

Mr K Burnett
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LONDON
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13 April 2017

Dear Mr Burnett,

Many thanks for your letter and your further correspondence about our draft consent guidance with Richard Marbrow.

Thank you also for responding to the draft consent guidance consultation. We have had a large response from various sectors, including many charity stakeholders, and we are considering these carefully. I shall send you a further note when the outcome of this consultation is clear.

The issue of consent is a difficult issue for many people undertaking direct marketing and is not restricted to charities.

Some of the opt-out consent currently relied upon by many in the charity sector would not be recognised by the ICO as consent under the Data Protection Act 1998 (DPA) or the Privacy and Electronic Communications Regulations 2003 (PECR). We describe opt-in as 'safer' in our draft guidance as it removes ambiguity around what constitutes a positive and action and increases the granularity of consent for specific processing purposes or marketing channels. It is a long settled ICO view that opt-in consent is best practice as opt-in will generally give consumers greater control. Opt-in means that the impact of inertia falls towards consent not being given rather than it being assumed.

Under the DPA the ICO has always accepted that forms of opt-out consent are permitted and that they will be valid as long as the consent is still freely given, specific and informed and the subject of a positive action.

There is another reason why opt-in is the safer route and this relates to the legislative changes under GDPR.



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Under the GDPR the standard of consent is raised and our draft guidance says:

You cannot rely on silence, inactivity, pre-ticked boxes, opt-out boxes, default settings or a blanket acceptance of your terms and conditions.

The GDPR does not specifically ban opt-out boxes but they are essentially the same as pre-ticked boxes, which are banned. Both methods bundle up consent with other matters by default, and then rely on inactivity. The usual reason for using opt-out boxes is to get more people to consent by taking advantage of inaction – but this is a clear warning sign of a problem with the quality of the consent. You should instead use specific opt-in boxes (or another active opt-in method) to obtain consent.

This means that a charity using the specific example you have outlined would find that their consents ceased to be valid on 25 May 2018. By not forewarning charities of this change it could cost them more money, lead to further changes to their systems and potentially lead to a reconsenting exercise that could cause confusion for donors.

Opt-in is therefore the 'clearest and safest form of consent' as outlined in your letter.

Our guidance interprets the law, it does not set it, and the draft guidance outlines our belief of what the law requires. Our draft guidance makes clear that we currently consider that the higher standard for consent has eliminated opt-out routes. Our guidance is also influenced by the need to be consistent with the other 27 EU Data Protection Authorities and we believe that the current draft will ensure a level playing field for all. It is draft guidance and your submission will be considered, along with others, to see whether we have got this right.

I have personally committed the ICO to ensuring that we continue to work with the charity sector to make this transition easier. Having taken enforcement action to change practices in the sector, we will not walk away from our education and engagement responsibilities. We will also continue to work with the Fundraising Regulator to consider whether this new standard of consent requires consideration of whether legitimate interests should and could be used for marketing channels not covered by PECR.



Thank you for your detailed and considered letter, I appreciate it when people engage as thoroughly with an issue we are working on as you so clearly have and I am only sorry I cannot agree with your premise on this occasion. I look forward to corresponding more on this issue in the future.

With best regards



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Information Commissioner

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