



Ministry of
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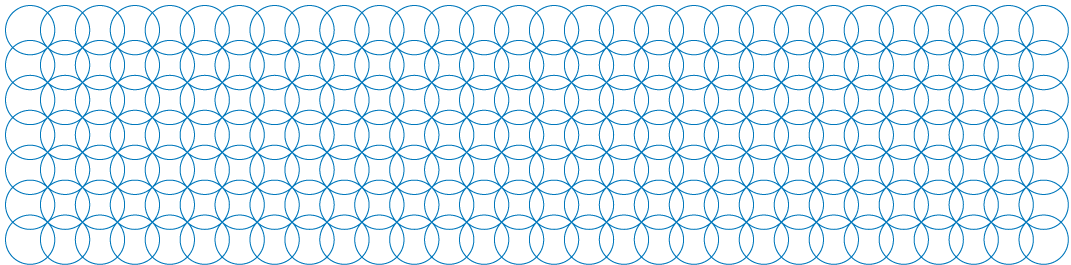
Civil Monetary Penalties

Setting the maximum penalty

Consultation Paper CP48/09

Published on 9 November 2009

This consultation will end on 21 December 2009



Civil Monetary Penalties: Setting the maximum penalty



Civil Monetary Penalties

Setting the maximum penalty

A consultation produced by the Ministry of Justice.

**This information is also available on the Ministry of Justice website:
www.justice.gov.uk**

Civil Monetary Penalties: Setting the maximum penalty

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Civil Monetary Penalties: Setting the maximum penalty

About this consultation

To:	Data controllers and their representative bodies
Duration:	From 09/11/09 to 21/12/09
Enquiries (including requests for the paper in an alternative format) to:	Victor Riega Ministry of Justice 102 Petty France London SW1H 9AJ Tel: 020 3334 5142 Fax: 020 3334 2245 Email: victor.riega@justice.gsi.gov.uk
How to respond:	Please send your response by 21/12/09 to: Victor Riega Ministry of Justice 102 Petty France London SW1H 9AJ Tel: 020 3334 5142 Fax: 020 3334 2245 Email: victor.riega@justice.gsi.gov.uk
Additional ways to feed in your views:	The Ministry of Justice is also happy to accept formal responses to the consultation via email.
Response paper:	A response to this consultation exercise is due to be published by 11/01/10 at: www.justice.gov.uk

Introduction

This paper sets out for consultation the Government's proposal for the maximum Civil Monetary Penalty that may be imposed by the Information Commissioner. The consultation is aimed at data controllers and organisations representing them in the UK.

For the most part, this consultation follows the Code of Practice on Consultation issued by the Cabinet Office. However, the Ministry of Justice has already informally consulted a number of different stakeholders to develop the proposed policy on Civil Monetary Penalties and is seeking views only on the maximum potential penalty in this consultation document. We therefore consider that a reduced consultation period of 6 weeks rather than 12 is appropriate in this instance.

An Impact Assessment has been completed and will be published alongside this document. This indicates that the proposal is likely to lead to additional costs for all data controllers, but only if they fail to comply with the Data Protection Principles set out in the Data Protection Act 1998.

Copies of the consultation paper are being sent to:

Association of Chief Executives of Voluntary Organisations

Association of Chief Police Officers in Scotland

Association of Chief Police Officers of England, Wales & Northern Ireland

Association of Private Client Investment Managers & Stockbrokers

Association of British Insurers

Audit Scotland

British Bankers Association

British Chamber of Commerce

British Gas

British Insurance Brokers' Association

British Retail consortium

The Campaign for Freedom of Information

CBI Scotland

Central Office of Information

The Charity Commission

Chief Information Officers Council

Citizens Advice Bureau

The Confederation of British Industry

The Consumers' Association

Convention of Scottish Local Authorities

The Customer's Voice

Data Protection Forum

Direct Marketing Association

Experian

Equifax

European Commission

Federation of Small Businesses

Financial Ombudsman Service

Financial Services Authority

First Minister for Wales, Welsh Ministers and Counsel to the Welsh Assembly

The Foreign and Commonwealth Office

The Forum of Private Business Ltd

FSB Scotland

Foundation for Information Policy Research

General Medical Council

The Home Office

HM Revenue & Customs

HM Treasury

Identity and Passport Service

Information Commissioner's Office (UK)

Information Commissioner's Office (Scotland)

The Information Tribunal

Local Authorities Co-ordinators of Regulatory Services

The Local Government Association

London Investment Bankers Association

National Archives

National Audit Office

The National Association of Data Protection Officers

National Association for Voluntary and Community Action

National Consumer Council

National Council for Voluntary Organisations

National Federation of Self Employed and Small Businesses Ltd

The Northern Ireland Executive

The Northern Ireland Office

Office of National Statistics

Office of Government Commerce

Office of the Scottish Charity Regulator

The Office of the Third Sector (Cabinet Office)

The Open Rights Group

Privy Council Office

Scottish Council for Development & Industry

Scottish Council for Voluntary Organisations

Scottish Enterprise

The Scottish Government

Scotland Office

The Wales Council for Voluntary Action

Wales Office

The Welsh Assembly Government

Royal Academy of Engineering

Royal College of Pathologists

Royal College of Physicians and Surgeons of Glasgow

Royal College of Physicians of Edinburgh

Tesco plc

T-Mobile (UK)

However, this list is not meant to be exhaustive or exclusive and responses are welcomed from anyone with an interest in or views on the subject covered by this paper.

The proposal

The Government proposes that in relation to Monetary Penalties imposed under Section 55A of the Data Protection Act 1998 (DPA) for serious breaches of the data protection principles, the maximum prescribed amount that the Information Commissioner will be able to impose will be £500,000

The Government is proposing to introduce a maximum Civil Monetary Penalty for serious breaches of the DPA of up to £500,000. This reflects the importance that Government places on safeguarding personal data effectively and processing it responsibly and lawfully. The Information Commissioner's Office (ICO) will exercise its discretion to assess the appropriate level of any penalty it imposes and will publish detailed guidance setting out the criteria it will use and circumstances it will take into consideration.

Background

The Government has amended the DPA, through section 144 of the Criminal Justice and Immigration Act 2008 (CJIA), to provide the ICO with a power to impose a civil monetary penalty on data controllers.

The Information Commissioner may impose a civil monetary penalty when the following criteria have been satisfied –

- (a) there has been a serious contravention of section 4(4) of the DPA by the data controller¹,
- (b) the contravention was of a kind likely to cause substantial damage or substantial distress and either,
 - (c) i) the contravention was deliberate, or,
 - (c) ii) the data controller knew or 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 or substantial distress, but failed to take reasonable steps to prevent the contravention.

¹ Section 4(4) of the DPA states that "it shall be the duty of a data controller to comply with the data protection principles in relation to all personal data with respect to which he is the data controller". The data protection principles are set out in Schedule 1 to the DPA and are reproduced at page 11.

Increasing the sanctions faced by data controllers through financial penalties should contribute to increased compliance with the data protection principles and greater confidence for data subjects that their information is being handled correctly. However, we must ensure that any financial sanction that may be imposed by the ICO is proportionate.

The Government believes that the maximum penalty should be an amount which gives the ICO the flexibility to deal effectively with a wide range of data controllers with varying financial resources. The ICO will also have regard to the financial hardship a penalty may inflict on a data controller guilty of a serious breach of the data protection principles.

Many regulators have the power to impose a penalty up to 10% of an organisation's turnover. Following discussion with the ICO and consideration of the greater administrative burden involved in operating a turnover-based system, we are consulting only on a fixed maximum amount. However, we consider it desirable that the maximum amount of the penalty should not be higher than the equivalent of 10% of the highest annual turnover of a small company.

The Data Protection Principles

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.

2. Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.

3. Personal data shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they are processed.

4. Personal data shall be accurate and, where necessary, kept up to date.

5. Personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes.

6. Personal data shall be processed in accordance with the rights of data subjects under this Act.

7. 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.

8. Personal data shall not be transferred to a country or territory outside the European Economic Area unless that country or territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data.

Questionnaire

We would welcome responses to the following question:

- 1. Do you consider that a penalty of up to £500,000 provides the ICO with a proportionate sanction for serious contraventions of the data protection principles?**

Thank you for participating in this consultation exercise.

About you

Please use this section to tell us about yourself

Full name	
Job title or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	
Date	
Company name/organisation (if applicable):	
Address	
Postcode	
If you would like us to acknowledge receipt of your response, please tick this box	<input type="checkbox"/> (please tick box)
Address to which the acknowledgement should be sent, if different from above	

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

Contact details/How to respond

Please send your response by 21/12/09 to:

Victor Riega
Ministry of Justice
Information Policy Division
6th Floor, 6.17
102 Petty France
London SW1H 9AJ

Tel: 0203 334 5142
Fax: 0203 334 2245
Email: victor.riega@justice.gsi.gov.uk

Extra copies

Further paper copies of this consultation can be obtained from this address and it is also available on-line at www.justice.gov.uk

Alternative format versions of this publication can be requested from Victor Riega (victor.riega@justice.gsi.gov.uk)

Publication of response

A paper summarising the responses to this consultation will be published by 11 January 2010. The response paper will be available on-line at www.justice.gov.uk

Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will

take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Ministry.

The Ministry will process your personal data in accordance with the DPA and in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

The consultation criteria

The seven consultation criteria are as follows:

1. **When to consult** – Formal consultations should take place at a stage where there is scope to influence the policy outcome.
2. **Duration of consultation exercises** – Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.
3. **Clarity of scope and impact** – Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.
4. **Accessibility of consultation exercises** – Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.
5. **The burden of consultation** – Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.
6. **Responsiveness of consultation exercises** – Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.
7. **Capacity to consult** – Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

These criteria must be reproduced within all consultation documents.

Consultation Co-ordinator contact details

If you have any complaints or comments about the consultation **process** rather than about the topic covered by this paper, you should contact Julia Bradford, Ministry of Justice Consultation Co-ordinator, on 020 3334 4492, or email her at: consultation@justice.gsi.gov.uk.

Alternatively, you may wish to write to the address below:

Julia Bradford
Consultation Co-ordinator
Ministry of Justice
102 Petty France
London SW1H 9AJ

If your complaints or comments refer to the topic covered by this paper rather than the consultation process, please direct them to the contact given under the **How to respond** section of this paper at page 13.

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victor.riega@justice.gsi.gov.uk