the DHA on 19 December 2019 (*"the 2019 EN"*) requiring, inter alia, that the DHA provide the data subject with the personal data to which

they were entitled, subject to the application of any restriction on the right of access.

26. The DHA did not appeal the 2019 EN to the Isle of Man Data Protection Tribunal and, on 15 January 2020, provided the data subject with all the personal data to which they were entitled, without applying any further restriction, as ordered in the 2019 EN.

#### *Investigation main findings*

27. The DHA did not comply with the Request without undue delay or within one month of receipt.
28. The DHA provided the personal data to the data subject in a piecemeal fashion, in particular in response to communications it received from the Commissioner.
29. However, the totality of the personal data to which the data subject was entitled was not provided by the DHA until 5 (five) months after receipt of the Request.

#### *Application of restrictions*

30. The only restrictions on the right of access to personal data are those prescribed in the Implementing Regulations. Controllers must be able to demonstrate that the application of any restriction is necessary and proportionate in all the circumstances of the case.
31. The DHA provided scant information to demonstrate the action taken to comply with the Request, or to demonstrate to the Commissioner what considerations it made regarding the application of any restriction on the right of access to personal data.
32. In any event, the DHA did not follow its own policy on complying with such requests with regard to the application of the restriction set out in paragraph 8 of

Schedule 9 to the Implementing Regulations, i.e. redaction of third party personal data where necessary.

*Extant enforcement notice (order)*

33. The DHA was, at the time the request was received, subject to an extant enforcement notice, issued to the DHA by the Commissioner on 27 January 2015 (*"the 2015 EN"*) in accordance with the provisions of the Data Protection Act 2002. The 2015 EN is attached as Annex 3 to this Notice.
34. The 2015 EN was issued as a subsequence of the DHA's failure to comply with the terms of an Undertaking, signed in October 2014. The 2015 EN and Undertaking were in respect of failures to comply with the right of access to personal data.
35. Paragraph 10 of the 2015 EN ordered the DHA:

*"... from the date of this Notice and for so long as similar standards are required by the Act or other successor legislation, ensure that personal data are processed in accordance with the Data Protection Principles set out in Part 1 of Schedule 1 [of] the Act, and in particular:*

  - a. Comply with all requests for personal data (subject access requests) in accordance with the requirements of the Act: ..."*
36. The 2015 EN has effect *"as if it were an enforcement notice made under regulation 106 of these [Implementing] Regulations."* The DHA failed to comply with that order made by the Commissioner.
37. In effect this amounts to a failure to comply with an order issued by the Commissioner under Article 58(2) in accordance with Regulation 106(2)(b).

*Representations made by DHA in response to the Notice of Intent*

38. In its representations, the DHA stated that the 2015 EN had been issued “*some time ago*”.
39. However, as indicated in paragraph 13 above, the 2015 EN remained valid and the Commissioner advised the DHA of its continuance in various communications relating to the complaint and in the 2019 EN.
40. The DHA also stated in its representations that the context of the Request, i.e. in relation to employment matters, was “*unprecedented in the Isle of Man*”.
41. This is incorrect and there are Employment and Equality Tribunal cases to demonstrate otherwise, including *Versluijs v Department of Home Affairs (Fire & Rescue Service)*(EET 19/12 dated 5 March 2020). It is common practice for such requests to be made in relation to employment matters.
42. Notwithstanding that the Commissioner had previously advised the DHA of Regulation 140 (Data subject’s rights and other prohibitions and restrictions), in particular in the 2019 EN, the DHA’s representations continued to state that there was a ‘balance’ to be struck between the right of access to personal data and requirements of other laws, regulations and non-statutory policies.
43. Regulation 140 states:
- (1) *An enactment or rule of law prohibiting or restricting the disclosure of information, or authorising the withholding of information, does not remove or restrict the obligations and rights provided for in the provisions listed in paragraph (2).*
- (2) *The provisions providing obligations and rights are, —*
- (a) *Chapter III of the applied GDPR (rights of the data subject); ...*

## **Mitigating factors**

44. The DHA did co-operate with the Commissioner in accordance with Article 31, to an extent, responding to the Commissioner's communications within the time required.
45. The DHA did complete the actions ordered in Part A of the 2019 EN and has confirmed it will comply with the ongoing requirements ordered in Part B of the 2019 EN.
46. The representations made by the DHA in response to the Notice of Intent did not include any additional relevant mitigating factors.

## **Imposition and amount of penalty**

47. The Commissioner, in imposing a penalty must have regard to the matters mentioned in Article 83(2).
48. Those matters are:

*(a) the nature, gravity and duration of the infringement taking into account the nature scope or purpose of the processing concerned as well as the number of data subjects affected and the level of damage suffered by them;*

*(b) the intentional or negligent character of the infringement;*

*(c) any action taken by the controller or processor to mitigate the damage suffered by data subjects;*

*(d) the degree of responsibility of the controller or processor taking into account technical and organisational measures implemented by them pursuant to Articles 25 and 32;*



- (e) any relevant previous infringements by the controller or processor;*
- (f) the degree of cooperation with the supervisory authority, in order to remedy the infringement and mitigate the possible adverse effects of the infringement;*
- (g) the categories of personal data affected by the infringement;*
- (h) the manner in which the infringement became known to the supervisory authority, in particular whether, and if so to what extent, the controller or processor notified the infringement;*
- (i) where measures referred to in Article 58(2) have previously been ordered against the controller or processor concerned with regard to the same subject matter, compliance with those measures;*
- (j) adherence to approved codes of conduct pursuant to Article 40 or approved certification mechanisms pursuant to Article 42; and*
- (k) any other aggravating or mitigating factor applicable to the circumstances of the case, such as financial benefits gained, or losses avoided, directly or indirectly, from the infringement.*

49. In this case, the Commissioner has had regard to paragraphs (a), (b), (c), (e), (f), (g), (h), (i) and (k) of Article 83(2). Paragraphs (d) and (j) are not relevant in this case.
50. *(a) the nature, gravity and duration of the infringement taking into account the nature scope or purpose of the processing concerned as well as the number of data subjects affected and the level of damage suffered by them;*

The infringements relate to the failure to comply with a data subject's exercise of their right of access to personal data pursuant to Articles 12 and 15.

The DHA failed to comply with the Request exercising that right without undue delay or within one month. The DHA did not provide the data subject with a copy of all the personal data to which they were entitled for a period of 5 (five) months from receipt of the Request.

In this case, the Request related to information regarding ongoing employment matters and disputes. The Commissioner considers that damage or distress is likely as a result of the data subject being denied the opportunity of properly understanding what personal data is processed about them by the controller.

51. *(b) the intentional or negligent character of the infringement;*

The Commissioner does not consider that the infringements were intentional. However, the Commissioner does consider that the infringements were negligent as the DHA knew, or should have known its obligations, and, in addition, had designated a data protection officer.

52. *(c) any action taken by the controller or processor to mitigate the damage suffered by data subjects;*

The DHA has not, to the Commissioner's knowledge, taken any action to mitigate any damage suffered by the data subject.

53. *(e) any relevant previous infringements by the controller or processor;*

Previous relevant infringements of the right of access to personal data have occurred and resulted in enforcement action by the Commissioner, i.e. the 2015 EN and the preceding undertaking.

54. *(f) the degree of cooperation with the supervisory authority, in order to remedy the infringement and mitigate the possible adverse effects of the infringement;*

The DHA did co-operate with the Commissioner, to the extent that responses were received to correspondence within the timeframe specified.

However, the infringements, and adverse effect of the infringements on the data subject, i.e. not being provided with their personal data, were not remedied until the Commissioner had issued the 2019 EN.

55. *(g) the categories of personal data affected by the infringement;*

The personal data affected by the infringements relates to staff records and internal work-related complaints. The Commissioner has not identified any special category data.

56. *(h) the manner in which the infringement became known to the supervisory authority, in particular whether, and if so to what extent, the controller or processor notified the infringement;*

The Commissioner became aware of the infringements following receipt of a complaint from the data subject, made under Article 77.

57. *(i) where measures referred to in Article 58(2) have previously been ordered against the controller or processor concerned with regard to the same subject matter, compliance with those measures;*

The DHA was subject to an extant Enforcement Notice, ordering the DHA to comply with the right of access to personal data issued under section 36 of the Data Protection Act 2002.

Paragraph 8 of Schedule 11 to the Implementing Regulations provides: “If, immediately before the coming into operation of these Regulations, an enforcement notice is served under section 36 of the 2002 Act, that notice has effect after such coming into operation as if it were an enforcement notice made under regulation 106 of these Regulations.”

58. *(k) any other aggravating or mitigating factor applicable to the circumstances of the case, such as financial benefits gained, or losses avoided, directly or indirectly, from the infringement.*

The Commissioner does not consider that there are any other relevant aggravating or mitigating factors other than those previously mentioned.

### **Amount of penalty**

59. The Commissioner is satisfied that a penalty is required in the circumstances.
60. In the Notice of Intent, the Commissioner proposed to impose a penalty of £10,000 (ten thousand pounds).
61. The DHA's representations stated that it did not wish to *"defend or otherwise attempt to diminish the responsibilities and obligations upon the Department or lessen the importance of ensuring data subject rights"*.
62. However, the DHA's representations included statements which sought to vindicate, or downplay, its failure to comply with the Request, diminish its obligation to comply with the extant 2015 EN, and demonstrated a continuing disregard for, or lack of comprehension of, the law relating to the right of access to personal data, in particular the extent to which that right may be restricted.
63. The Commissioner considers those statements made by the DHA in its representations to be additional aggravating factors.
64. DHA's compliance with the 2019 EN, also included by the DHA in its representations as mitigation, is not relevant to the DHA's failure to comply with either the Request or the extant 2015 EN, nor mitigates the imposition of a penalty for the failures.

65. Infringements of the right of access to personal data are included in the higher tier of penalties in Article 83(5)(b). Non-compliance with an order issued by the Commissioner is also subject to the higher tier of penalties (Article 83(6)).
66. The maximum amount of penalty in Article 83(5) and 83(6) does not apply in the Isle of Man, and, instead, Regulation 114 sets out the maximum penalty as £1,000,000 (one million pounds).
67. Regulations must, however, be read and construed as subordinate to the Applied GDPR, in accordance with Regulation 3, and the penalty should, therefore, reflect the more serious and significant infringements imputed in the Applied GDPR.
68. In calculating the penalty, the Commissioner has taken into account the size of the DHA and its Revenue Budget for 2018 -2019, as published in the 2018 -2019 'Pink Book'.
69. Mindful that the penalty must be effective, proportionate and dissuasive, and taking all the above factors into account, the Commissioner has decided to impose a penalty of **£12,250.00** (twelve thousand, two hundred and fifty pounds) on the DHA.

#### **Payment of penalty - paragraph 6 of Schedule 5 to the Implementing Regulations**

70. The penalty must be paid to the Commissioner's office by BACS transfer, journal transfer or cheque by **20 April 2020** at the latest. The penalty is not kept by the Commissioner but will be paid into the Treasury's General Revenue Account.

#### **Right of appeal - Regulation 120**

71. There is a right of appeal to the Isle of Man Data Protection Tribunal ("the Tribunal").

72. Regulation 120(4) states that a person who is given a penalty notice may appeal to the Tribunal against the amount of the penalty specified in the notice, whether or not they appeal against the issue of the penalty notice.
73. The determination of appeals by the Tribunal is prescribed in Regulation 121.
74. Appeals to the Tribunal must be made in accordance with the Isle of Man Data Protection Tribunal Rules in force at the time of the appeal.

#### **Failure to comply with this Notice - Regulation 117**

75. The Commissioner may certify in writing to the High Court that a controller has failed to comply with a penalty notice but must not exercise that power before the expiration of the payment period specified in the penalty notice.
76. The High Court must inquire into the matter and may deal with the controller as if it had committed a contempt of court.

#### **Enforcement of payment - paragraph 9 of Schedule 5 to the Implementing Regulations**

77. The Information Commissioner must not take action to recover a penalty unless,
  - (a) the period specified in accordance with paragraph 6 of Schedule 5 has ended,
  - (b) any appeals against the penalty notice have been decided or otherwise ended,
  - (c) if the penalty notice has been varied, any appeals against the penalty variation notice have been decided or otherwise ended, and
  - (d) the period for the controller or processor to appeal against the penalty, and any variation of it, has ended.

A penalty is recoverable if the court so orders in accordance with proceedings taken under regulation 117, as if it were payable under an order of that court.

**Enforcement Notice**

**19 December 2019**

**Notice of Intent**

**20 February 2020**



**Enforcement Notice**

**27 January 2015**