

WORLD DATA PROTECTION REPORT >>>

News and analysis of data protection developments around the world.
For the latest updates, visit www.bna.com

International Information for International Business

VOLUME 16, NUMBER 6 >>> JUNE 2016

Reproduced with permission from World Data Protection Report, 16 WDPR 06, 6/28/16. Copyright © 2016 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

U.K. Privacy Office Fines Pro-Brexit Campaign Company for 500,000 Spam Texts



By Rafi Azim-Khan and Steven Farmer

The Information Commissioner's Office has fined an European Union referendum campaign company 50,000 pounds (\$66,490) for sending more than 500,000 spam texts. Better for the Country Ltd., best known for campaigning under the name "Leave.EU," breached data protection rules by not having the consent of the people it sent text messages to. The company had obtained the list of telephone numbers from

Rafi Azim-Khan is a partner at Pillsbury Winthrop Shaw Pittman LLP, London and is head of the firm's data privacy practice group.

Steven Farmer is counsel at Pillsbury Winthrop, London and member of the firm's data privacy practice group.

a third party supplier, but had not, the Commissioner found, obtained the necessary consents. The penalty notice, issued under § 55A of the Data Protection Act 1998, includes some useful observations by the Commissioner on the due diligence that companies should carry out when purchasing marketing data from third parties in order to check whether the necessary consent has been obtained.

Background

Better for the Country campaigns for the U.K. to leave the EU, formerly under the name "The Know" and now as "Leave.EU." As part of that campaign, it sent unsolicited direct marketing text messages in the following terms:

(i) "Hello, it's Liz from The Know. Text YES to support our fight to leave the EU or see <http://goo.gl/86G6Mp> for more info. Reply STOP to opt-out;"

(ii) "Hello, we're contacting you from The Know. Text YES to support our fight to leave the EU or see <http://goo.gl/6Sbnlv> for more info. Reply STOP to opt-out."

Between 1 May and 7 October 2015, 140 complaints were made by those who received the texts.

Following notification by the U.K. Information Commissioner’s Office (ICO), Better for the Country explained that some of the text messages had been sent to individuals who had registered as supporters of the campaign on the company’s website. However, the remainder were sent to individuals whose details had been obtained from a third party data supplier. The company explained that the data obtained from the third party supplier was “double opt-in consented for government and local government marketing” and provided the following examples of the consent that had been relied on:

“By providing us with your details and agreeing to our terms and conditions you have given us and our carefully selected partners permission to send you offers by e-mail, post or SMS and from time to time to telephone you. We may also share your details with our partners in order to improve the relevance of the offers that they wish to send you. These offers may relate to utilities, retail products & services, travel, leisure, insurance, finance, real estate, telecoms, gambling, home improvements, health, automotive, legal services, or local & national government . . .”

“By entering your e-mail you consent to xxxx and its partners, sending you information and offers on products and/or services that may be of interest to you via e-mail, SMS, telephone or direct mail. These offers may relate to utilities, retail products & services, travel, leisure, insurance, finance, real estate, telecoms, gambling, home improvements, health, automotive, legal services or local & national government.”

Better for the Country confirmed that it had sent a total of 501,135 text messages between 1 May and 7 Oct. 2015 to individuals whose details had been obtained from the third party supplier.

sents to messages being sent by, or at the instigation of, that sender. Indirect, or third party, consent can be valid, “but only if it is clear and specific enough”.

The Commissioner was satisfied that Better for the Country did not have the consent, within the meaning of regulation 22(2), of the 501,135 subscribers to whom it had sent unsolicited direct marketing text messages.

Section 55A of the DPA

As for whether the conditions under § 55A were met, the Commissioner was satisfied that the contravention was serious due to the number of texts sent within a five-month period resulting in 140 complaints being made.

The contravention was not deliberate in the Commissioner’s view, but it was negligent. Better for the Country knew or ought reasonably to have known that there was a risk that such contraventions would occur, since the company relied heavily on direct marketing due to the nature of its campaign, and the issue of unsolicited text messages had been widely publicised by the media as being a problem.

Further, the Commissioner considered that Better for the Country had failed to take reasonable steps to prevent the contraventions. The Commissioner points out in the penalty notice that organisations buying marketing lists from third parties, or contracting with third parties to carry out marketing for them, “must make rigorous checks to satisfy themselves that the third party has obtained the personal data it is using fairly and lawfully, and that they have the necessary consent.” Organisations should take extra care to ensure that the consent is “sufficiently clear and specific” if using a bought-in list to send marketing texts or e-mails, he adds.

The Commissioner continues by saying that it is not acceptable to rely on assurances of indirect consent without undertaking proper due diligence. The Commissioner advises that such due diligence might, for example, include checking the following:

- how and when was consent obtained?
- who obtained it and in what context?
- what method was used—was it opt-in or opt-out?
- was the information provided clear and intelligible? How was it provided—behind a link, in a footnote, in a pop-up box, in a clear statement next to the opt-in box?
- did it specifically mention texts, e-mails or automated calls?
- did it list organisations by name, by description, or was the consent for disclosure to any third party?
- is the seller a member of a professional body or accredited in some way?

A reputable list broker should be able to demonstrate that the marketing list for sale is reliable by explaining how it was compiled and providing full details of what individuals consented to, when and how, the Commis-

Organisations buying marketing lists from third parties, or contracting with third parties to carry out marketing, “must make rigorous checks that the third party has obtained the personal data it is using fairly and lawfully.

U.K. Information Commissioner’s Penalty Notice

ICO Decision

Consent

The Information Commissioner found that Better for the Country had breached regulation 22 of the Privacy and Electronic Communications (EC Directive) Regulations 2003 (PECR) by using a public telecommunications service for the purposes of instigating the transmission of 501,135 unsolicited communications by means of electronic mail to individual subscribers for the purposes of direct marketing.

The Commissioner said that “consent” within the meaning of regulation 22(2) requires that the recipient of the electronic mail has notified the sender that he/she con-

sioner says. If the seller cannot provide this information, a buyer should not use the list.

In this case Better for the Country had relied upon contractual assurances from its third party data supplier that the necessary consent had been obtained for sending unsolicited direct marketing text messages. However, the Commissioner did not consider that the company had undertaken sufficient due diligence. In the circumstances, the Commissioner was satisfied that the company had failed to take reasonable steps to prevent the contraventions in this case.

“Political parties and campaign groups must follow the same rules as anyone else. That means they must have people’s permission before sending them text messages.”

Stephen Eckersley, ICO Head of Enforcement

Monetary penalty

The Commissioner noted that his underlying objective in imposing a monetary penalty notice is to promote compliance with PECR. The sending of unsolicited marketing texts is, he said, “a matter of significant public concern.” He decided to issue a monetary penalty in this case to act as “a general encouragement towards compliance with the law,” or at least as a deterrent against non-compliance, on the part of all persons running businesses currently engaging in these practices. The issuing of a monetary penalty would, he said, “reinforce the

need for businesses to ensure that they are only texting those who consent to receive marketing.”

The Commissioner decided that a penalty of 50,000 pounds (\$66,490) was reasonable and proportionate given the particular facts of the case and the underlying objective in imposing the penalty.

Comment

This is not the first time the ICO has taken action over political campaigning that falls short of the law. In March 2016, the ICO fined Member of Parliament David Lammy for making nuisance calls and in December 2015 it fined the Telegraph Media Group 30,000 pounds (\$39,988) for sending hundreds of thousands of e-mails on the day of the general election urging readers to vote Conservative even though many had only signed up to editorial content. In addition, in November 2013, in the run-up to the Scottish Referendum, the Better Together campaign signed an undertaking after sending 300,000 text messages to individuals without adequately checking whether they had consented to being contacted.

Stephen Eckersley, ICO Head of Enforcement, said: “Political parties and campaign groups must follow the same rules as anyone else. That means they must have people’s permission before sending them text messages. Better for the Country did not have permission to send these messages. After considering all the options we decided that enforcement action was necessary.”

Better for the Country is reported to be appealing the ICO’s decision. Nevertheless, whatever the ultimate outcome, this case underlines the significant health warning which bought in customer lists often come with and also that steps must be taken by marketers before seeking to use them in order to create a due diligence shield in the event of regulator action.