

Professor Russel Griggs OBE
Independent Lending Code Review
C/o Lending Standards Board
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9 March 2015

Dear Professor Griggs

The Information Commissioner's response to the Lending Code Review

Thank you for your letter of 17 December 2014 addressed to the Information Commissioner inviting his views to help inform your review of the Lending Code. The Commissioner welcomes your review and has asked me to respond on his behalf.

The Information Commissioner has responsibility for promoting and enforcing the Data Protection Act 1998 (DPA), the Freedom of Information Act 2000, the Environmental Information Regulations and the Privacy and Electronic Communications (EC Directive) 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.

Our response to your request focuses on those areas which engage the ICO's responsibilities; principally those elements involving data protection and electronic marketing. We make a number of general comments below, together with suggestions concerning specific code provisions.

Section 2: Communications and financial promotions

We welcome that there are a number of provisions relating to marketing in the Code and that our guidance is referenced throughout. We understand subscribers to the Code will need to take into account regulatory rules arising from various sources when planning their marketing strategy. As a general point we feel that this section would benefit from clearer drafting.

Consideration might be given to drafting the Code's provisions more generally and then referring subscribers to published guidance for further detail. Whilst we appreciate there is a balance to strike in a Code of this nature, there is a danger that in summarising

complex rules too heavily much important detail may be lost. In respect of electronic marketing, for example, it might be advantageous if it were stated at the outset that it is a requirement that subscribers should follow the guidance set out in our *Guide to privacy and electronic communications*¹ and *Direct marketing guidance*² rather than trying to summarise detailed requirements within the Code itself. A similar general statement might also be included at the outset for the processing of personal data and compliance with the DPA. The advantage of such an approach is that the Code would be more future-proof and less likely to require significant redrafting in light of any policy or legal changes that follow.

It may be useful to clarify in this section the fact that different rules will apply depending on the type of marketing communication. Stricter rules apply, for example, to electronic marketing (which is governed by PECR) than marketing conducted by post.

Paragraphs 25 and 26: There may be circumstances when it is not appropriate or permitted to send marketing relating to a third party and this provision may therefore benefit from a caveat. For example if a subscriber wanted to send marketing emails there is a general rule within PECR that this can only be done with consent, however there is an exception to this general rule known as 'soft opt-in'. To meet this exception there are a number of requirements to be met, for example the subscriber can only send their own marketing materials. Third party marketing should therefore not be sent if the subscriber is relying on the 'soft opt-in'. More information can be found in our guidance referred to above.

Paragraphs 27, 29, 34 and 35: We note there are various provisions regarding the ability of customers to opt-out of marketing. It may be clearer if all of the provisions relating to opt-outs were brought together in one place in the Code – perhaps under a subheading. It may also be useful to mention that there is no requirement within the DPA or PECR to send reminders every three years, although there is a requirement within PECR to provide a simple way to opt-out of every marketing email. In our *Direct marketing guidance* we explain that the length of time consent remains valid depends upon the context and will not last forever.

Paragraphs 30 and 31: The term 'direct marketing' is defined in Section 11(3) of the DPA ("the communication (by whatever means) of any advertising or marketing material which is directed to particular individuals") and the same definition applies to the provisions under PECR. Guidance on the meaning of 'direct marketing' is set out in the *Direct marketing guidance* where we explain that the definition covers all promotional material and not just the selling of particular products and services. This is in contrast to the Code which adopts the term 'marketing approaches' and appears to relate only to communications designed to sell products and services. Consideration may be given to

¹ <https://ico.org.uk/for-organisations/guide-to-pecr/>

² <https://ico.org.uk/media/for-organisations/documents/1555/direct-marketing-guidance.pdf>

aligning the definitions in light of the fact that ICO guidance is referred to throughout this section.

Paragraph 33: The regulations referred to are "The Privacy and Electronic Communications (**EC** Directive) Regulations 2003".

Section 3: Credit reference agencies

Paragraphs 38 and 49: The domain name of the ICO website has changed to **ico.org.uk**.

Paragraphs 40 to 43: Whilst the ICO previously published *Data protection technical guidance: filing defaults with credit reference agencies*, this has since been withdrawn. In its place SCOR now publish *Principles for the Reporting of Arrears, Arrangements and Defaults at Credit Reference Agencies*³. It would be advisable to replace references to the ICO guidance and paragraph 42 may also need rewording as a result. Individuals who have concerns regarding the accuracy or fairness of information that has been shared with a credit reference agency may, of course, still raise this fact with the ICO. However, reference to guidance in this part of the Code should refer to the SCOR guidance.

Paragraph 39: There is not much context given in relation to this paragraph and it is not clear what requirement to share data is being referred to.

Paragraph 45: We publish advice for the public on what to do if an application for credit is refused. We explain that an individual may ask for the main reason why credit was refused and, if they have relevant information that might alter the decision, they can request that the decision be reviewed⁴. We note that paragraph 45 does not mention the option of a review and instead recommends the customer obtain their credit report. Whilst we advocate customers obtain a copy of their credit report, the most appropriate first step may be for the customer to ask for a review by the lender.

Paragraph 48 and 49: We note these points deal with customer 'permission', and it may be helpful to mention that the ICO does not generally use this term. The ICO would consider the processing and sharing of data as described in this section in terms of compliance with the data protection principles set out in Schedule 2 of the DPA, in particular the first principle. This principle requires that personal information is processed fairly and lawfully and that a condition for processing can be met. There are a number of conditions for processing, one of which is "consent". Further information about the first principle may be found in the ICO's guidance⁵.

³ http://www.scoronline.co.uk/files/scor/high_level_principles_document_final.pdf

⁴ <https://ico.org.uk/media/for-the-public/documents/1282/credit-explained-dp-guidance.pdf>

⁵ <https://ico.org.uk/for-organisations/guide-to-data-protection/principle-1-fair-and-lawful/>

Whilst we would accept that sharing data about the performance of an account is a common occurrence, we submit that an organisation cannot rely on consent if, in reality, the individual does not have a choice about it; consent should be specific, informed and freely given. There are other conditions for processing that are likely to apply. We have some concern with the wording that the ICO "...accepts that such permission may be made a condition of borrowing". Whilst we understand the point being made, it is not appropriate for the ICO to suggest conditions for processing data. There is similar wording to this in paragraph 37. ICO guidance touches on how sharing information with CRAs may be in the subscriber's terms and conditions and how customers may be refused credit if they do not agree⁶. A suggestion here could be to consider rewording these paragraphs, perhaps by looking at the wording used in current ICO guidance.

Section 4: Credit assessment

Paragraph 56: Please see comments relating to paragraph 45 above.

Section 6: Credit Cards

Paragraph 106: Please see comments relating to paragraph 45 above.

Section 7: Loans

Paragraph 166: Please see comments relating to paragraph 45 above.

Paragraph 168: This paragraph warns of a financial crime risk in giving written explanations on reasons for the refusal of credit. This point seemed a little ambiguous and we question whether there is sufficient information for the intended audience to understand what is required of them.

Section 9: Financial difficulties

We appreciate this is an important section of the Code that requires subscribers to take certain steps to protect those in financial difficulties. We anticipate the taking of such steps would lead to the processing of personal data. It may therefore be useful to include a reference to ensuring that the processing of data is undertaken in compliance with the DPA, in particular doing this in a manner which is fair and which ensures data is accurate and not excessive.

Debt and mental health: We welcome the reference to the DPA in this section, as well as reference to the guidance of the Money Advice Liaison Group (MALG) which takes into account data protection requirements. Please be aware the link to the MALG guidance appears to be broken.

⁶ <https://ico.org.uk/for-the-public/credit/>



Information Commissioner's Office

I hope these comments are useful and help inform your review. Should you need to discuss any of the matters set out above in further detail then please do not hesitate to contact me.

Yours sincerely

Garreth Cameron
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