

Data Protection Law 2017

Guidance on Monetary Penalty Orders

Introduction

This guidance sets out information on the exercise of the Ombudsman's functions under the Data Protection Law (DPL) in relation to serving a data controller with a monetary penalty order (MPO). It is issued after consultation with Cabinet in accordance with section 56 of the DPL.

Power to impose an MPO

Section 55 of the DPL grants the Ombudsman the power to serve a data controller with an MPO if the Ombudsman is satisfied on a balance of probabilities that there has been a serious contravention of the DPL by the data controller, and the contravention was of a kind likely to cause substantial damage or substantial distress to a data subject or subjects.

The power to impose an MPO is part of the Ombudsman's overall regulatory regime which also includes the power to serve information orders and enforcement orders.¹ The MPO is used both as a sanction and as a deterrent against non-compliance with the statutory requirements.

An MPO is an order requiring the data controller to pay a monetary penalty of an amount determined by the Ombudsman and specified in the order. The amount of the monetary penalty cannot exceed \$250,000 and is paid into the general revenues of the Islands. Payment must be made within the period specified in the order.

Before issuing an MPO, the Ombudsman is required to serve the data controller with a notice of intent, inviting the data controller to make representations on any factors militating in favour or against an MPO, and on the amount of the penalty, within 21 calendar days. After receiving the data controller's representations, the Ombudsman then decides whether to serve the monetary penalty order and, if so, in what amount.²

The data controller may seek judicial review of the MPO in the courts within 45 days of receipt.³ Unless there is a successful application for judicial review, a data controller who fails to comply with an MPO commits an offence and is liable on conviction to a fine of \$100,000 or to imprisonment for a term of five years, or both.⁴

Section 56 of the DPL requires that the Ombudsman prepare and issue guidance, after consultation with the Cabinet, on:

- a) the circumstances in which the Ombudsman would consider it appropriate to issue an MPO; and,
- b) how the Ombudsman will determine the amount of the monetary penalty.

¹ DPL, ss.44-45

² DPL, s.55

³ DPL, s. 47.

⁴ DPL, s. 46.

Circumstances in which the Ombudsman would consider it appropriate to issue an MPO

When deciding to impose an MPO, the Ombudsman shall investigate whether, on the balance of probabilities -

- there has been a serious contravention of the DPL by the data controller; and
- the contravention was of a kind likely to cause substantial damage or substantial distress to the data subject.

The presence of one or more of the following factors will make the imposition of an MPO more likely:

- a) the contravention was serious because of the nature, gravity and duration of the infringement taking into account the nature, scope or purpose of the processing concerned as well as the categories of personal data involved, the number of data subjects affected, and the level of damage suffered by them;
- b) the intentional or negligent character of the infringement;
- c) the degree of responsibility of the controller (or data processor engaged by the controller) taking into account technical and organizational measures implemented by them pursuant to the seventh data protection principle;
- d) any relevant previous infringements by the controller;
- e) measures referred to in section 45(1) of the DPL have previously been ordered against the controller concerned with regard to the same subject-matter, and whether the data controller was in compliance with those measures;
- f) the likelihood that the contravention was of a kind to cause substantial damage or substantial distress to an individual or individuals;
- g) the likelihood that the contravention should have been apparent to a reasonably prudent person;
- h) any other aggravating factor applicable to the circumstances of the case, such as financial benefits gained, or losses avoided, directly or indirectly, from the infringement.

The presence of one or more of the following factors will make the imposition of an MPO less likely:

- i) the contravention was caused or exacerbated by circumstances outside the direct control of the data controller concerned, and they had done all they reasonably could to prevent contraventions;
- j) the data controller had already complied with any requirements or rulings in respect of the facts giving rise to the contravention;

- k) the degree of cooperation with the Ombudsman, in order to remedy the infringement and mitigate the possible adverse effects of the infringement;
- l) the manner in which the infringement became known to the Ombudsman, including whether, and if so to what extent, the controller or processor notified the infringement;
- m) adherence to any approved codes of practice pursuant to section 42 of the DPL;
- n) there was genuine doubt or uncertainty that any relevant conduct, activity or omission in fact constituted a contravention of the DPL – although simple ignorance of the Law will be no defence;
- o) whether the contravention took place within the first six months following the commencement of the DPL;
- p) whether the MPO would be effective, proportionate and dissuasive;
- q) any action taken by the controller or processor to mitigate the damage or distress suffered by data subjects;

In considering whether to issue an MPO, the Ombudsman may take into account any additional factors which appear to be relevant to her in the particular circumstances of the case in question, and shall explain what these are.

Determining the amount of the penalty

When the Ombudsman has decided that it is appropriate to impose an MPO, she shall determine the amount of the penalty on the basis of the relevant factors, including:

- a) the seriousness of the contravention in terms of the nature of the personal data concerned and the number of individuals actually or potentially affected;
- b) the type of individuals affected (e.g. children or vulnerable adults);
- c) whether the contravention was a “one-off” event, or part of a series of similar contraventions;
- d) the duration and extent of the contravention;
- e) whether the contravention was caused or exacerbated by activities or circumstances outside the direct control of the data controller concerned (but the data controller shall be held accountable for the actions of any data processor they have engaged);
- f) whether procedures or processes were in place to avoid the contravention;

- g) whether any steps were taken to avoid the contravention (e.g. staff training);
- h) whether any steps were taken once the data controller became aware of the contravention, both positive (e.g. voluntary reporting to the Ombudsman) or negative (concealment of the contravention);
- i) whether the data controller had been willing to offer compensation to the individuals affected;
- j) the degree of cooperation with the Ombudsman, in order to remedy the infringement and mitigate the possible adverse effects of the infringement;
- k) the sector and size of the data controller, and the financial and other resources available to it;
- l) whether the liability to pay the MPO will fall on individuals, and, if so, their status;
- m) the likely financial and reputational impact of the MPO on the data controller;
- n) proof of any genuine financial hardship caused by the MPO.

In considering the amount of an MPO the Ombudsman may take into account any additional factors which appear to be relevant to her in the particular circumstances of the case in question, and shall explain what these are.