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Ms Elizabeth Denham
The Information Commissioner
Information Commissioner's Office
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24th April 2017

Dear Ms Denham,

A plea for balanced advice setting out a viable alternative to 'opt in only'.

Thank you for your response of 13th April to my letter of 13th March. I'm glad that you appreciate my engaging with you on this issue and I'm encouraged that you say you are committed to working with the charity sector to make this transition easier.

However, from your reply I fear I've failed to make myself understood. As this issue is so important for donors and charities I trust you won't mind if I try again. Please bear with me.

When I wrote, I wasn't questioning the ICO's guidance, given the relevant legislation's current focus on a legal definition of consent, that 'opt in is the clearest, safest route' to how consent is defined. That I accept is the case. I am also clear that consent has been and remains a requirement for some channels such as SMS and email. But there are other vital channels for charities, most importantly direct postal communication, where there are permissible alternatives.

I was making the point that, for these channels, there is an acceptable alternative route for charities wishing to keep in contact with their past donors - 'legitimate interest'. I merely wanted to ask the ICO and the Fundraising Regulator to reframe your advice so that both alternatives are clearly given equal weight and prominence. I see no problem with you as a regulator pointing out the shortcomings of one route - legitimate interest - provided you make equally clear the potentially damaging consequences of the other - consent/opt in. As more than one option is available to charities, the pros and cons of those options should be equally explicit and clear. Charities should be free to choose the right route for them and to have all the information they need to choose well.

My only interest is in avoiding the unintended consequences of a serious reduction of income and loss of donors for charities if they feel obliged to go down or are led down the 'opt-in' route as the only acceptable or preferred choice. There is already some anecdotal evidence that confirms our worry that this will happen because of the way the guidance has been framed. A small charity cited in the Fundraising Regulator's case studies lost 85 per cent of its contacts through their opt-in campaign.

Many, myself included, seem to find the information on this subject confusing. So, unless the available alternatives are equally explained, 'every-channel opt-in consent' will be seen by many as the much-preferred route, which will impose often unforeseen limitations on charities that are unnecessary and will be damaging for many.

To be clear, as I understand it

- For some channels (eg communicating by post) there are viable, acceptable alternatives to opt-in consent, for charities.
- 'Legitimate interest' is a valid basis for communicating with donors, under which charities can send them, by post, details of the work their donations have supported.
- Best practice consent based on opt in could have damaging consequences for donors and for the causes they have supported, in lost income and lost donors.
- Though opt out cannot be used as a route to consent, legitimate interest is valid, particularly if it can be a way of providing donors with choices that enable them to control what they do or don't wish to receive from causes they have supported.

I believe charities are seeking a positive way forward that will give donors practical control of what they receive yet will neither damage fundraising nor prevent charities from contacting past donors who are still prepared to hear from them. So, to dispel confusion, my request is for clarity. Assuming that for most charities the above conclusions are valid, will the approach described below be acceptable to the ICO, or not?

A possible solution, based on giving donor choices rather than on insisting upon consent, is an alternative to 'opt in' that I believe would work now and post GDPR, because it offers donors both the chance to opt in or to opt out, plus additional appropriate choices too.

- Of course donors should be encouraged to confirm their willingness to receive information from a charity they have supported in the past. Opting in is a wonderful sign of positive commitment to current and future support.
- Equally, donors should also be entitled to opt out of any future communication, entirely, if they wish. That too is a positive action so should be respected rigorously.
- But of course, not everyone will be at either extreme. Donors may not respond to either choice because it doesn't matter much to them, or because they don't get round to it, because they are distracted by other priorities, or because they're happy with how things are, or for some other reason.
 - Some might prefer to receive news of the charity's work in a format that suits them, but with no fundraising appeals.
 - Others might wish to hear less often, say once a year only.
- As with the 'opt-in' only route, those justifying contact under 'legitimate interest' might limit the number of times that they would contact past donors and also the frequency of contact to those who don't initially respond to, say, once each year.

The ability to offer these choices would, I believe, be excellent practice both for a charity and for donors. ICO's guidance says on page 2, *'Remember – you don't always need consent. If consent is too difficult, look at whether another lawful basis is more appropriate.'* I presume it would be acceptable for a charity to substitute 'damaging', or 'costly' for 'difficult'?

To summarise, I advocate a system where donors can regularly be given appropriate, practical choices in how they wish to be communicated with, so that they can control and adjust what they receive. I don't believe any charity should be unable to exercise its legitimate interest to contact a past donor who for any of a number of reasons has not yet exercised his or her choices. At least, not prematurely. Donors like these choices, for it gives them all the control they might wish for. It works for the charity too, building trust, loyalty and commitment from donors in it for the long term.

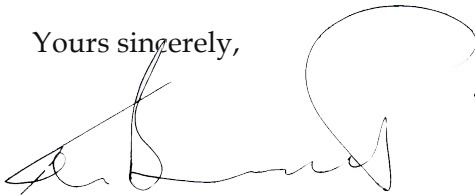
Given ICO's advice, my additional, connected question is, under 'legitimate interest', with no link to consent other than for those who opt in, will a programme of communication such as that described above be acceptable to the regulators?

It would be a tragedy and a travesty if this system were not to be permissible. From what I've read and been advised, I believe it should be, under legitimate interest, not consent.

I hope you will be able to confirm that my understanding is correct. And if so, I would like to ask once more if you might qualify the guidance that you have just been consulting on, to make it clear that a blanket 'opt-in only' policy across every channel could substantially reduce a charity's income, plus cause it to lose potentially active donors, and that there is at least one other valid, permissible alternative that might work better for many charities, their donors and their beneficiaries.

Thank you for your consideration and for working to make the coming changes fair and workable for all.

Yours sincerely,



Ken Burnett