ICO issues new guidance on direct marketing by electronic mail

Hey, did you know the ICO has issued new guidance on direct marketing … click this button to 'tell a friend'! By **Claire Saunders** and **Jenai Nissim** of HelloDPO.

You only have to cast a glance down the list of enforcement actions issued by the UK Information Commissioner's Office (ICO) to understand how seriously they take unsolicited direct marketing. The fines are high, and understandably so, given the distress and nuisance which can be caused to a significant number of people. Considering this, the ICO's new guidance on direct marketing released over the latter part of 2022, culminating in the introduction of a new marketing guidance hub in December 2022 will undoubtedly be welcomed by organisations engaging in all forms of direct marketing activities.

Amongst the new suite of guidance is the ICO's guide to direct marketing by electronic mail which was released in October 2022, and deals, for the most part, with the rules set out in the Privacy and Electronic Communications Regulations 2003 (the PECR).

The new guidance is much more detailed than that contained in the Guide to PECR, indeed the ICO recommends reading the section in the Guide to PECR as an introduction to the subject matter, before approaching the new guidance. There is a good deal of familiar ground covered, bringing together general guidance along with issues dealt with in other ICO guides which are relevant to electronic mail marketing.

The new guidance follows the general move by the ICO to issue practical advice for organisations, with examples and step-by-step guides bringing colour to the text. It deploys the use of "must" "should" and "could" to help readers understand where instructions are mandatory, good practice (you should unless you have a good reason not to) or an option they may want to consider to help them comply.

The tone of the guidance is clear – the ICO is not trying to prevent marketing taking place and acknowledges that it can be a useful way to reach people and to grow an organisation. However any marketing activities must be undertaken in compliance with data protection laws to ensure recipients' interests are protected.

With the ICO frequently issuing guidance for best practice throughout the commentary on its enforcement actions, has anything new really been added to the guidance? We think so …

A useful walk through consent and the soft opt-in

The new guidance restates the (fairly well understood) position under the PECR that you will need to have consent to send electronic mail marketing to an individual subscriber, unless you can comply with all elements of the soft opt-in exception.

As well as a run through of the elements of consent required (UK GDPR standard consent) the new guidance adds value by giving examples of obtaining consent verbally and stating that you must obtain consent for the method of communication you will be using (e.g. text, email etc.) as well as clarifying that obtaining consent marketing by telephone is not the same as having consent to receive marketing by SMS.

There are useful reminders, like the fact that consent is not transferrable and so just because an individual is happy for you to send marketing material to a particular email address, does not give you the right to use other email addresses for the same person.

After an initial introduction to the soft opt-in in the introductory pages, the guidance provides a step-by-step guide on how to use soft opt-in, breaking the concept down into its component parts with examples and points to note. This will be particularly helpful to those smaller organisations who do not have the luxury of obtaining legal advice or clarification when launching marketing campaigns and engaging with new prospects.

There is a clear reminder that only the entity, i.e. the controller, which directly collects the personal data (i.e. contact details) can benefit from the soft opt-in exemption and a further confirmation that charities, political organisations and other not-for-profit organisations cannot benefit from the soft opt-in exemption for the purposes of fundraising and campaigning. However, for example, charities can potentially use the soft opt-in exemption for running commercial enterprises such as a charity shop.

The new guidance also looks further into the meaning of "negotiation" relating to the sale of goods and services, advising that negotiation might include, for example, signing up to a free trial, but not a query from a potential customer which does not relate to buying products or services. This is welcome clarification for the lawyers in the room, and their clients who have hotly debated and reviewed this provision of the PECR with many clients whose services are "free" and require no payment to use them.

Finally, the new guidance also includes further clarification of examples of what might constitute "similar" goods and services to assist with deciding what can be marketed under the soft opt-in exemption.

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Social media and "tell a friend!"

It is clear that the ICO had the proliferation of marketing via social media in mind at times in the new guidance, with specific reference to direct messages on social media being a form of electronic mail and a clarification that advertising messages shown on news feeds do *not* constitute electronic mail as the messages are not stored, waiting for collection by the recipient. These types of marketing are, however, governed by other parts of the PECR.

The new guidance contains a section on viral marketing (so called "tell a friend" or "refer a friend" campaigns), which are frequently used on social media and through "ambassador" or "influencer" campaigns. The ICO makes it clear that, despite the seeming informality of these types of engagements and the fact the original party is not "sending the messages", the entity whose brand is being promoted or who is offering incentives is instigating the sending or forwarding of electronic mail marketing if they ask people to send direct marketing on to others. It does not matter if they only provide a reward/benefit to an individual to encourage them to send the messages, it is enough that they encourage them to do so.

The ICO further states that this method of marketing cannot be achieved compliantly by relying on soft opt-in and therefore consent must be sought from the individuals who are the recipient of the "refer a friend" communication. In reality, obtaining consent for this is unlikely to be possible and therefore organisations should take steps to avoid encouraging the sending on of promotions by electronic mail unless they are compliant.

The example provided to assist organisations in avoiding this pitfall, is to provide a code on a webpage which can be used by family and friends, but not giving any indication of how the individual should pass this code on to anyone else. In this way, the individual can decide if they want to follow up and how to do so. This is a fairly black and white example and undoubtedly there will be room for debate when considering different ways of communicating these types of promotions. It will be interesting to see if the ICO seeks to take action against organisations who routinely use marketing strategies such as "refer a friend" in contravention of this best practice once the new guidance has been released … watch this space!

Data for sale! – using publicly available contact details and bought-in marketing lists

The use of publicly available contact details and bought-in marketing lists are two data sources which have been the cause of controversy in relation to marketing by electronic mail. Thankfully, these are now directly addressed in the new guidance. We however remain sceptical of the extent to which organisations will heed this guidance given the competition for business growth and new prospects.

The ICO considers that "publicly available" refers to contact details sourced from "various places, including social media accounts, websites or other online or offline sources." The new guidance further confirms the established position that the soft opt-in exemption does not apply to contact details collected from publicly available sources and that it is unlikely that you can send unsolicited electronic mail marketing using these details. An exception perhaps is the situation where an individual's business contact details are on their employer's website.

As can be seen from ICO enforcement action and indeed action taken by other European Data Protection Supervisory Authorities, the realities of using "bought in" lists are stark, despite what the purveyors of such lists and services may claim. The people on these lists must have given consent to receive electronic mail marketing from the organisation using the bought in lists and they will need to ensure that this consent has been properly obtained, prior to using the personal data. This is not a new concept, however we welcome the codification of these best-practices in the new guidance.

Helpfully, the ICO sets out questions that an organisation intending to use a bought-in list should ask and we recommend that the responses to such questions are documented fully as part of a data protection impact assessment or as part of any pre-contractual and ongoing due diligence undertaken. The ICO recommends that you always ask:

1. What were people told?
2. What did they consent to?
3. Was your organisation named on the consent request?
4. When and how did they consent?
5. Did they have a choice to consent?
6. Is there a record of the consent?

Using publicly available contact details and bought-in marketing lists compliantly will continue to be an uphill struggle and sadly the new guidance does not rubber stamp the use of such sources despite this being a common way for organisations to enrich their prospects databases.

Whilst the new guidance on electronic mail marketing may not be ground-breaking in nature, it is a very useful tool for organisations undertaking this kind of marketing. It is clearly an attempt to make it as easy as possible for organisations to get it right, which will surely be very welcome especially in the current economic climate when the focus is now, more so than ever, to get individuals to engage with brands.

INFORMATION

See the ICO's Direct Marketing Guidance and practical tips at ico.org.uk/for-organisations/direct-marketing-guidance-and-resources/

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Identical BCR mechanisms sought in the UK and EU

A *PL&B* and Hogan Lovells Workshop identified differences between the current EU Binding Corporate Rules and the ICO's new UK approach. By **Laura Linkomies**.

The starting point for the Workshop was that the ICO issued a document on its new approach to Binding Corporate Rules (BCRs) on 25 July 2022[1], including simplifications for organisations. While the ICO regards BCRs as "the gold standard" and was a driving force to get this concept developed at European level for almost 20 years (*PL&B International* August/September 2004 p.13), it now

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Ghost in the machine: Guidance on using AI recruitment systems

Edward Machin of Ropes & Gray assesses how the Information Commissioner's guidance on artificial intelligence and data protection applies to organisations' recruitment practices.

In 2012, the American software engineer and entrepreneur Marc Andreessen predicted that the rise of the Internet would put jobs in two categories: people who tell computers what to do, and people who are told what to do by computers. With that prediction continuing to prove correct, I wonder whether there is a similar prognostication to be made on the ubiquity of artificial intelligence (AI). The recent ChatGPT[1]

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Spotlight on Artificial Intelligence

It was noticeable at our planning meeting this month how many of the speaking proposals we had received for *Who's Watching Me?*, our 36th Annual Conference 3-5 July (p.22), had aspects of AI in them. The technology certainly impacts our lives already in so many ways. The ICO is now saying that AI technology is no longer a new issue, and compliance with data protection law is required on all aspects (p.11).

On p.1 our correspondent assesses the ICO's guidance on using AI recruitment systems. Bias is one of the essential questions to consider. We await the government's White Paper on AI - it will be interesting to see how it suggests tackling this issue. A recent paper from the Oxford Internet Institute comes to the conclusion that the current discrimination laws fail to protect people from AI-generated unfair outcomes. The author, Professor Sandra Wachter, highlights that AI is creating new digital groups in society – algorithmic groups – whose members are at risk of being discriminated against.[1]

How skillful is AI-based ChatGPT? The law firm Linklaters took a closer look to see whether the technology can also tackle legal questions[2]. There was a broad range of results from the surprisingly good to the bad, they say. To the lawyers' relief, it cannot, at least for now, advise their clients to the level of detail they need.

Also looking into the future is the article on the DPO role and function on p.13. Those in the role already know that DPOs are increasingly required to have not just legal knowledge but also expertise in other areas.

Privacy Laws & Business held a very successful Workshop in December together with law firm Hogan Lovells on Binding Corporate Rules (p.1). The Workshop identified differences between the UK and the EU regimes, and made recommendations for achieving the ideal of harmonisation or mutual recognition. We have now sent a memo to the European Data Protection Board, the ICO, Ireland's Data Protection Commission and the UK government.

Laura Linkomies, Editor
PRIVACY LAWS & BUSINESS

1 *www.oii.ox.ac.uk/news-events/news/ai-creates-unintuitive-and-unconventional-groups-to-make-life-changing-decisions-yet-current-laws-do-not-protect-group-members-from-ai-generated-unfair-outcomes-says-new-paper*
2 *www.linklaters.com/en/insights/blogs/digilinks/2022/december/chatgpt—-50-questions-to-road-test-its-legal-advice*

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