

The Information Commissioner's response to Ofgem's "Consultation on extending the existing smart meter framework for data access and privacy to Smart-Type Meters and Advanced Meters"

The Information Commissioner has responsibility for promoting and enforcing the Data Protection Act 1998 ("DPA"), the Freedom of Information Act 2000 ("FOIA"), the Environmental Information Regulations ("EIR") and the Privacy and Electronic Communications Regulations 2003 ("PECR"). He is independent from government and upholds information rights in the public interest, promoting openness by public bodies and data privacy for individuals. The Commissioner does this by providing guidance to individuals and organisations, solving problems where he can, and taking appropriate action where the law is broken.

The Information Commissioner welcomes the opportunity to respond to Ofgem's *"Consultation on extending the existing smart meter framework for data access and privacy to Smart-Type Meters and Advanced Meters."*

Question 1: Please provide views on the different approaches to extending the data access and privacy framework discussed in this chapter. In particular, which is your preferred approach and why?

The first principle of the DPA requires personal data to be processed "fairly". One aspect of this is ensuring that personal data is treated in a consistent manner and that certain individuals (or groups of individuals) are not treated differently without proper justification.

With this in mind, it would appear to be reasonable to extend the Privacy Requirements' obligations to suppliers with customers with Smart-Type Meters. As Ofgem has itself mentioned, this would provide some assurance that the treatment of customers with Smart-Type meters is consistent with that of consumers with full Smart Meters.

Ultimately, it is the nature and granularity of the consumption data that a supplier can collect from a meter that should determine the rules in place for using that data, rather than the specification of the equipment that allows that access. It would therefore seem reasonable that if the consumption data available to a supplier via a Smart-Type Meter is the same as that available via a full Smart Meter, the rules for accessing and using that data are the same.

Question 3: We have questioned whether a consumer who already has a Smart-Type Meter being approached again regarding their choices for data privacy could create a poor experience. Relevant to this is the nature of the conversation on their choices they had at installation. If you think a more flexible framework (ie opt-out consent permissible if accessing Detailed Data) is necessary to prevent poor consumer experience, please provide evidence that the consumer would be unnecessarily inconvenienced by a further conversation regarding their choices.

The European Data Protection Directive (to which the DPA gives effect) defines an individual's consent as:

"...any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed."

The fact that an individual must "signify" their agreement means that there must be some active communication between the parties. An individual may "signify" agreement other than in writing, but organisations should not infer consent if an individual does not respond to a communication – for example, from a customer's failure to return a form or respond to a leaflet.

Organisations will need to examine the circumstances of each case to decide whether consent has been given. In some cases this will be obvious, but in others the particular circumstances will need to be examined closely to decide whether they amount to an adequate consent.

In most cases, where consumers already have a Smart-Type Meter installed, we do not believe that the act of contacting customers in order to clarify their preferences regarding the use of their consumption data would create a poor customer experience. However as pointed out in the question itself and clarified above, the necessity to do this would rely to large extent on the nature of the conversation the consumer had with the supplier at the time the Smart-Type Meter was installed.

Where it can be demonstrated that an individual

- has had the purposes for which their detailed consumption data will be used clearly explained to them,

- has been offered the chance to clearly indicate their preferences regarding the use of their detailed consumption data in this manner, and
- did not object to the use of their detailed consumption data for those purposes

It may be sufficient to simply remind the consumer of the purposes for which their detailed consumption data is being used and, where the purposes is something that would require their consent under the extended data access and privacy framework, explain clearly how they can object if they wish to do so.

We would add that we do not wish consumers to lose access to important or essential services because they have failed to respond to a request for consent (for example, because they were away at the time consent was requested). Organisations should therefore think carefully about factors such as the manner in which they contact individuals and the time they provide individuals to respond to respond to any communications when considering their approach to this issue.

Question 5: If we introduce a flexible framework, what level of consent (ie opt-in or opt-out) should suppliers be required to obtain from domestic consumers before using any data for Marketing purposes?

When sending marketing by electronic means, organisations must comply with the PECR. PECR places specific requirements on organisations that wish to send direct marketing by electronic means and, in the case of certain types of communications, requires organisations to have an individual's prior consent.

Furthermore, in the context of marketing, consent must be specific to the type of marketing communication in question (e.g. automated call or text message) and to the organisation sending it. For more information, please see our detailed guidance on Direct Marketing¹.

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http://ico.org.uk/~media/documents/library/Privacy_and_electronic/Practical_applications/direct-marketing-guidance.pdf

In view of the stricter requirements of PECR, we would consider it appropriate for suppliers to require specific opt-in consent to use consumption data for marketing purposes. This is because we would not consider marketing to be an essential or important service to most consumers. We also note that unwanted marketing was the primary concern amongst those who responded to the Department of Energy and Climate Change's consultation on data access and privacy.

Question 7: We invite comments on our proposal to extend the Privacy Requirements to cover Advanced Meters installed at micro businesses

As referred to in our response to Question 1, one aspect of the "fairness" requirements of the DPA is that individuals are treated consistently. In many cases, micro businesses will be sole traders. As a sole trader is a living individual, information about a sole trader must be processed in compliance with the DPA.

Therefore, for the same reasons as those in our response to Question 1, it would appear reasonable to extend the Privacy Requirements' obligations to cover Advanced Meters installed at micro businesses. This is to provide some assurance that the treatment of micro businesses (including sole traders) with Advanced Meters is consistent with that of micro businesses with full Smart Meters.

Question 8: Do you agree with the proposal to not extend the existing data access and privacy arrangements that apply to network companies for premises with smart meters to network companies for premises with Smart-Type Meters?

If, as Ofgem has explained, it is unlikely that Smart-Type and Advanced Meters can be enrolled with the DCC, it would not appear necessary to extend the existing data access and privacy arrangements that apply to network companies for premises with Smart Meters to network companies for premises with Smart-Type Meters.

However, if network companies are able access information from Smart-Type Meters and Advanced Meters via other routes, this must only be where there is a reasonable justification for doing so and we would expect the information to be treated in a manner consistent with the information collected from full Smart Meters.