Appeal number: EA/2019/0170

V[1]

FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(DATA PROTECTION)

TRUE VISION PRODUCTIONS LTD **Appellant**

- and -

THE INFORMATION COMMISSIONER **Respondent**

Before:

JUDGE Edward Jacobs

Sitting in public on 23 and 24 November 2020

Appearances:
Antony White QC and Aidan Eardley of counsel for the Appellant

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[1] *V: video whether partly (someone physically in a hearing centre) or fully (all remote)*

Christopher Knight for the Respondent

MODE OF HEARING

1. This decision was made by a Salaried Judge, sitting alone. The Tribunal was satisfied that it was appropriate to compose the panel in this way, having regard to paragraph 6 (a) of the Senior President's Pilot Practice Direction dated 19 March 2020[2] and the desirability of determining all cases which are capable of determination by the most expeditious means possible during the pandemic.

2. The Tribunal held the hearing in public, within the meaning of rule 35A (3)(c) of the Chamber's Procedure Rules.[3] I am grateful to counsel for their interesting and helpful arguments.

DECISION

The First-tier Tribunal substitutes for the Information Commissioner's monetary penalty notice of 8 April 2019 one in the same terms save that the amount of the penalty is fixed at £20,000 reduced to £18,000 if paid within one month of the date when this decision is issued to the parties.

REASONS FOR DECISION

History and background

1. True Vision Productions Ltd (TVP from now on) is a television production company. Brian Woods was one of the original directors and is still a director. He is also known as Brian Edwards, but I will refer to him as Mr Woods. By his own evidence, he was responsible for the relevant decision-making in this case, so his decisions and actions, and any failings, are those of TVP. He and the company have a track record of investigating and making sensitive films about social justice issues. The various awards that the programmes have attracted speak to their quality and to the reputation of him and TVP.

2. The Information Commissioner issued a monetary penalty notice to TVP on 8 April 2019. It imposed a penalty of £120,000, reduced to £96,000 if it was paid within a month, which it was not. The penalty related to recording, both video and audio, in most of the examination rooms of Clinic 23 at Addenbrooke's Hospital through CCTV cameras and microphones during the inclusive period from 24 July 2017 to 29 November 2017. This is an appeal against that decision brought to the First-tier Tribunal under section 55B(5) of the Data Protection Act 1998. I have the powers in

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[2] https://www.judiciary.uk/publications/pilot-practice-direction-panel-composition-in-the-first-tier-tribunal-and-the-upper-tribunal/

[3] http://www.legislation.gov.uk/uksi/2020/416/article/6/made

section 49(1) and (2) by virtue of Article 7 of Data Protection (Monetary Penalties) Order 2010. Those provisions, together with the other relevant legislation, are in the Appendix to this decision. The issue for me is the extent to which section 32 applies to protect TVP.

The making of *Child of Mine*

3. My findings are based on Mr Woods' two witness statements and his oral evidence at the hearing, unless otherwise stated. His representatives arranged for a full transcript to be taken of the proceedings and I am grateful to them for providing me with a copy.

4. The recording in Clinic 23 was undertaken in preparation for the making of a documentary called *Child of Mine*, which was commissioned and broadcast by Channel 4. I did not see the programme at that time, but I was given and watched a copy on DVD.

5. The programme was an observational documentary following the experience and aftermath of stillbirths. The idea was brought to Mr Woods in 2015 and he put a proposal to Channel 4 in 2016. It was made with the approval and support of the midwives and consultants. University College London Hospital was also involved in the project, but this case is only concerned with Clinic 23 at Addenbrooke's.

6. In Mr Woods' words, the aim of the programme was to convey the experience of losing a child 'from the moment they were given the terrible news that their baby had not survived, through their care and their cycle of grief, and that this would have the most impact in illuminating a difficult and taboo subject which remains something that few people understand or talk about.' Ideally, the programme would include three strands: (a) a high risk multiple pregnancy in which one child was experiencing growth restriction; (b) a mother who had experienced a stillbirth and was now pregnant again; and (c) a non-high risk pregnancy in which the mother noticed that her baby was not moving normally and was told that the baby's heart had stopped. This third strand was important because it contained the majority of stillbirths.

7. The principal, if not the sole, purpose of the recording was to capture the moment of diagnosis when the mother learned that her baby had died. Channel 4 and the clinical teams shared this view. It was not the only subject of the documentary, but it was a moment that would convey better and more powerfully than words or images the mother's spontaneous reaction to the news. A clinician had described this to Mr Woods as a 'guttural, primal groan'. Those words and the image they created on Mr Woods must have made a big impression on him, as he went to considerable lengths to capture it, and he mentioned it several times during his oral evidence. This was his editorial judgment.

8. The plan was to use CCTV cameras in the examination rooms, positioned to preserve the patient's dignity. There were hand-held cameras available on site, but TVP did not have the staff to make full use of them every time a patient attended the clinic. There was a division of responsibility, under which TVP dealt with filming and the clinicians dealt with medical matters. That may seem obvious, but it is worth making because the clinicians insisted that they would not be involved in handing out notices about the recording or otherwise informing the patients. Nor would they

operate equipment. In particular, they would not turn the equipment on and off, even if there was the facility to do so.

9. All bar one of the examination rooms in the clinic were fitted with cameras and microphones. The remaining room was, in practice, always available for any patient who noticed the recording and objected to its use. There was no facility to switch the recording on and off, even if the clinical staff had been willing to undertake that task. Once the recording was made, no one had access to it without the patient's consent. Any that were not accessed were automatically deleted after 72 hours.

10. There were three sorts of notice of filming in the hospital. There were notices about filming, which relates specifically to hand held cameras. There was a general letter, which was available in the clinic waiting room and elsewhere, but which was written before the final decisions were made about filming in the examination rooms. And there were notices next to the CCTV cameras in the examination rooms. The value and effect of these notices have to be assessed in the light of the mental state of the mothers and anyone who accompanied them to the clinic. Their mental state is also relevant to the possibility of obtaining consent to the filming in advance.

11. I had no direct evidence from individuals, but it is not difficult to understand how the mothers and their companions would be feeling. My findings are based on the probabilities. The clinic was a walk-in clinic for pregnant women who had concerns about their babies. The nature and extent of their concerns would vary. At one extreme, some would have no experience of losing a baby in the womb and had not considered that this might be happening, but they had noticed something unusual and would be seeking reassurance. At the opposite extreme, others would have had previous experience of losing a baby and be terrified that it was happening again. Between those extremes would be every variation in knowledge and experience, and in the level of their concerns. But for all of them, the thought that would be uppermost in their minds would be the safety of their unborn child, a thought that had brought them to the hospital, often in the evening (I was told) when the mothers would be resting and more likely to notice a change in the baby's movements. For those who were not familiar with the hospital, there would in addition be the distraction of finding their way to the clinic by following the trail of signs along a maze of corridors. It is unlikely that they would want to take the time to read notices, even if they registered their presence. These findings are inevitably general, and are intended to be so. There would be exceptions. We know, for example, that one mother asked to use the room without the recording equipment.

12. Anyone in this state would pay little attention to CCTV cameras. They are so ubiquitous nowadays that they are part of the background. The notices were obvious, but I find that mothers would mostly likely associate the cameras with safety and security. They would have little interest in reading the letters and notices, especially when they had finally been shown into a consulting room to see a midwife or doctor. And anyone who did read all the notices would probably have been more confused than enlightened. It would take more mental energy than most possessed to unravel the relationship between three different documents written at different times for different purposes. And staff and mothers alike would be unlikely to subject the documents to the kind of detailed linguistic construction undertaken at the hearing that would be more appropriate to a contract, deed or statute. For all those factors, the

notices, individually and collectively, were insufficient to allow me to find that the mothers were sufficiently alerted to what was happening such that they could be taken as consenting. The notices in the examination rooms were the most informative, but my finding is that the mothers were unlikely to pay them much attention, even when waiting for a midwife or doctor.

13. I need to make findings about Mr Woods' approach to data protection. He was concerned throughout with the mother's privacy in a general sense and with their welfare. He and the company had a reputation for making highly regarded programmes about difficult subjects and doing so sensitively. So it was only natural that he accepted the clinicians' advice that alerting a mother to the possibility that her baby might have died was detrimental to her welfare. As to data protection specifically, he knew it existed, but I find that it did not influence his thinking before or during the period covered by the Information Commissioner's notice. He was concerned about the mothers, their privacy and their welfare. But he did not understand that the making of the recording, its retention and finally its erasure were all acts of processing data that had to comply with the Data Protection Act 1998. That understanding only came later. Since he did not think in terms of data protection, he did not arrange any assessment of the data protection implications for what he was doing or take any steps to obtain advice about what the law required. On the positive side, though, he was aware of and concerned to maintain the privacy of the patients, which is a core principle in data protection. He was concerned to make, and did make, a sensitive quality programme that took account of the mother's interests and did not involve anything that would be detrimental to the mothers or their babies or unethical in terms of his profession of journalism. He relied, properly, on the clinical team to lay down the limits of what was permissible from a medical point of view and always accepted their advice. I am satisfied that he wanted to do all he could to behave ethically towards the mothers and believed that there nothing more that he could do to draw their attention to the filming in a way that was consistent with the clinical guidelines.

14. Finally, I need only mention that, when the recording was drawn to the attention of the media, the effect of the publicity brought it to an end. The midwives in the clinic immediately covered the cameras and the Hospital decided to withdraw consent. Thereafter, all recording was undertaken with hand held cameras. I have no evidence of why the decision to withdraw consent was made, and there is nothing to suggest that it was made by applying any provisions of data protection legislation. The most likely explanation is that it was, at least in part, taken to protect the Hospital's reputation from adverse publicity and to maintain the confidence of its patients. I so find. I do not consider that the Hospital's reaction and the method of recording used thereafter is relevant to application of the legislation, specifically section 32(1)(c).

15. Mr Woods speculated in his evidence about who might have told the media that filming was taking place and what their motives might have been. I do not need to make findings on those matters, because they are not relevant to anything I have to decide.

How section 32 applies

16. This is how section 32 applies. There is no need to cite authorities for propositions of law that are not in dispute in any way that would affect the outcome of my analysis.

17. What is the effect of section 32? In other words, from what provisions is personal data exempt if section 32 applies? The answer is that the data is exempt only from those provisions that are caught by section 32(1)(c). That is the effect of the word *that* in that provision. Any other reading would provide a sort of 'get out of jail free' card. That would be contrary to the language and make no rational sense. Why should data be exempt from a provision that could be complied with? On that basis, I come to how section 32 applies.

18. The contents of the recording was both personal data and sensitive personal data. That is now accepted, although it was not understood at the time.

19. The data was processed. This involved the recording in the first place, then its retention, and finally its erasure. It is irrelevant that it was not accessed without consent of the patient and was erased relatively promptly. Again, this is now accepted, although it was not understood at the time.

20. The material for publication was *Child of Mine*, which constituted journalistic material. The purpose of the recording, and its only purpose, was to obtain material for possible inclusion in programme. It is irrelevant that particular data was not in the event used or that it was known that much of it would not be used. It is sufficient that it was processed with a view to the publication, which it was. Looking ahead to section 32(1)(c), the reference to compatibility with special purposes must refer in any particular case to the data that is obtained with a view to the publication of the journalistic material.

21. It is no part of the function of the Information Commissioner or of this tribunal to substitute their view of what programme should have been made, what evidence should have been gathered for it, or the methods used to obtain it. Nor is it part of their function to act as an arbiter of good taste, either in the content of the programme or the method of investigation, or as a censor. I therefore proceed on the basis that section 32 applies to data collected to capture the moment of diagnosis and any vocalisation that went with it. This, of course, is subject to the public interest test in section 32(1)(b), to which I now come.

22. Mr Woods actually believed that broadcasting *Child of Mine* was in the public interest. He did not form that belief by reference to or in the context of the Data Protection Act 1998, but that is not required under section 32. It is self-evident, and not in dispute, that that belief was reasonably held.

23. Did Mr Woods form a subjective belief under this provision? He did not have the data protection legislation in mind at the time, but I accept Mr Knight's argument that that was not essential. This was his argument:

> I do accept that the test must be one of substance rather than of form. So it is not necessarily the case that the controller has to show that the subjective belief has been formed in a way which specifically refers necessarily to section 32 or its

particular terminology or in any particular document, so long as it can show that it has considered the substance of the question.

I do not, though, accept his argument that Mr Woods did not form a subjective belief for the purposes of section 32(1)(c). He did consider 'the substance of the question'. He always had in mind the issue of privacy, which is central to data protection law under Directive 95/46/EC, as stated in Preamble (2). So he was thinking in terms of privacy as a concept. On a practical level, he was concerned to ensure that: (a) no recording was actually viewed without consent; (b) mothers should be made aware of the filming and that their consent was needed for its ultimate use; and (c) that a room should be available without cameras; but (d) without putting the mothers' health at risk or interfering with the clinical judgment of what was in their best interests. Those are all important factors that would have been relevant if he had directed his mind specifically to the data protection legislation. The result was a belief that it was impossible to comply with the data protection principles without referring to, or hinting at, the real purpose of the recording. Having addressed his mind to the correct issues, Mr Woods did in substance form a belief for the purposes of section 32(1)(c).

24. Was that belief reasonable? This obviously raises the issue of what criteria are to be used in deciding reasonableness? I heard detailed legal analysis about this issue. I have decided that it is not necessary to resolve the differences between the parties, because there can only be one answer to this question, whatever the criteria that have to be applied.

25. The answer is that it was a reasonable belief so far as obtaining 'explicit consent' under Schedule 3 is concerned, because the clinicians would not allow it. If the recording was going to be made, it was impossible to provide a mother with the necessary information for her to give it without alerting her to the possibility of a stillbirth. The same is true for consent under Schedule 2, paragraph 1. There is no mention of the consent being 'explicit', so something more general is acceptable, but for practical purposes there was an insuperable problem. The more general the information provided, the less informative it was for a mother. And the more specific the information, the more misleading it became by omitting the important factor of the primary purpose of the recording. My judgment is that it was not possible for mothers to be provided with information that would allow them to give the consent necessary to satisfy Schedule 2. To that extent, the belief was reasonable.

26. But there is more. There is also the requirement that data be processed fairly, specifically by reference to the method by which they are obtained. I do not accept every point that Mr Knight made about this, but I do accept the general point that the data could have been collected by using hand held cameras. That is what happened when the filming was stopped after publicity, but I am not going to rely on hindsight to show that it could result in a high quality and effective programme. I put that to one side, but nevertheless decide that it was not reasonable to believe that collecting the data required could only be achieved in a way that was incompatible with the principle of fairness. I say that after (a) taking care not to override editorial judgment about the data that should be sought for the programme and (b) considering whether there was any possibility of different but reasonable views. I now explain why.

27. Given the state of mind of the mothers coming to the clinic, it was unlikely in the general run of cases that they would realise, either from the presence of cameras or from the various notices, that the cameras were present for anything other than the safety and security of staff and patients. Although it was not possible to obtain effective consent, let alone explicit consent, the use of hand held cameras would at least have made every mother aware that they were being filmed and their voices recorded. This would be more demanding of staff time and so more expensive, but it would have prevented the collection and retention of data without a mother being aware that it was taking place. As Mr Knight suggested, TVP could have hired more staff to film. Modern cameras are easy to operate, meaning that experience and therefore expensive staff would not be required. It would also have been possible to target the times when mothers were most likely to attend – the evenings, I was told. And, of course, the period during which filming took place could have been extended by agreement.

28. Being as fair as I can to Mr Woods and TVP, and leaving them full range to define the subject and contents of the programme and the need to collect the necessary data for it, the use of hand held cameras was a modest, practical and reasonable alternative method that would at least have prevented recording taking place without the mothers being aware of it. To that extent, the manner in which filming took place was not compatible with the principle of fairness. It is a mistake to concentrate on the data that would be used in *Child of Mine* without also taking into account the comparatively much larger amount of the data – the overwhelming majority it – that would never be used. This was where Mr Woods' thinking went wrong, because he did not realise that he was processing data that would not be used. He saw that data as incidental. He was right that it was incidental to his project, but it was not incidental to the Data Protection Act.

The penalty

29. That leaves the questions whether to issue a monetary penalty notice and, if so, in what amount.

30. I have decided to replace the Commissioner's notice with one substituting a lower amount.

31. Issuing a notice is appropriate, because this was a significant breach of data protection law in that (a) it demonstrates a failure by Mr Woods and TVP to appreciate that what they were doing was governed by legislation and (b) it involved intimate data about women that were collected and retained when they were distracted and in a vulnerable state.

32. Coming to the amount of the penalty, Mr Knight did not support the amount imposed by the Commissioner. He invited me to fix a different amount in the light of (a) TVP's financial position as shown in its latest accounts and (b) the effects of the pandemic. Given the current circumstances, he could offer no comparators, but suggested a range of £10,000 to £40,000. Balancing the nature of the breach and the mitigating factors, I have fixed the penalty at £20,000, reduced to £18,000 if paid within one month.

33. In fixing the amount, I have had particular regard to the following. They are in no particular order.

- Mr Woods never realised that data protection legislation applied to what he was doing. That is a mitigating factor in that the breach was not deliberate. It is also a point against him, because this lack of understanding is surprising. He was been making programmes throughout the time that the 1998 Act was in force. It was no longer something new or unfamiliar and should have formed part of his thinking.
- Mr Woods acted at all times in what he believed to be the best interests of the mothers. The data was not accessed without consent and was destroyed automatically with 3 days of recording. He took steps, albeit ones that I have found were ineffective, to alert the mothers to the filming that was being undertaken. All that is to his credit. But – and it is a big BUT – this was a serious breach. The fact that the mothers were unaware of what had happened and that no harm came to anyone are matters that go to penalty, not to breach.
- Imposing the penalty and its amount may have a salutary effect in the industry to raise awareness of the full scope of data protection law.
- The original argument for TVP was that the penalty would have had a significant impact on its viability. That argument may have focused too much on the effect on Mr Woods. The penalty was imposed on the company. Mr Woods had so arranged matters that he was paid largely through dividends rather than salary. That is a common arrangement with advantages, but there are also drawbacks, one of which is that dividends can only be paid from profits, which would be reduced by the amount of the penalty. Nevertheless, the sort of breach involved in this case does not justify putting a company out of business.
- It is appropriate to take account of the most up-to-date information about a company, since accounts often reflect the position some time in the past. There may be exceptions, but generally speaking the impact of a penalty should be judged on the company's current financial position. I have seen the most recent accounts available, but it is not necessary to set out their contents.
- The penalty is intended to have an impact, both financially and on TVP's future conduct, not merely to mark disapproval of what has happened.

A final word – guidance for the Information Commissioner

34. Mr Knight told me that 'this appeal is an unusual one, and of course the Commissioner will welcome any guidance that the Tribunal gives as to the approach to section 32 in your decision.' She will, I fear, be disappointed. I have said repeatedly in the Upper Tribunal that decisions of the First-tier Tribunal do not bind that tribunal or the Commissioner; the decisions are binding only on the parties to a particular case. I am not going to commit the error of disregarding my own decisions. That is why I have concentrated on making findings of fact and explaining how I have applied the law to them, dealing only with issues of law in so far as I need to do so, and then avoiding elaborate legal analysis.

Authorised for issue

Judge of the Upper Tribunal sitting in the First-tier Tribunal

Date: 8 January 2021

Date Promulgated 12 January 2021

APPENDIX

DIRECTIVE 95/46/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 24 October 1995

on the protection of individuals with regard to the processing of personal data and on the free movement of such data

…

(2) Whereas data-processing systems are designed to serve man; whereas they must, whatever the nationality or residence of natural persons, respect their fundamental rights and freedoms, notably the right to privacy, and contribute to economic and social progress, trade expansion and the well-being of individuals;

…

(17) Whereas, as far as the processing of sound and image data carried out for purposes of journalism or the purposes of literary or artistic expression is concerned, in particular in the audiovisual field, the principles of the Directive are to apply in a restricted manner according to the provisions laid down in Article 9;

…

(37) Whereas the processing of personal data for purposes of journalism or for purposes of literary of artistic expression, in particular in the audiovisual field, should qualify for exemption from the requirements of certain provisions of this Directive in so far as this is necessary to reconcile the fundamental rights of individuals with freedom of information and notably the right to receive and impart information, as guaranteed in particular in Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; whereas Member States should therefore lay down exemptions and derogations necessary for the purpose of balance between fundamental rights as regards general measures on the legitimacy of data processing, measures on the transfer of data to third countries and the power of the supervisory authority; whereas this should not, however, lead Member States to lay down exemptions from the measures to ensure security of processing; whereas at least the supervisory authority responsible for this sector should also be provided with certain ex-post powers, e.g. to publish a regular report or to refer matters to the judicial authorities;

…

Article 9

Processing of personal data and freedom of expression

Member States shall provide for exemptions or derogations from the provisions of this Chapter, Chapter IV and Chapter VI for the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression only if

they are necessary to reconcile the right to privacy with the rules governing freedom of expression.

Data Protection Act 1998

2 Sensitive personal data

In this Act 'sensitive personal data' means personal data consisting of information as to—

…

(e) his physical or mental health or condition, …

3 The special purposes

In this Act 'the special purposes' means any one or more of the following—

(a) the purposes of journalism,

(b) artistic purposes, and

(c) literary purposes.

4 The data protection principles

(1) References in this Act to the data protection principles are to the principles set out in Part I of Schedule 1.

(2) Those principles are to be interpreted in accordance with Part II of Schedule 1.

(3) Schedule 2 (which applies to all personal data) and Schedule 3 (which applies only to sensitive personal data) set out conditions applying for the purposes of the first principle; and Schedule 4 sets out cases in which the eighth principle does not apply.

(4) Subject to section 27(1), 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.

32 Journalism, literature and art

(1) Personal data which are processed only for the special purposes are exempt from any provision to which this subsection relates if—

(a) the processing is undertaken with a view to the publication by any person of any journalistic, literary or artistic material,

(b) the data controller reasonably believes that, having regard in particular to the special importance of the public interest in freedom of expression, publication would be in the public interest, and

(c) the data controller reasonably believes that, in all the circumstances, compliance with that provision is incompatible with the special purposes.

(2) Subsection (1) relates to the provisions of—

(a) the data protection principles except the seventh data protection principle,

(b) section 7,

(c) section 10,

(d) section 12, and

(e) section 14(1) to (3).

(3) In considering for the purposes of subsection (1)(b) whether the belief of a data controller that publication would be in the public interest was or is a reasonable one, regard may be had to his compliance with any code of practice which—

(a) is relevant to the publication in question, and

(b) is designated by the Secretary of State by order for the purposes of this subsection.

(4) Where at any time ('the relevant time') in any proceedings against a data controller under section 7(9), 10(4), 12(8) or 14 or by virtue of section 13 the data controller claims, or it appears to the court, that any personal data to which the proceedings relate are being processed—

(a) only for the special purposes, and

(b) with a view to the publication by any person of any journalistic, literary or artistic material which, at the time twenty-four hours immediately before the relevant time, had not previously been published by the data controller,

the court shall stay the proceedings until either of the conditions in subsection (5) is met.

(5) Those conditions are—

(a) that a determination of the Commissioner under section 45 with respect to the data in question takes effect, or

(b) in a case where the proceedings were stayed on the making of a claim, that the claim is withdrawn.

(6) For the purposes of this Act 'publish', in relation to journalistic, literary or artistic material, means make available to the public or any section of the public.

49 Determination of appeals.

(1) If on an appeal under section 48(1) 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 shall allow the appeal or substitute such other notice or decision as could have been served or made by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

(2) On such an appeal, the Tribunal may review any determination of fact on which the notice in question was based.

…

55A Power of Commissioner to impose monetary penalty

(1) 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) 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.

(3A) The Commissioner may not be satisfied as mentioned in subsection (1) by virtue of any matter which comes to the Commissioner's attention as a result of anything done in pursuance of—

(a) an assessment notice;

(b) an assessment under section 51(7).

(4) A monetary penalty notice is a notice requiring the data controller to pay to the Commissioner a monetary penalty of an amount determined by the Commissioner and specified in the notice.

(5) The amount determined by the Commissioner must not exceed the prescribed amount.

(6) The monetary penalty must be paid to the Commissioner within the period specified in the notice.

(7) The notice must contain such information as may be prescribed.

(8) Any sum received by the Commissioner by virtue of this section must be paid into the Consolidated Fund.

(9) In this section—

‘data controller’ does not include the Crown Estate Commissioners, a relevant person or a person who is a data controller by virtue of section 63(3);

‘prescribed’ means prescribed by regulations made by the Secretary of State; and

‘relevant person’ means a person who is discharging functions in relation to the management of any property, rights or interests to which section 90B(5) of the Scotland Act 1998 applies.

55B Monetary penalty notices: procedural rights

(1) Before serving a monetary penalty notice, the Commissioner must serve the data controller with a notice of intent.

(2) A notice of intent is a notice that the Commissioner proposes to serve a monetary penalty notice.

(3) A notice of intent must—

(a) inform the data controller that he may make written representations in relation to the Commissioner's proposal within a period specified in the notice, and

(b) contain such other information as may be prescribed.

(4) The Commissioner may not serve a monetary penalty notice until the time within which the data controller may make representations has expired.

(5) A person on whom a monetary penalty notice is served may appeal to the Tribunal against—

(a) the issue of the monetary penalty notice;

(b) the amount of the penalty specified in the notice.

(6) In this section, ‘prescribed’ means prescribed by regulations made by the Secretary of State.

SCHEDULE 1

THE DATA PROTECTION PRINCIPLES

PART 1

THE 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.

…

PART II

INTERPRETATION OF THE PRINCIPLES IN PART I

The first principle

1(1) In determining for the purposes of the first principle whether personal data are processed fairly, regard is to be had to the method by which they are obtained, including in particular whether any person from whom they are obtained is deceived or misled as to the purpose or purposes for which they are to be processed.

(2) Subject to paragraph 2, for the purposes of the first principle data are to be treated as obtained fairly if they consist of information obtained from a person who—

(a) is authorised by or under any enactment to supply it, or

(b) is required to supply it by or under any enactment or by any convention or other instrument imposing an international obligation on the United Kingdom.

2(1) Subject to paragraph 3, for the purposes of the first principle personal data are not to be treated as processed fairly unless—

(a) in the case of data obtained from the data subject, the data controller ensures so far as practicable that the data subject has, is provided with, or has made readily available to him, the information specified in sub-paragraph (3), and

(b) in any other case, the data controller ensures so far as practicable that, before the relevant time or as soon as practicable after that time, the data subject has, is provided with, or has made readily available to him, the information specified in sub-paragraph (3).

(2) In sub-paragraph (1)(b) 'the relevant time' means—

(a) the time when the data controller first processes the data, or

(b) in a case where at that time disclosure to a third party within a reasonable period is envisaged—

(i) if the data are in fact disclosed to such a person within that period, the time when the data are first disclosed,

(ii) if within that period the data controller becomes, or ought to become, aware that the data are unlikely to be disclosed to such a person within that period, the time when the data controller does become, or ought to become, so aware, or

(iii) in any other case, the end of that period.

(3) The information referred to in sub-paragraph (1) is as follows, namely—

(a) the identity of the data controller,

(b) if he has nominated a representative for the purposes of this Act, the identity of that representative,

(c) the purpose or purposes for which the data are intended to be processed, and

(d) any further information which is necessary, having regard to the specific circumstances in which the data are or are to be processed, to enable processing in respect of the data subject to be fair.

3(1) Paragraph 2(1)(b) does not apply where either of the primary conditions in sub-paragraph (2), together with such further conditions as may be prescribed by the Secretary of State by order, are met.

(2) The primary conditions referred to in sub-paragraph (1) are—

(a) that the provision of that information would involve a disproportionate effort, or

(b) that the recording of the information to be contained in the data by, or the disclosure of the data by, the data controller is necessary for compliance with

any legal obligation to which the data controller is subject, other than an obligation imposed by contract.

4(1) Personal data which contain a general identifier falling within a description prescribed by the Secretary of State by order are not to be treated as processed fairly and lawfully unless they are processed in compliance with any conditions so prescribed in relation to general identifiers of that description.

(2) In sub-paragraph (1) 'a general identifier' means any identifier (such as, for example, a number or code used for identification purposes) which—

(a) relates to an individual, and

(b) forms part of a set of similar identifiers which is of general application.

SCHEDULE 2

CONDITIONS RELEVANT FOR PURPOSES OF THE FIRST PRINCIPLE: PROCESSING OF ANY PERSONAL DATA

1. The data subject has given his consent to the processing.

6(1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

(2) The Secretary of State may by order specify particular circumstances in which this condition is, or is not, to be taken to be satisfied.

SCHEDULE 3

CONDITIONS RELEVANT FOR PURPOSES OF THE FIRST PRINCIPLE: PROCESSING OF SENSITIVE PERSONAL DATA

1. The data subject has given his explicit consent to the processing of the personal data.

Data Protection (Monetary Penalties) Order 2010

(SI 2010/910)

7. Appeals

Section 49 and Schedule 6 have effect in relation to appeals under section 55B(5) and article 4(5) as they have effect in relation to appeals under section 48(1).