

Don't you dare send that ad-spaff email without 'specific' consent

http://www.theregister.co.uk/2013/09/11/direct_marketing_via_email_to_consumers_requires_extremely_clear_and_specific_consent_says_ico/

ICO: You at the back of the class... No texting, either

By [OUT-LAW.COM](http://www.out-law.com)

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Organisations need to obtain "extremely clear and specific" consent from individuals in order to conduct direct marketing to them via email or through any other form of electronic marketing message, according to new guidelines.

The Information Commissioner's Office (ICO) said that rules set out in the UK's Privacy and Electronic Communications Regulations (PECR) place additional consent requirements for direct marketing via electronic messages compared with direct marketing via other means.

In new guidance on direct marketing (44-page/349KB [PDF](#)), the ICO said that organisations conducting direct marketing via email to consumers would not be able to rely on the consent legitimising that activity to then conduct direct marketing over the phone or via text message.

"The person must specifically consent to the type of communication in question," the ICO said in its guidance. "In other words, organisations cannot make an automated call unless the person has consented to receiving automated calls, cannot send a text unless they have consented to receive texts, and so on. Consent to receive phone calls cannot be extended to cover texts or emails, and vice versa. And a general statement of consent to receive marketing might be valid for mail marketing, but will not cover calls or texts."

Under PECR, businesses can conduct direct marketing via electronic marketing calls or messages to a consumer if the person receiving those communications "has previously notified the [caller or sender] that he consents for the time being to such communications being sent by, or at the instigation of, the [caller or sender]".

The ICO said that businesses cannot rely on consent provided to third parties unless the intended recipient of electronic direct marketing messages "intended for their consent to be passed on to the organisation doing the marketing".

In addition, the context in which consent is obtained will determine whether ongoing direct marketing via electronic messaging is legitimate, the watchdog said.

"Consent for a one-off message, or consent that is clearly only intended to cover a short period of time or a particular context, will not count as ongoing consent for all future marketing messages," it said. "We also consider that consent 'for the time being' implies that consent lasts as long as circumstances remain the same, and will expire if there is a significant change in circumstances."

The ICO also made clear that *organisations can, if possible, rely on individuals' implied consent in order to proceed with direct marketing activities. It warned, though, that businesses "cannot rely on 'implied consent' as a euphemism for ignoring the need for consent, or assuming everyone consents unless they complain".*

The ICO said that *companies seeking to rely on implied consent to justify direct marketing to individuals still need to ensure that that consent has been "freely given, specific and informed, and must still involve a positive action indicating agreement".*

"The person must have understood that they were consenting, and exactly what they were consenting to, and must have had a genuine choice – consent cannot be a condition of subscribing to a service," it said.

However, the ICO said it "will be difficult" for businesses to rely on consent obtained for direct marketing where that consent was gleaned in the context of another service. *It also said businesses will not be able to claim they have individuals' implied consent to engage in direct marketing where they have obtained that consent through a privacy policy that is "hard to find, difficult to understand, lengthy, or rarely read".*

The ICO recommended that companies engaging in direct marketing to consumers "use opt-in boxes in order to obtain explicit consent" after concluding that the process for obtaining implied consent "is not necessarily an easier option and is likely to require organisations to take similar steps to explicit consent".

The ICO said that organisations should maintain "clear records" of the consent they obtain for direct marketing activities so as to present the evidence if challenged on their compliance in the event of a complaint.

Under PECR [the ICO can fine businesses](#) and other organisations up to £500,000 for serious breaches of the rules, which include in relation to the sending of unwanted marketing emails and texts or live and automated marketing phone calls.

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