

**DATA PROTECTION ACT 1998**  
**SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER**  
**ENFORCEMENT NOTICE**  
**Dated 5 July 2013**

To: **Tameside Energy Services Ltd**

Of: **Crossgate House, 53b Manchester Road, Denton, Manchester, M34 2AF.**

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 The Data Protection Act 1998 (the "Act") came into force on 1 March 2000 and repealed the Data Protection Act 1984 (the "1984 Act").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 ("PECR") and revoked the Telecommunications (Data Protection and Privacy) Regulations 1999. They came into force on 11 December 2003. PECR adopted Part V entitled, 'Enforcement', and Schedules 6 and 9 of the Act 1998 (the "Act"). By virtue of Regulation 31 subparagraph 2 of PECR the Commissioner was made responsible for the enforcement functions under PECR. PECR was amended by the Privacy and Electronic Communications (EC Directive) (Amendment) Regulations 2004 and by the Privacy and Electronic Communications

(EC Directive) (Amendment) Regulations 2011 whose amendments relating to civil monetary penalties came into force on 26 May 2011.

3. Under section 40 subsection 1 of the Act as adopted by PECR and with the specific adaptations to that subsection set out in Schedule 1 of PECR, if the Commissioner is satisfied that a person has contravened any of the requirements of PECR the Commissioner may serve him with an enforcement notice requiring him to comply with the requirements in question.
4. A Preliminary Notice was served on Tameside on 15 April 2013 inviting representations to be made by Tameside. The Commissioner considered the representations made by Tameside's solicitors dated 28 May 2013 and after considering those the Commissioner gave Tameside a further opportunity until the end of June 2013 to provide further representations. No further representations were received.
5. The Commissioner is satisfied that Tameside Energy Services Ltd ("Tameside") has contravened the requirements of Regulation 21 on the grounds set out in this Notice.
6. Tameside was incorporated on 2 September 2003. It has been operating under its current name since 18 July 2012. It has four Directors on record. Gary Thomas O'Brien, who is the Managing Director, Ian Jeffrey Gibson, Suzanne Jean Gibson and Lindsay Elaine O'Brien. Tameside is a national company which describes itself on its website as a company that offers a range of energy efficiency improvements, such as wall or loft insulation, solar panels, double glazing and central heating upgrades. It is formally registered at Companies House as a business of, 'Other construction installation'.

Companies House records show that the company changed its name from Tameside Insulation Ltd on 18<sup>th</sup> July 2012.

7. OFCOM is the Office of Communications established by section 1 of the Office of Communications Act 2002 to facilitate the regulation of communications. Under Regulation 26 PECR, OFCOM is required to maintain a register of numbers allocated to subscribers who have notified them that they do not wish, for the time being, to receive unsolicited calls for direct marketing purposes on those lines. Telephone Preference Service Limited ("TPS") is a limited company set up by OFCOM to carry out this role. Businesses who wish to carry out direct marketing by telephone can subscribe to TPS for a fee and receive from them monthly a list of numbers on that register.
8. Tameside's business involves direct marketing to consumers by telephone. It is a fundamental requirement of the PECR, and well-known throughout the direct marketing industry, that a consumer's consent must have been notified to the company before it makes direct marketing telephone calls to that consumer if the consumer is registered with TPS. Therefore, it is a necessary step for businesses undertaking telesales to make arrangements to ensure that they do not make direct marketing calls to those consumers who have subscribed to TPS, unless the business holds records showing that those consumers have given their informed consent to that business to receive such calls.
9. To that end, it is also a necessary step for a business involved in direct marketing to register with the TPS to ensure that the business has access to a monthly update of the TPS list as new numbers are registered daily by consumers. Furthermore, the business should hold

a 'suppression list' of those consumers who have informed it directly that they do not wish to receive direct marketing calls.

10. Between 26 May 2011 and 31 January 2013, ("period of complaint") TPS received 1,010 (one thousand and ten) complaints from persons registered with them who had received unsolicited direct marketing calls from Tameside. In addition, during the period of complaint, the Commissioner received 13 complaints about unsolicited marketing calls to individual subscribers registered with the TPS. There are also 47 separate complaints on the Commissioner's on-line survey directly attributable to Tameside making a total of 60. (Of the 60, 8 were duplicated on the TPS list of 1,010 so that number is reduced to 52.) The overall total of complaints both to TPS and the Commissioner in this case during the period of complaint is 1,010 plus 52 giving a total of 1,062.
11. Each of the 1,062 complainants had registered their number with the TPS at least 28 days prior to receiving the calls. None had previously notified Tameside that they were willing to receive calls from them. 15 of the 60 individuals who had complained to the Commissioner stated that they had previously notified Tameside that such calls should not be made on that line. Complaints are still being received via TPS and the Commissioner's on-line survey about Tameside.
12. Between 14 May 2012 and 29<sup>TH</sup> January 2013 the Commissioner engaged in correspondence with Tameside whose Managing Director Gary O'Brien responded on behalf of the company. Despite the Commissioner's letters explaining the legal position and warning Tameside of his powers of enforcement, Tameside's responses did not to persuade the Commissioner that the company was taking any reasonable steps to comply with Regulation 21. In fact the number of

complaints to TPS increased during the period of the correspondence and Tameside did not actually download the TPS list until 14<sup>th</sup> January 2013.

13. The relevant provision of PECR is Regulation 21 paragraph (1) (a) and (b) which provides that,

“..a person shall neither use, nor instigate the use of, a public electronic communications service for the purposes of making unsolicited calls for direct marketing purposes where-

- a) the called line is that of a subscriber who has previously notified the caller that such calls should not for the time being be made on that line; or
- b) the number allocated to a subscriber in respect of the called line is one listed in the register kept under regulation 26.”(c.f. the TPS register see paragraph 10 above)

14. Regulation 21 applies to the making of unsolicited calls for direct marketing purposes. It means that if a company wants to make calls promoting a product or service to an individual who has a telephone number which is registered with TPS, then that individual must have given their consent to that company to receive such calls.

15. The Commissioner considered, as he is required to do under section 40 (2) of the Act, as adapted by Schedule 1 of PECR, when deciding whether to serve an Enforcement Notice, whether any contravention has caused or is likely to cause any person damage. The

Commissioner has considered that it is unlikely that actual damage has been caused in this instance.

16. 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 Tameside shall by 5.00 pm on 2 August 2013 comply with the terms specified in **Annex 1** hereto.
  
17. There is a right of appeal to the First-tier Tribunal (Information Rights) against the decision of the Commissioner to serve this Notice and the details of how to do this are contained in Annex 2. Any Notice of Appeal should be served on the Tribunal by 5pm on 2 August 2013 at the latest. If the notice of appeal is served late the Tribunal will not accept it unless the Tribunal has extended the time for complying with this rule.
  
18. No enforcement action under section 47 of the Data Protection Act 1998 as adopted by Regulation 31 of PECR shall be taken under this notice by the Commissioner unless and until:
  - the appeal period has expired and
  - any appeal which has been brought has been determined or withdrawn.

Dated 5 July 2013

Signed: .....

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

## **ANNEX 1**

### **TERMS OF THE PROPOSED ENFORCEMENT NOTICE**

Tameside Energy Services Ltd shall within 28 days of the date of this notice:

Neither use, nor instigate the use of a public electronic communications service for the purposes of making unsolicited calls for direct marketing purposes where the called line is that of :

- a) a subscriber who has previously notified Tameside that such calls should not be made on that line ; and /or
- b) a subscriber who has registered their number with the TPS at least 28 days previously and who has not notified Tameside that they do not object to such calls being made

## Annex 2

### **The Privacy and Electronic Communications (EC) Regulations 2003 as amended (PECR)**

#### **RIGHTS OF APPEAL AGAINST DECISIONS OF THE COMMISSIONER**

1. Regulation 31 of PECR adopted Part V of the Data Protection Act 1998 headed 'Enforcement' (subject to modifications imposed by Schedule 1 of PECR). This includes Section 48 which 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.
6. 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.
7. 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.
8. The statutory provisions concerning appeals to the First-tier Tribunal (Information Rights) 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).

