

Assessment Notices

The purpose of this guidance is to explain the various statutory provisions that relate to, the content of, the right of appeal against and the potential consequences of failing to comply with, an assessment notice.

It does not constitute legal guidance.

INTRODUCTION

The data protection legislation provides the Information Commissioner ('Commissioner') with the power to give an *'assessment notice'*.

The purpose of an assessment notice is to enable the Commissioner to investigate whether the controller or processor is compliant with data protection legislation. An assessment notice may be given at the Commissioner's discretion whether or not an investigation into compliance with the data protection legislation has commenced as a result of a complaint or a personal data breach has been reported.

In deciding to give an assessment notice, the Commissioner will consider whether an assessment is an appropriate and proportionate course of action. Matters the Commissioner may consider include but are not limited to the following:-

- the probability that personal data is not being processed in compliance with the data protection legislation,
- other information about the controller or processor that suggest personal data is not being processed in compliance with the data protection legislation, and
- the risk of damage or distress to individuals.

An assessment notice may also be given where:-

- where a controller or processor has failed to respond to an information notice within the required time, or
- to verify compliance with an enforcement notice.

This guidance seeks to explain the various statutory provisions that relate to, the content of, the right of appeal against and the potential consequences of failing to comply with, an assessment notice. It does not constitute legal guidance.

STATUTORY PROVISIONS

Applied GDPR and Applied LED

The relevant powers of the Commissioner under the Applied GDPR and the Applied LED that may lead to the Commissioner giving an assessment notice are set out in Annex 1.

GDPR and LED Implementing Regulations 2018

The power for the Commissioner to give an assessment notice is provided for by Regulation 104 of the Regulations. How a notice must be given is set out in Regulation 100.

Regulation 105 provides restrictions as to when an assessment notice may not be given.

The above mentioned Regulations are set out in Annex 2.

CONTENT OF AN ASSESSMENT NOTICE

The notice will be addressed to the proper officer, for example the secretary or directors, of the body at its principal office. However, where a controller or processor has advised the Commissioner of a designated Data Protection Officer (DPO), a copy of the assessment notice will also be sent to the DPO.

If an assessment notice is given to a processor, a copy of the notice will also be given to each controller for whom the processor processes personal data.

An assessment notice may require the controller or processor to:-

- permit access to specified documents and equipment;
- direct the Commissioner to specified equipment and material;
- assist the Commissioner to view information using equipment on the premises;
- permit the Commissioner to inspect or examine, the documents, information, equipment or material;
- permit the Commissioner to observe the processing of personal data on the premises
- make available for interview persons, willing to be interviewed, who process personal data on behalf of the controller.

The assessment notice will also explain the right of appeal.

The timescale for compliance will reflect the significance and/or urgency of the issue. In deciding whether or not to issue an 'urgent' assessment notice, and in deciding the period for compliance with such a notice, the Commissioner will consider whether urgent action is appropriate and proportionate in the circumstances.

RIGHT OF APPEAL

Regulation 120 provides a right of appeal against an assessment notice.

In general terms an appeal must be made within 28 days of the date of issue of the assessment notice.

The provisions relating to the right of appeal, including how to make an appeal, are set out in Annex 3.

FAILURE TO COMPLY WITH AN ASSESSMENT NOTICE

If a person fails to comply with an assessment notice, the Commissioner can take further action. The Commissioner can certify the failure to the High Court and may also give a penalty notice.

Penalty Notice

Under Regulation 112(1)(c) (see Annex 4), where a person has failed to comply with an assessment notice, the Commissioner may, by written notice ('penalty notice'), require the person to pay a penalty up to the maximum amount of £1 million. (See Regulation 114 in Annex 4)

A penalty notice cannot be given in respect of a failure to comply with an assessment notice given to a competent authority under the Applied LED.

High Court

Regulation 117, set out in Annex 4, provides that where a person fails to comply with an assessment notice, the Commissioner can certify that failure to the High Court.

The High Court must inquire into the matter and may deal with the controller or processor as if it had committed a contempt of court.

ANNEX 1

APPLIED GDPR AND APPLIED LED ORDERS

Commissioner's Tasks

Article 57 of the Applied GDPR sets out the Commissioner's tasks including:-

Art 57(1)(a): "monitor and enforce the application of this Regulation"

Art 57(1)(f): "handle complaints ..., and investigate, to the extent appropriate, the subject matter of the complaint..." and

Art 57(1)(h): "conduct investigations on the application of this Regulation..."

While Article 46 of the Applied LED sets out the Commissioner's tasks including:-

Art 46(1)(a): "monitor and enforce the application of the provisions adopted pursuant to this Directive and its implementing measures;"

Art 46(1)(f): "deal with complaints lodged ... and investigate, to the extent appropriate, the subject-matter of the complaint..."

Art46(1)(i) "conduct investigations on the application of this Directive..."

Commissioner's Powers

Article 58 of the Applied GDPR sets out the Commissioner's powers including:-

Art 58(1): "Each supervisory authority shall have all of the following investigative powers:

(a)to order the controller and the processor, and, where applicable, the controller's or the processor's representative to provide any information it requires for the performance of its tasks;

(b) to carry out investigations in the form of data protection audits;

(c)to carry out a review on certifications issued pursuant to Article 42(7);

(d)to notify the controller or the processor of an alleged infringement of this Regulation;

(e)to obtain, from the controller and the processor, access to all personal data and to all information necessary for the performance of its tasks;

(f)to obtain access to any premises of the controller and the processor, including to any data processing equipment and means, in accordance

with Union procedural law (as applied to the Island by or under the authority of an Act of Tynwald) or Manx Member State procedural law.:

While Article 47 of Applied LED sets out the Commissioner's powers including:-

Each Member State shall provide by law for each supervisory authority to have effective investigative powers. Those powers shall include at least the power to obtain from the controller and the processor access to all personal data that are being processed and to all information necessary for the performance of its tasks.

ANNEX 2
GDPR AND LED IMPLEMENTING REGULATIONS 2018
REGULATIONS 100, 104 & 105

100: Notice from the Information Commissioner

- (1) This regulation applies in relation to a notice authorised or required by these Regulations to be given to a person by the Information Commissioner.*
- (2) The notice may be given to a natural person —*
 - (a) by delivering it to the natural person;*
 - (b) by sending it to the natural person by post addressed to the natural person at his or her usual or last-known place of residence or business; or*
 - (c) by leaving it for the natural person at that place.*
- (3) The notice may be given to a body corporate or unincorporate—*
 - (a) by sending it by post to the proper officer of the body at its principal office; or*
 - (b) by addressing it to the proper officer of the body and leaving it at that office.*
- (4) The notice may be given to the person by other means, including by electronic means, with the person's consent.*
- (5) In this regulation—*
 - (a) "principal office", in relation to a registered company, means its registered office;*
 - (b) "proper officer", in relation to any body, means the secretary or other executive officer, including but not limited to the registered agent, board of directors, or equivalent governing body, as may be charged with the conduct of its general;*
 - (c) "registered company" means a company registered under the enactments relating to companies for the time being in force in the Island.*
- (6) For the purposes of this regulation, so far as it relates to the addresses of controllers —*
 - (a) the address of a registered company is that of its registered office; and*
 - (b) the address of a person (other than a registered company) carrying on a business is that of the person's principal place of business on the Island.*
- (7) This regulation is without prejudice to any other lawful method of giving a notice.*

104: Assessment notices

(1) The Information Commissioner may by written notice (an "assessment notice") require a controller or processor to permit the Information Commissioner to carry out an assessment of whether the controller or processor has complied or is complying with the data protection legislation.

(2) An assessment notice may require the controller or processor to do any of the following —

(a) to enter any premises or vehicle (both of which terms have in the regulation the same meanings as are ascribed to them in section 81(1) of the Police Powers and Procedures Act 1998) occupied or controlled by the controller or processor (excluding any dwelling house in respect of which either the Information Commissioner must have the consent of the occupier of the dwelling house or otherwise obtain a warrant in accordance with Schedule 4);

(b) to obtain access to any data processing equipment and means on the premises;

(c) to obtain access to all information, documents or material, necessary for the performance of his tasks;

(d) to observe the processing of personal data that takes place on the premises;

(e) to access all personal data on the premises necessary for the performance of his tasks under this Regulation;

(f) to interview any person who processes personal data for or on behalf of the controller or processor, provided that any interviewee must be provided with —

(i) notice of not less than 72 hours of the date and time of the prospective interview;

(ii) notice of the right to obtain legal advice or other professional advice prior to the prospective interview;

(iii) a reasonable period of not less than 72 hours for the purpose of obtaining such professional advice prior to the date and time of the interview set out in the notice;

(g) to be provided with a copy (in such form as may be requested) of any information, documents or materials accessed under regulation 104(2)(c) or personal data on the premises accessed under regulation 104(2)(e).

(See Schedule 4, paragraph 2 for action that the Information Commissioner can take if the controller or processor fails to comply with an assessment notice.)

(3) An assessment notice must provide information about the rights of appeal under regulation 120.

(4) An assessment notice may not require a person to do anything before the end of the period within which an appeal may be brought against the notice.

(5) If an appeal is brought against an assessment notice, the controller or processor need not comply with a requirement in the notice pending the determination of withdrawal of the appeal.

(6) If an assessment notice —

(a) states that, in the Information Commissioner's opinion, it is necessary for the controller or processor to comply with a requirement in the notice urgently; and

(b) gives the Information Commissioner's reasons for reaching that opinion, paragraphs (5) and (6) do not apply; but the notice must not require the controller or processor to comply with the requirement before the end of the period of 7 days beginning with the day on which the notice is given.

(7) The Information Commissioner may cancel an assessment notice by written notice to the controller or processor to whom it was given.

(8) Where the Information Commissioner gives an assessment notice to a processor, the Information Commissioner must, so far as reasonably practicable, give a copy of the notice to each controller for whom the processor processes personal data.

(9) The provisions of this regulation and of regulation 105 do not in any way limit the Information Commissioner's ability to exercise any powers conferred on him or her by Article 58 of the applied GDPR that are not specifically referred to in any of those regulations. Accordingly, the Information Commissioner may exercise any of those powers that may reasonably be exercised independently of serving an assessment notice

105: Assessment notices: restrictions

(1) An assessment notice does not have effect so far as compliance would result in the disclosure of a communication which is made —

(a) between a professional legal adviser and the adviser's client; and

(b) in connection with the giving of legal advice to the client with respect to obligations, liabilities or rights under the data protection legislation.

(2) An assessment notice does not have effect so far as compliance would result in the disclosure of a communication which is made —

(a) between a professional legal adviser and the adviser's client or between such an adviser or client and another person;

(b) in connection with or in contemplation of proceedings under or arising out of the data protection legislation; and

(c) for the purposes of such proceedings.

(3) In paragraphs (1) and (2) —

(a) references to the client of a professional legal adviser include references to a person acting on behalf of such a client; and

(b) references to a communication include —

(i) a copy or other record of the communication; and

(ii) anything enclosed with or referred to in the communication if made as described in paragraph (1)(b) or in paragraph (2)(b) and (c).

(4) The Information Commissioner may not give a controller or processor an assessment notice with respect to the processing of personal data for the special purposes.

ANNEX 3

RIGHT OF APPEAL, TRIBUNAL PROCEDURES AND RULES

APPEAL

120: Right of appeal

- (1) *A person who is given any of the following notices may appeal to the Tribunal—*
...
(b) an assessment notice; or
...
(7) *Schedule 8 contains additional provisions relevant to appeals.*

121: Determination of appeals

- (1) *Paragraphs (2) to (4) apply where a person appeals to the Tribunal under regulation 120(1) or (4).*
- (2) *The Tribunal may review any determination of fact on which the notice or decision against which the appeal is brought was based.*
- (3) *If the Tribunal considers—*
(a) that the notice or decision against which the appeal is brought is not in accordance with the law; or
(b) to the extent that the notice or decision involved an exercise of discretion by the Information Commissioner, that the Information Commissioner ought to have exercised the discretion differently,
the Tribunal must allow the appeal or substitute another notice or decision which the Information Commissioner could have given or made.
- (4) *Otherwise, the Tribunal must dismiss the appeal.*
- (5) *On an appeal under regulation 120(2), the Tribunal may direct—*
(a) that the notice against which the appeal is brought is to have effect as if it did not contain the statement under regulation 101(7)(a), 104(8)(a) or 107(8)(a) (urgency); or
(b) that the inclusion of that statement is not to have effect in relation to any part of the notice,
and may make such modifications to the notice as are required to give effect to the direction.
- (6) *On an appeal under regulation 120(3), if the Tribunal considers that the enforcement notice ought to be cancelled or varied by reason of a change in circumstances, the Tribunal must cancel or vary the notice.*
- (7) *On an appeal under regulation 120(5), the Tribunal may cancel the Information Commissioner's determination.*

PROCEDURE

146: Tribunal Procedure Rules

(1) Tribunal Procedure Rules may make provision for regulating, —

(a) the exercise of the rights of appeal conferred by regulation 120; ...

(b) ...

including their exercise by a representative body.

(2) In relation to proceedings involving the exercise of those rights, Tribunal Procedure Rules may make provision about, —

*(a) securing the production of material used for the processing of personal data;
and*

(b) the inspection, examination, operation and testing of equipment or material used in connection with the processing of personal data.

(3) Paragraph 5 of Schedule 8 makes additional provisions in respect of Tribunal Procedure Rules.

147: Disclosure of information to Tribunal

No enactment or rule of law prohibiting or restricting the disclosure of information precludes a person from providing the Tribunal with information necessary for the discharge of the Tribunal's functions under data protection legislation.

ISLE OF MAN DATA PROTECTION TRIBUNAL RULES 2003

Tribunal Rule 52 – Time limit for appealing

Rule 52 sets out the time limit for appeal. In general, the time limit is **28 days** from the Issue Date of the assessment notice.

Tribunal Rule 51(1) - Method of appeal

You may bring an appeal by serving notice of appeal in writing to:

The Clerk to the Appeals Tribunal
General Registry
Isle of Man Courts of Justice
Deemsters' Walk
Douglas, Isle of Man
IM1 3AR

Tribunal Rule 51(2) – Completing a notice of appeal

"The notice of appeal shall -

- (a) identify the disputed decision and the date on which the notice relating to such decision was served on or given to the appellant; and*
- (b) state -*
 - (i) the name and address of the appellant;*
 - (ii) the grounds of the appeal;*
 - (iii) whether the appellant considers that he is likely to wish a hearing to be held or not;*
 - (iv) where applicable, the special circumstances which the appellant considers justify the Tribunal's accepting jurisdiction under rule 52(2); and*
 - (v) an address in the Island or the United Kingdom for service of notices and other documents on the appellant."*

Tribunal Rule 51(4) – request for early hearing

"A notice of appeal may include a request for an early hearing of the appeal and the reasons for that request."

A copy of the Isle of Man Data Protection Tribunal Rules 2003 can be found at:-
<http://www.tynwald.org.im/links/tls/SD/2003/2003-SD-0027.pdf>

ANNEX 4
GDPR AND LED IMPLEMENTING REGULATIONS 2018

PENALTIES

112: Penalty notices

- (1) *If the Information Commissioner is satisfied that a person —*
...
(c) has failed to comply with an assessment notice given, pursuant to regulation 77, in exercise of the Information Commissioner's powers under Article 58(1) of the applied GDPR;
...
the Information Commissioner may, by written notice (a "penalty notice"), require the person to pay to the Information Commissioner an amount specified in the notice.

114: Maximum amount of penalty

- (1) *In relation to an infringement of a provision of the applied GDPR, the maximum amount of the penalty that may be imposed by a penalty notice is £1,000,000.*

HIGH COURT

117: Failure to comply with notices

- (1) *The Information Commissioner may certify in writing to the High Court that a controller or processor has, or both have (as the case may be), failed to comply with —*
- (a) an information notice;*
 - (b) an assessment notice;*
 - (c) an enforcement notice; or*
 - (d) a penalty notice.*
- (2) *The Information Commissioner must not exercise the power under paragraph (1) before the expiry of the period of time specified in the relevant notice.*
- (3) *The High Court must inquire into the matter and, after hearing —*
- (a) any witness who may be produced against or on behalf of the controller or processor, as the case may be; and*
 - (b) any statement that may be offered in defence, may deal with the controller or processor, as the case may be, as if it had committed a contempt of court.*

- (4) *This regulation does not confer any right of action in civil proceedings in respect of a failure to comply with a duty imposed by or under these Regulations.*
- (5) *The High Court may for the purposes of securing compliance with data protection legislation make an order requiring the controller (or a processor acting on behalf of that controller), in respect of the processing, —*
 - (a) *to take steps specified in the order; or*
 - (b) *to refrain from taking steps specified in the Order.*