

Data Protection Act 1998

Monetary Penalty Notice

Dated: 30 July 2012

Name: Torbay Care Trust

Address: Bay House, Nicholson road, Torquay, Devon, TQ2 7TD

Statutory framework

1. Torbay Care Trust is the data controller, as defined in section 1(1) of the Data Protection Act 1998 (the "Act"), in respect of the processing of personal data carried out by Torbay Care Trust and is referred to in this notice as the "data controller". Section 4(4) of the Act provides that, subject to section 27(1) of the Act, 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.
2. The Act came into force on 1 March 2000 and repealed the Data Protection Act 1984 (the "1984 Act").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 the Data Protection Registrar originally established by section 3(1) (a) of the 1984 Act became known as the Data Protection Commissioner. From 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").
3. Under sections 55A and 55B of the Act (introduced by the Criminal Justice and Immigration Act 2008 which came into force on 6 April 2010) the Commissioner may, in certain circumstances, where there has there been a serious contravention of section 4(4) of the Act, serve a monetary penalty notice on a data controller requiring the data controller to pay a monetary penalty of an amount determined by the Commissioner and specified in the notice but not exceeding £500,000. The Commissioner has issued Statutory Guidance under section 55C (1) of the Act about the issuing of monetary penalties which is published on the Commissioner's website. 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.

Power of Commissioner to impose a monetary penalty

- (1) Under section 55A of the Act 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 Act 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.

Background

4. In April 2011, the [REDACTED] asked a [REDACTED] for equality and diversity metrics held on the electronic staff records system following a survey of the data controller's staff. The equality and diversity metrics together with the source data consisting of staff information was provided by the [REDACTED] in an excel spreadsheet. The [REDACTED] then submitted the excel spreadsheet for approval to a [REDACTED] using the electronic approval form, with a view to publication on the data controller's website.
5. At the time of the security breach, the data controller did not have any process governing requests to the workforce planning team for information from the electronic staff records system which were poorly

controlled. The Commissioner understands that it was not unusual for source data to be provided over and above the information actually requested. There was also no requirement to complete the narrative in the electronic approval form which might have alerted the [REDACTED] to the nature and sensitivity of the data on the excel spreadsheet. In the absence of any guidance on what information should not be published, the [REDACTED] placed a degree of reliance on the [REDACTED] who was responsible for the information. Consequently, the [REDACTED] approved the publication of the excel spreadsheet which was inadvertently published on the data controller's website.

6. The spreadsheet contained confidential and sensitive personal data relating to 1373 employees including the employee's name, pay scale, National Insurance number and date of birth. It also contained sensitive personal data such as their "disabled" status, ethnicity, religious belief and sexual orientation. The data was publicly available for over 19 weeks. During this period, the data controller's website received approximately 21,000 visits and the web page containing the spreadsheet received approximately 300 visits. The data controller has not been able to establish how often the actual spreadsheet was accessed by the public although the Commissioner understands that 32 of the visits to their website were from unidentified IP addresses. As soon as the data controller was made aware of this security breach the spreadsheet was removed from its website and all of the cached information was deleted by a third party.
7. The data controller has now taken remedial action which includes the implementation of a formal process governing requests for information from the electronic staff records system together with a "management of website" policy.

Grounds on which the Commissioner proposes to serve a monetary penalty notice

The relevant provision of the Act is the Seventh Data Protection Principle which provides, at Part I of Schedule 1 to the Act, that:

"Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data".

Paragraph 9 at Part II of Schedule 1 to the Act further provides that:

"Having regard to the state of technological development and the cost of

implementing any measures, the measures must ensure a level of security appropriate to -

(a) the harm that might result from such unauthorised or unlawful processing or accidental loss, destruction or damage as are mentioned in the seventh principle, and

(b) the nature of the data to be protected”.

- The Commissioner is satisfied that there has been a serious contravention of section 4(4) of the Act in that there has been a breach of the data controller's duty to comply with the Seventh Data Protection Principle.

In particular, the data controller had failed to take appropriate organisational measures against unauthorised processing of personal data such as having effective policies and procedures in place to control its use and further dissemination.

The contravention is serious because the measures did not ensure a level of security appropriate to the harm that might result from such unauthorised processing and the nature of the data to be protected, having regard to the state of technological development and the cost of implementing any such measures.

- The Commissioner is satisfied that the contravention is of a kind likely to cause substantial damage and/or substantial distress. Unauthorised confidential and sensitive personal data relating to 1373 employees was inadvertently published on the data controller's website due to the inappropriate organisational measures taken by the data controller. The failure to take appropriate organisational measures has the potential to cause substantial distress to individuals who may suspect that their confidential and sensitive personal data has been accessed by individuals who have no right to know that information.

If the data has in fact been accessed by untrustworthy third parties then it is likely that the contravention would cause further distress and also substantial damage to the data subjects such as exposing them to identity fraud and possible financial loss.

- The Commissioner is satisfied that section 55A (3) of the Act applies in that the data controller ought to have known that there was a risk that the contravention would occur, and that such a contravention would be of a kind likely to cause substantial damage and/or substantial distress, but failed to take reasonable steps to prevent the contravention.

The Commissioner has taken this view because the data controller was holding confidential and sensitive personal data relating to its employees and should have realised the potential for human error when uploading data to its website in the absence of appropriate security measures leading up to that point.

In the circumstances, the data controller ought to have known that there was a risk that the contravention would occur unless reasonable steps were taken to prevent the contravention, such as having effective policies and procedures to control the use and further dissemination of the data. Further, it should have been obvious to the data controller who was holding confidential and sensitive personal data relating to its employees that such a contravention would be of a kind likely to cause substantial damage and/or substantial distress to the data subjects due to the nature of the data involved.

Aggravating features the Commissioner has taken into account in determining the amount of a monetary penalty

Nature of the contravention

- Confidential and sensitive personal data was inadvertently uploaded to a website and accessible to the public for over 19 weeks
- Contravention was especially serious because of the large number of employee records involved and the confidential and sensitive nature of the personal data

Effect of the contravention

- Potential for damage in the form of identity fraud and possible financial loss

Behavioural issues

- Contravention was due to the negligent behaviour of the data controller in failing to take appropriate organisational measures against the unauthorised processing of personal data

Impact on the data controller

- Sufficient financial resources to pay a monetary penalty up to the maximum without causing undue financial hardship

Mitigating features the Commissioner has taken into account in determining the amount of the monetary penalty

Nature of the contravention

- No previous similar security breach that the Commissioner is aware of

Effect of the contravention

- No complaints from the data subjects have been received to date

Behavioural issues

- Voluntarily reported to Commissioner's office
- Data subjects were notified about the security breach, given an apology and offered support and compensation
- Full investigation carried out
- Remedial action has now been taken
- Fully cooperative with Commissioner's office

Impact on the data controller

- Liability to pay monetary penalty will fall on the public purse although the penalty will be paid into the Consolidated Fund
- Significant impact on reputation of data controller as a result of this security breach

Other considerations

- The Commissioner's underlying objective in imposing a monetary penalty notice is to promote compliance with the Act. This is an opportunity to reinforce the need for data controllers to ensure that appropriate and effective security measures are applied to personal data

Notice of Intent

A notice of intent was served on the data controller dated 17 May 2012. The Commissioner received written representations from the data controller in a letter from the Chief executive dated 15 June 2012. The Commissioner has considered the written representations

made in relation to the notice of intent when deciding whether to serve a monetary penalty notice. In particular, the Commissioner has taken the following steps:

- reconsidered the amount of the monetary penalty generally, and whether it is a reasonable and proportionate means of achieving the objective which the Commissioner seeks to achieve by this imposition;
- ensured that the monetary penalty is within the prescribed limit of £500,000; and
- ensured 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.

Amount of the monetary penalty

The Commissioner considers that the contravention of section 4(4) of the Act is very serious and that the imposition of a monetary penalty is appropriate. Further that a monetary penalty in the sum of £175,000 (One hundred and seventy five thousand pounds) is reasonable and proportionate given the particular facts of the case and the underlying objective in imposing the penalty.

Payment

The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by Monday 3 September 2012 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.

Early payment discount

If the Commissioner receives full payment of the monetary penalty by Friday 31 August 2012 the Commissioner will reduce the monetary penalty by 20% to £140,000 (One hundred and forty thousand pounds).

Right of Appeal

There is a right of appeal to the (First-tier Tribunal) General Regulatory Chamber against:

- a. the imposition of the monetary penalty
and/or;
- b. the amount of the penalty specified in the monetary
penalty notice.

Any Notice of Appeal should be served on the Tribunal by 5pm on Friday 31 August 2012 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.

Information about appeals is set out in the attached Annex 1.

Enforcement

The Commissioner will not take action to enforce a monetary penalty unless:

- the period specified in 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 the data controller to appeal against the monetary penalty and any variation of it has expired.

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 or any sheriffdom in Scotland.

Dated the 30th day of July 2012

Signed:

David Smith
Deputy Information Commissioner
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 person 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 served on the Tribunal by 5pm on Friday 31 August 2012 at the latest.
 - 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)).