

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The Information Commissioner welcomes the opportunity to respond to this consultation on the Draft Guidance on Digital Marketing and Promotions, to the extent relevant.

Q.1: Do you agree with our assessment of digital marketing in the PRS context and with our overall approach for dealing with it? If not, why not?

Whilst we are responsible for overseeing the rules regarding marketing conveyed by electronic means (email, SMS, fax and telephone) set by the PECR, other digital marketing practices are outside our remit. We can therefore only respond in general terms to the assessment you have made of misleading digital marketing practices.

We agree with the overall approach of promoting transparency, fairness and privacy in the use of promotional tools. All three elements are crucial in protecting individuals' rights and promoting a more level playing field between parties with a historical imbalance in power. We have always encouraged transparency in the handling of personal data where at all possible, and in line with the principles of the DPA, not least because the availability of information should assist individuals in making better decisions about disclosing their personal data.

Q.2: Do you agree with our consideration of typosquatting and proposed expectation? If not, why not?

Q.3: Do you agree with our consideration of Clickjacking and our proposed expectations? If not, why not?

Q.4: Do you agree with our consideration of Likejacking and our proposed expectations? If not, why not?

Q.5: Do you agree with PhonepayPlus' consideration of banner ads, pop-ups and pop-unders and our expectations around them? If not, why not?

Q.6: Do you agree with PhonepayPlus' definition of SEM and SEO and our expectations around them? If not, why not?

We agree with the proposed approach in respect of typosquatting, clickjacking and likejacking. We also note that the collection of personal data via any such activity is unlikely to be compliant with the DPA. Principle 1 of the DPA requires that personal data be processed 'fairly and lawfully' - any collection of personal data by methods that intentionally mislead individuals is unlikely to be able to comply with the fairness aspect of this principle.

If individuals have not been given adequate information to enable them to understand how their collected personal data will actually be used, then that collection of data will be unfair and not compliant with the DPA in its own right. It is also worth noting that any subsequent processing of personal data collected via unfair means would most likely not be justifiable under the DPA due to the non-compliant basis of its original collection.

Setting aside fairness issues, any situation that arises whereby an individual believes that they are interacting with one party when they are in fact unknowingly interacting with a third party (for example, clickjacking) is also unlikely to satisfy the DPA's requirement that individuals be notified which data controller is handling their personal data.

There is also a potential issue under principle 4 of the DPA where likejacking is concerned. For example, if likejacking results in inaccurate data being recorded by a third party on an individual's Facebook profile, without their knowledge or consent. There is an expectation that an individual's social networking profile is personal to that individual and not a resource to be shaped or altered by unrelated third parties.

Q.7: Do you agree with our consideration of content locking practices and our expectations around them? If not, why not?

There are potential consumer contractual issues relating to content locking which are not within our remit. Setting these issues aside, content locking – where an individual is unexpectedly required to provide information to access certain content – raise further issues of fairness under the DPA. For example, if individuals are forced to provide irrelevant or unrelated information when it was not clear that that was a condition of the contract, that could be a unfair consumer contracts issue – which in turn could negate the lawfulness and the fairness of that use of data.

Any 'consent' obtained in this scenario would – at least in data protection terms – be unlikely to be valid as it would not be specific, freely given and informed consent.

Q.8: Do you agree with PhonepayPlus' consideration of spam and our related expectations? If not, why not?

We agree that email marketing can only lawfully be sent to individuals where the individual has consented, or where an organisation can meet the 'soft opt in' criteria set out in our guidance. Any consent obtained to such marketing must be explicit – but the requirement to record that consent is over and above the requirements of the PECR.

In our guidance we recommend that organisations keep an audit trail, but this is a good practice recommendation rather than a legal requirement at this time. That said, you may be happy to make this a baseline requirement for the PRS industry, as from a practical perspective in the face of any complaints organisations relying on consent are best protected by having an audit trail available. It is worth noting that the definition of consent which we work to (taken from the Data Protection Directive 95/46 EC) is currently subject to review in Europe. The present proposal is that there will be a requirement to be able to prove consent has been obtained, but whether this requirement will remain when the legislation is finalised is not currently clear.

Q.9: Are there any other potentially misleading digital marketing practices that we have not identified? If so, then please suggest any, including appropriate evidence.

Q.10: Do you agree with our illustrative representation of affiliate marketing? If not, why not?

Our remit does not extend to marketing activities outside the scope of the PECR and our experiences of the affiliate marketing industry have been in a wider context than that of the promotion of PRS services. We therefore have no comments to make in respect of these questions.

Q.11: Do you agree with our consideration of affiliate marketing and our expectations? If not, why not?



Information Commissioner's Office

We welcome the stated accountability of PRS providers in respect of the affiliate marketers they use – and in particular the practical guidance given around the appointment of such marketers.

Our ongoing investigations into breaches of the PECR in the lead generation industry have identified a concerning culture whereby individuals' information has been changing hands without appropriate controls or basic compliance with the DPA. The ease with which personal data can be shared electronically, and consequently the number of transfers of the data that may occur, mean that it is more important than ever that organisations are accountable for their actions and that organisations collecting contact details via third parties undertake due diligence sufficient to ensure that they are not sending marketing in breach of the PECR. We agree with the recommendations made, in particular the intention to ensure that any such marketing is carried out in an accountable and traceable manner.