

13 July 2023

**IC-238630-W0N4**

**Request**

You asked us:

*"I have noted reports about Stephen Bonner's interview with MLex about non-compliant cookie banners. [...] Unfortunately the interview seems to be hidden behind a paywall.*

*Please could you provide me with the following information:*

*1. Please could you provide me with the full text/transcript in respect of Stephen Bonner's interview with MLex concerning cookies?*

*The article states: "'If you don't have 'reject all' on your top level [cookie banner], you are breaking the law," Bonner said, according to MLex. Bonner said the ICO is scrutinising compliance in this area.'*

*2. Please could you provide me with further details about what the ICO is doing to scrutinise compliance in this area? Please provide details regarding the number of investigations the ICO is currently undertaking in this regard and against which organisations. Please also state which websites the ICO has checked for compliance with the cookies legislation and the ICO's findings. Please also disclose any policies that the ICO has specifically for the enforcement of cookies legislation.*

*3. Are there any plans to update the ICO's Cookies brief-guide and detailed guidance to more prominently make unambiguously clear that consent must be as easy to reject as to give? [...]*

*4. I have noted that the ICO currently has a page on enforcement action about cookies: <https://ico.org.uk/action-weve-taken/cookies> However this was last updated in 2021. Please could you update the enforcement action page for*

*cookies with the most recent statistics about the number of complaints made? Please could you also publish details about enforcement action and investigations the ICO is undertaking in this regard?"*

We have handled your request under the Freedom of Information Act 2000 (the FOIA).

## **Our response**

For ease of legibility, we have addressed each of your concerns in turn below.

*1. Please could you provide me with the full text/transcript in respect of Stephen Bonner's interview with MLex concerning cookies?*

We confirm that we hold information within scope of your request. Please find a copy of the full text of the interview attached.

*2. Please could you provide me with further details about what the ICO is doing to scrutinise compliance in this area?*

The information held in regard to this request, taken in and of itself, is extremely broad in scope. This would require a manual search of a large amount of information under a wide range of different ICO directorates and workstreams. We would likely refuse a request of this breadth as a grossly oppressive burden under Section 14 of the FOIA.

However, we have instead interpreted this part of your request for information your request as being clarified by the follow-up questions you included under the same heading of item 2. Accordingly, we have focused our search on our activities as defined by the follow-up questions.

For your interest, however, we have included some general information about our activities in this area.

The following excerpt from our "*Responding to emerging technology*" brief to the Information Commissioner was previously published in our disclosure log under [IC-151664-D5Q4](#). We have reproduced this information below for your convenience:

*"The Technology Department has responded to concerns about the adtech ecosystem by: [...]"*

- *Supporting Operation Cobar, launched in response to our concerns about non-compliance in the adtech industry, by conducting technical analysis on cookie use and compliance with UK GDPR and PECR, and by acting as subject matter experts during audits by regulatory supervision colleagues. [...]*

- *Spearheading work to replace 'cookie pop-ups' with more meaningful Consent online, building on our agreement reached with other G7 data protection authorities during the UK's 2021 G7 presidency. We are assessing what technical and policy changes are needed to ensure that browsers and IoT services can gather a user's choice, and ensure that any other service has to respect the choice. This approach has the potential to address concerns about 'click-through' consent mechanisms (dubbed 'the scourge of the internet' by some UK commentators), which add friction and fatigue to the browsing experience without yielding meaningful consent.*

- *Shaping the future legislative landscape, by providing expert analysis on cookies and similar technologies to inform DCMS plans to reform UK GDPR and PECR.*

*2022 will see ongoing work with the CMA to shape the proposals by Google, the launch of the G7 cookies programme and potential enforcement action from the ICO in relation to RTB. In tandem, we will examine the role of other key players in the adtech ecosystem such as Facebook."*

We are also working on a joint position paper with the Competition and Markets Authority (CMA) on online choice architecture practices that lead to competition, consumer protection and data protection harms. The paper will include a section on cookie banners and cookie rejection. As this joint position paper is intended for publication, requests for further information about this would likely be withheld under section 22 of the FOIA.

We also provide a reporting tool for members of the public to report their concerns about cookies to the ICO. We use this information to monitor organisations' adherence to the rules, identify sectors where we might need to make contact or take enforcement action and work out if organisations might need further guidance.

We primarily use the information collected via the cookie reporting tool for analysis, intelligence and statistical purposes. This means that we do not handle cookie reports from the public on an individual basis, as we might in our public

complaints services. The ICO generally focuses our regulatory work in the cookies and AdTech area via other workstreams.

*Please provide details regarding the number of investigations the ICO is currently undertaking in this regard and against which organisations.*

We can confirm that we hold information in scope of this request. We have one ongoing investigation at this time that covers the topic of cookie banners. However, as the investigation is ongoing, further information has been withheld under Section 31 of the FOIA.

Additionally, we have four ongoing audits that fall within scope of your request at this time. It is important to note, however, that the topic of cookie banners was not the primary focus of these investigations. As these audits are also still ongoing, further information has been withheld under Section 31 of the FOIA.

Further information regarding section 31 has been provided below.

*Please also state which websites the ICO has checked for compliance with the cookies legislation and the ICO's findings.*

We can confirm that we hold some information in scope of this request.

As part of Operation Cobar, we conducted cookies sweeps of 49 websites considered to be among the top 50 accessed websites by people within the UK. We performed further, rudimentary manual cookie sweeps of 34 of those websites in late April and early May 2021. The websites subject to manual sweeps were as follows:

amazon.co.uk  
amazon.com  
imdb.com  
autotrader.co.uk  
bbc.co.uk  
bing.com  
live.com  
microsoft.com  
microsoftonline.com  
msn.com  
office.com  
bt.com

dailymail.co.uk  
disneyplus.com  
ebay.co.uk  
etsy.com  
facebook.com  
fandom.com  
hotukdeals.com  
google.co.uk  
google.com  
ladbible.com  
sportbible.com  
netflix.com

reddit.com  
rightmove.co.uk  
theguardian.com  
trustpilot.com  
twitch.tv  
virginmedia.com  
wikipedia.org  
yahoo.com  
youtube.com  
zoom.us

The objective of the cookies sweep was primarily to collate further intelligence about the AdTech ecosystem. Based on the limited scope of the sweep, we were not able to make assessments as to whether or not the organisations in question had complied with the requirements of the Privacy and Electronic Communications Regulations (PECR).

The ICO did informally contact these organisations to raise further queries regarding their cookies compliance where our cookie sweeps highlighted potential issues. However, we did not conduct formal compliance checks nor issue any formal outcomes in relation to these cookie sweeps.

We did produce more general findings and conclusions as a result of the cookies sweep. We have reproduced these conclusions as an extract below:

### **"Conclusions**

*The cookies sweep and subsequent review demonstrates that organisations obtain and process information from cookies for the purposes of marketing, personalisation of advertising, profiling, and tracking. This is used both by the organisation operating the website and third party vendors they have a relationship with. On a positive side, most organisations do present individuals with the apparent opportunity to opt out of marketing in the cookie banner or cookie consent management tool.*

### **Types of cookies**

*It is important to note that some cookies would be required for the website to function and allow individuals to use services or make a transaction. However, to consider if this was the case, further lengthier enquiries would need to be undertaken directly with the organisations.*

*The review has confirmed that all but one of the websites apply cookies to a device prior to obtaining consent. However, some of these may be required for the website to function and we do not have any evidence at this stage to suggest that any are particularly intrusive.*

*In some cases, we have been able to identify a use or possible use for a cookie. However, we would still have to approach the organisations to understand how these work in practice, including what information is collected and used.*

### ***Duration of cookies***

*There is information to suggest that cookies can be applied to a device for several years. At this stage, we have no information nor requested a justification from the organisation why they would require placing these persistent cookies.*

### ***Consent and transparency of processing***

*The approach used by organisations to obtain consent from individuals is broadly similar, suggesting that they are adopting industry accepted practices. It is clear that the majority of organisations are satisfied with the cookie controls they have in place and only 6 (17%) have carried out remedial measures as a result of receiving the ICO's letter issued following the sweep.*

*There are major differences in the way that processing of personal data is presented in privacy and cookie policies. Some organisations will go into great detail regarding a list of cookies that may be applied to a device, its function and purpose, description, what personal data is captured and how it is applied and used. However, other organisations only provide a high level overview of cookies and their categories.*

*For the most part, organisations advise individuals that personal data will be passed to third party organisations for marketing, bringing Articles 26 and 28 into consideration. However, only 8 websites confirm what information is shared, the purposes, and who information is shared with. It is important to note that five websites belong to Microsoft, two to LadBible and one to Hotukdeals. Therefore, only three separate organisations have provided this level of detail.*

*The review has highlighted that over 2,000 organisations could receive personal information from cookies which may be used for administration or functional purposes, or marketing, personalisation, and tracking. However, it is not always clear what the purpose is and the extent to which this information will be shared and processed further.*

*The scale of the network is immense, noting that Google may share personal data with over 2 million third party organisations. It is assumed that many of these organisations will be based outside of the UK. Unfortunately, no information is provided to individuals on which organisations may receive data and for what purpose. This is concerning given the number of times*

*Google has been mentioned in privacy policies as receiving personal information.*

*It is also possible that information may be inadvertently shared with third party organisations as a result of a technical error. Recently, the PDMIT have been made aware of a data breach in which the 'reject all' button was not functioning correctly in the cookie management tool. Whilst individuals could opt out of each cookie in turn, they wouldn't be opted out if selecting 'reject all'. This error could have huge implications for individuals given that personal data may potentially be passed to multiple third party organisations.*

*In terms of the companies identified as having the most extensive network of associated companies, the review has identified the following top 5 organisations:*

- *Google*
- *Facebook*
- *Adobe*
- *Dentsu*
- *Nielsen*

*Most websites use a highlighted 'Accept All' button, which is also known as 'nudging'. This may be used to encourage the individual to accept all cookies without full review and therefore potentially inadequate consent. The apparent unequal weighting of options is concerning given the high volume of third party vendors that could receive information and process it further without consent.*

*The ICO's guidance states that this method of obtaining consent would be non-compliant:*

*"A consent mechanism that emphasises 'agree' or 'allow' over 'reject' or 'block' represents a non-compliant approach, as the online service is influencing users towards the 'accept' option."*

*It is also concerning that the majority of organisations have not provided individuals with the option to 'Reject all' in the initial cookie notice/pop up banner. In some cases, it is difficult or overly convoluted for individuals to opt out as they would have to review each 'tick box' separately. There are some instances in which organisations have automatically opted-in individuals into marketing/personalisation/tracking cookies under the banner*

*of legitimate interests. These include Autotrader, BT, Daily Mail, Fandom, LadBible, Netflix and The Guardian. At this stage, we have yet to approach organisations about this method or determine if this condition for processing has been used correctly.*

### **Harms**

*There is obvious potential that the processing is likely to cause substantial damage or substantial distress. However, from the limited information obtained from the cookies sweep there is no evidence at this stage to demonstrate that this is the case.*

*Unfortunately, due to the limited scope and methodology of the sweep we have failed to identify actual harm, financial hardship or otherwise in which an individual(s) has suffered damage and/or distress. Whilst a sweep in isolation would not generally obtain this type of evidence, other available sources may yet yield the requisite evidence of harms. These sources may include the ICO's online reporting tool for cookies or complaints to the ICO under the GDPR in which individuals have provided information obtained during their own SAR submissions relating to the sharing of data. [...]*

### **Learnings**

*The cookies sweep has provided a number of learnings both in terms of information about the current industry approaches and our own intelligence gaps about the wider AdTech ecosystem.*

### **Information and intelligence**

*The sweep has met the initial objective of providing a general picture of how the UK's most accessed websites apply cookies and approach privacy matters. Given the relatively small sample size we cannot say that their approach will necessarily be replicated across the millions of other websites accessed by UK based individuals, but it certainly provides a useful basis upon which to consider next steps in terms of any regulatory intervention.*

### **Compliance**

*The letters issued have at the very least prompted the organisations to internally review their processes and policies with regard to their regulatory obligations. Whilst some organisations have advised that work to conform*



*was either already underway or planned, only 6 (17%) have confirmed the implementation of remedial measures as a result of the ICO's letter.*

## **Challenges**

*When responding to the ICO's sweep, the majority of organisations stated they believed that their cookie consent process was essentially compliant with the legislation. The limitations of the methodology of the sweep means that there is a significant intelligence and evidential gap in order to challenge these assertions without undertaking a further, more robust sweep, initiating a wider series of audits, or instigating investigations. Jurisdictional issues also present both legal and practical challenges, although these are not necessarily unsurmountable.*

*Challenges also extend to being unable to determine if the legitimate interest condition has been used correctly as this requires a full review of any balancing test documents used. To date we have limited information provided by organisations on how a third party organisation may process (or further process) data once received."*

The above extract was excerpted from our March 2022 cookies sweep briefing, and it is important to note that the information contained within will therefore not be up-to-date.

*Please also disclose any policies that the ICO has specifically for the enforcement of cookies legislation.*

We do not hold information in scope of this request. I can confirm that we do not hold a policy specifically about enforcement as it relates to cookies compliance.

However, it may of interest to you to view our guidance to organisations regarding [non-compliant use of cookies under the Privacy and Electronic Communications Regulations \(PECR\)](#) on our website, along with our [Regulatory Action Policy](#).

*3. Are there any plans to update the ICO's Cookies brief-guide and detailed guidance to more prominently make unambiguously clear that consent must be as easy to reject as to give? [...]*

I have contacted the relevant department and can confirm that the ICO does not have specific plans regarding an update to the cookies guidance at this time. We therefore do not hold information in scope of this request.

However, we do review and update the guidance on our website on an ongoing basis.

*I have noted that the ICO currently has a page on enforcement action about cookies: <https://ico.org.uk/action-weve-taken/cookies> However this was last updated in 2021. Please could you update the enforcement action page for cookies with the most recent statistics about the number of complaints made?*

As this is a request for the ICO to take action, rather than a request for copies of information we hold, technically this is not a valid request under FOIA.

However, we are able to respond to query on a discretionary basis. After contacting the appropriate department, we can confirm that the ICO is reviewing the information we hold with a view to updating the website in the near future.

*Please could you also publish details about enforcement action and investigations the ICO is undertaking in this regard?*

The ICO already publishes information on enforcement action and noteworthy investigations in the [Action we've taken](#) section of our website, in line with our ["Communicating our Regulatory and Enforcement Activity Policy"](#). You can also [sign up to our e-newsletter](#) to stay up to date with news from the ICO or the action we've taken.

## **Section 31**

As described above, we have relied on section 31 of the FOIA to exempt some information from disclosure. We can rely on section 31(1)(g) of the FOIA where disclosure:

*"would, or would be likely to, prejudice... the exercise by any public authority of its functions for any of the purposes specified in subsection (2)."*

In this case the relevant purposes contained in subsection 31(2) are 31(2)(a) and 31(2)(c) which state:

*"(a) the purpose of ascertaining whether any person has failed to comply with the law..."*

*(c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise ..."*

Section 31 is not an absolute exemption, and we must consider the prejudice or harm which may be caused by disclosure. We also have to carry out a public interest test to weigh up the factors in favour of disclosure and those against.

Our investigations within scope of this request are still ongoing. To release the information you have requested could prejudice the ICO's ability to conduct the investigation in an appropriate manner.

Disclosure at this stage would discourage our ongoing discussions between the ICO and the relevant organisations and may damage our ability to conduct and conclude the investigation fairly and proportionately. Disclosure could also jeopardise the ICO's ability to obtain information relating to this case or others in the future, and is likely to result in other parties being reluctant to engage with the ICO in the future. Any information released at this stage could be misinterpreted, which in turn could distract from the investigation process.

With this in mind, we have then considered the public interest test for and against disclosure.

In this case the public interest factors in disclosing the information are:

- increased transparency in the way in which the organisations have responded to the ICO's enquiries; and
- increased transparency in the way in which the ICO conducts its investigations.

The factors in withholding the information are:

- the public interest in maintaining organisations' trust and confidence that their replies to the ICO's enquiries will be afforded an appropriate level of confidentiality;
- the public interest in organisations being open and honest in their correspondence with the ICO without fear that their comments will be made public prematurely or, as appropriate, at all; and
- the public interest in maintaining the ICO's ability to conduct the investigation into complaints as it thinks fit,
- the public interest is served by our commitment to publish noteworthy investigations in due course as published in our ["Communicating our Regulatory and Enforcement Activity Policy"](#)

Having considered these factors, we are satisfied that it is appropriate to withhold the information.

## Next steps

You can ask us to review our response. Please let us know in writing if you want us to carry out a review. Please do so within 40 working days.

You can read a copy of our full review procedure [here](#).

If we perform a review but you are still dissatisfied, you can complain to the ICO as regulator of the FOIA. This complaint will be handled just like a complaint made to the ICO about any other public authority.

You can [raise a complaint through our website](#).

## Your information

Our [Privacy notice](#) explains what we do with the personal data you provide to us, and set out your rights. Our retention schedule can be found [here](#).

Yours sincerely



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