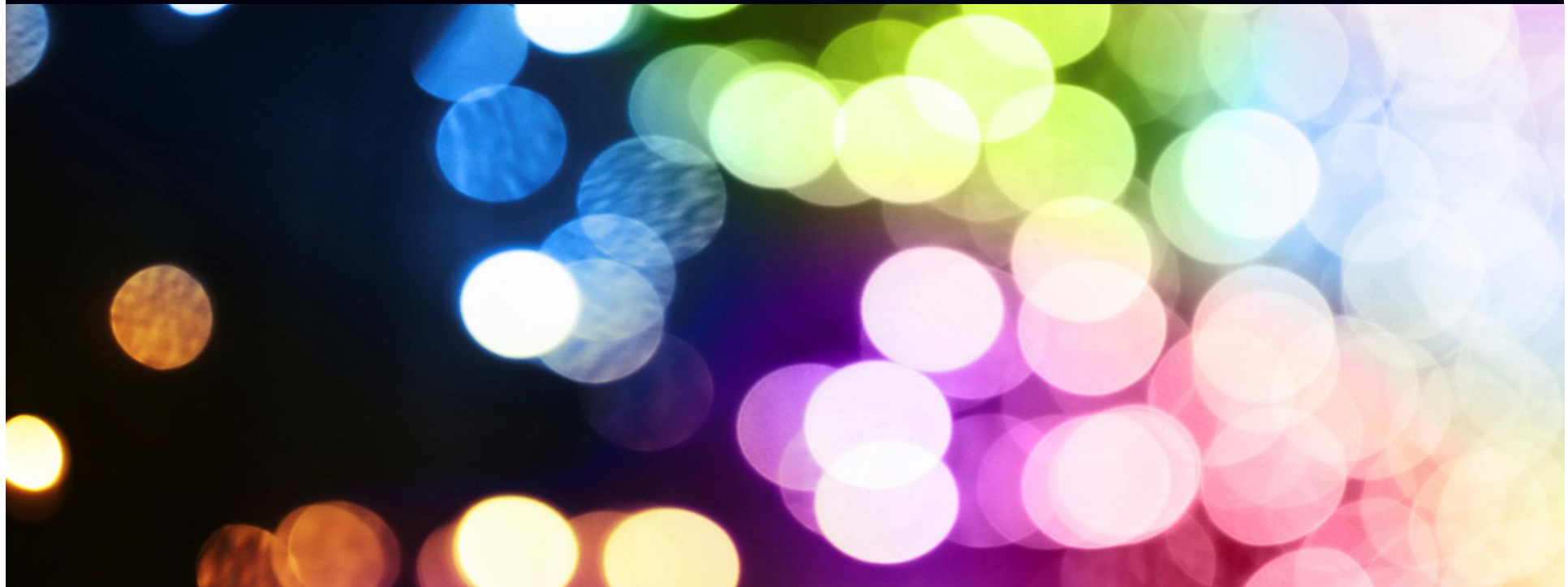


Frequently asked data protection / direct marketing questions - a legal guide

5 March 2009

Marc Dautlich



Data Protection principles



THESE ARE ABOUT PRIVACY

1. Personal data shall be processed fairly and lawfully
2. Personal data shall be obtained only for one or more specified and lawful purposes
3. Personal data shall be adequate, relevant and not excessive

THESE ARE ABOUT DATA MANAGEMENT

4. Personal data shall be accurate and kept up to date
5. Personal data shall not be kept for longer than necessary
6. Personal data shall be processed in accordance with the rights of data subjects
7. Appropriate technical and organisational measures shall be taken against unauthorised unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data
8. Personal data shall not be transferred to a country or territory outside the European Economic Area unless that country or territory ensures an adequate level of protection

Data security - five fallacies



1. Data too piecemeal to be of value to fraudsters
2. Only high net worth individuals make attractive targets
3. Only the largest firms are at risk
4. Threats are only from external sources
5. No complaints from consumer

(from Data Security in Financial Services, FSA, April 2008)

Data security - do's and don'ts



- Do
 - ensure that you have reviewed the security arrangements of any third party processing data on your behalf
 - enter into a written agreement with any such third party containing provisions as required by the seventh principle
 - consider what notification you will require from a third party of security incidents involving your personal data and required remedial procedures
 - consider what vetting is needed of staff (including of a third party) who will have access to personal data
 - review security arrangements regularly and in light of ICO guidance

Data security - do's and don'ts

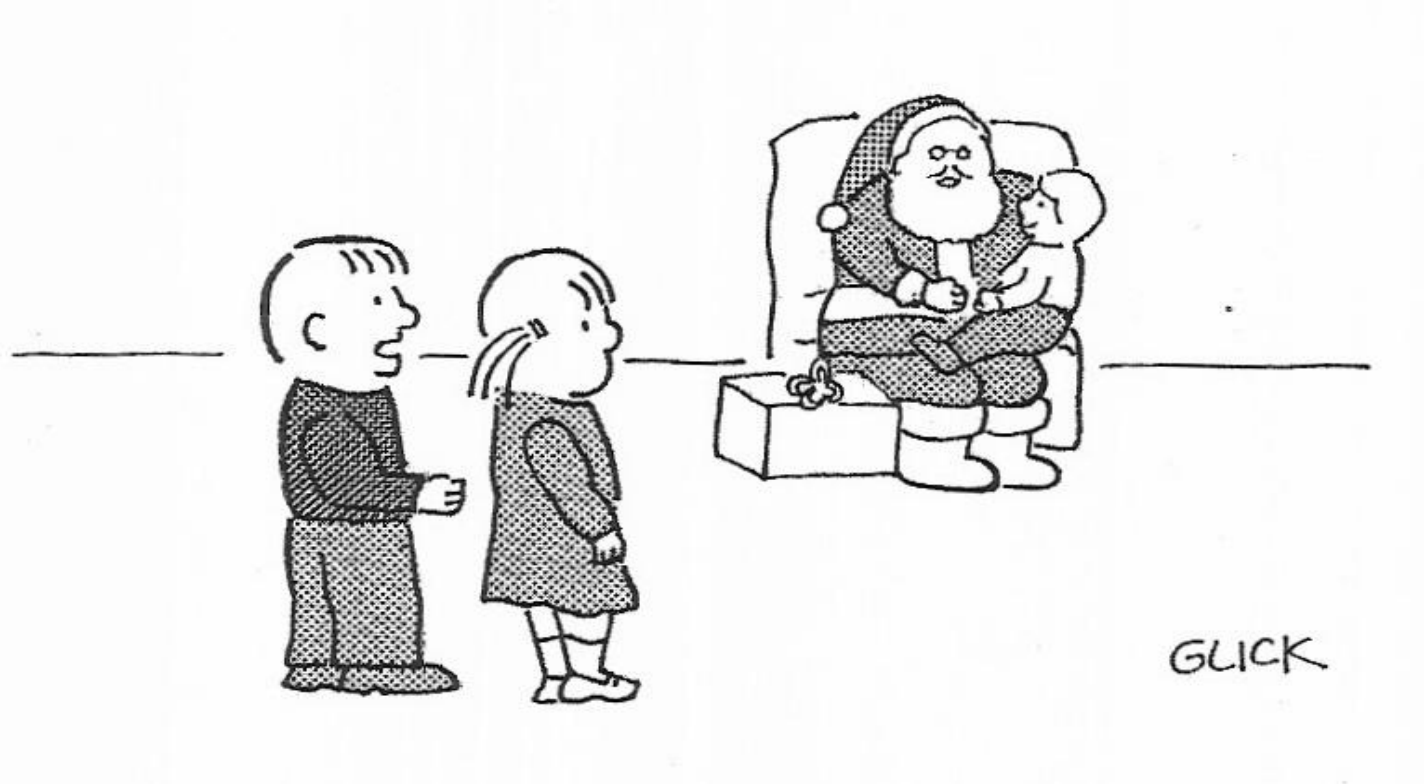


- Do not
 - treat data security as a matter exclusively for 'specialists' e.g. the IT team
 - permit personal data to be held on laptops, portable media or similar technology without appropriate encryption
 - dispose of equipment containing personal data, or hard copies of personal data, without ensuring permanent destruction
 - forget about publicly available tools to help you e.g. www.securityhealthcheck.berr.gov.uk/

Data collection



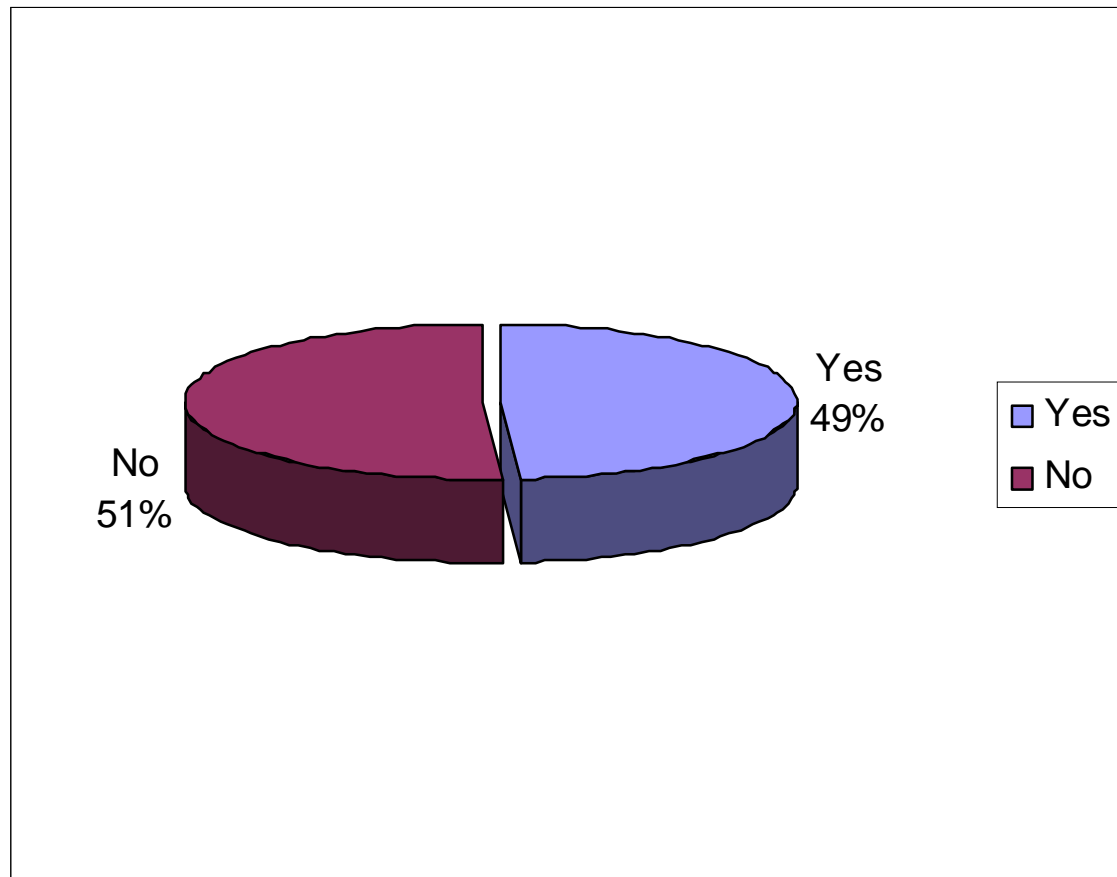
He knows if we've been good or bad. But we need to see his privacy policy.



What the public thinks (1)

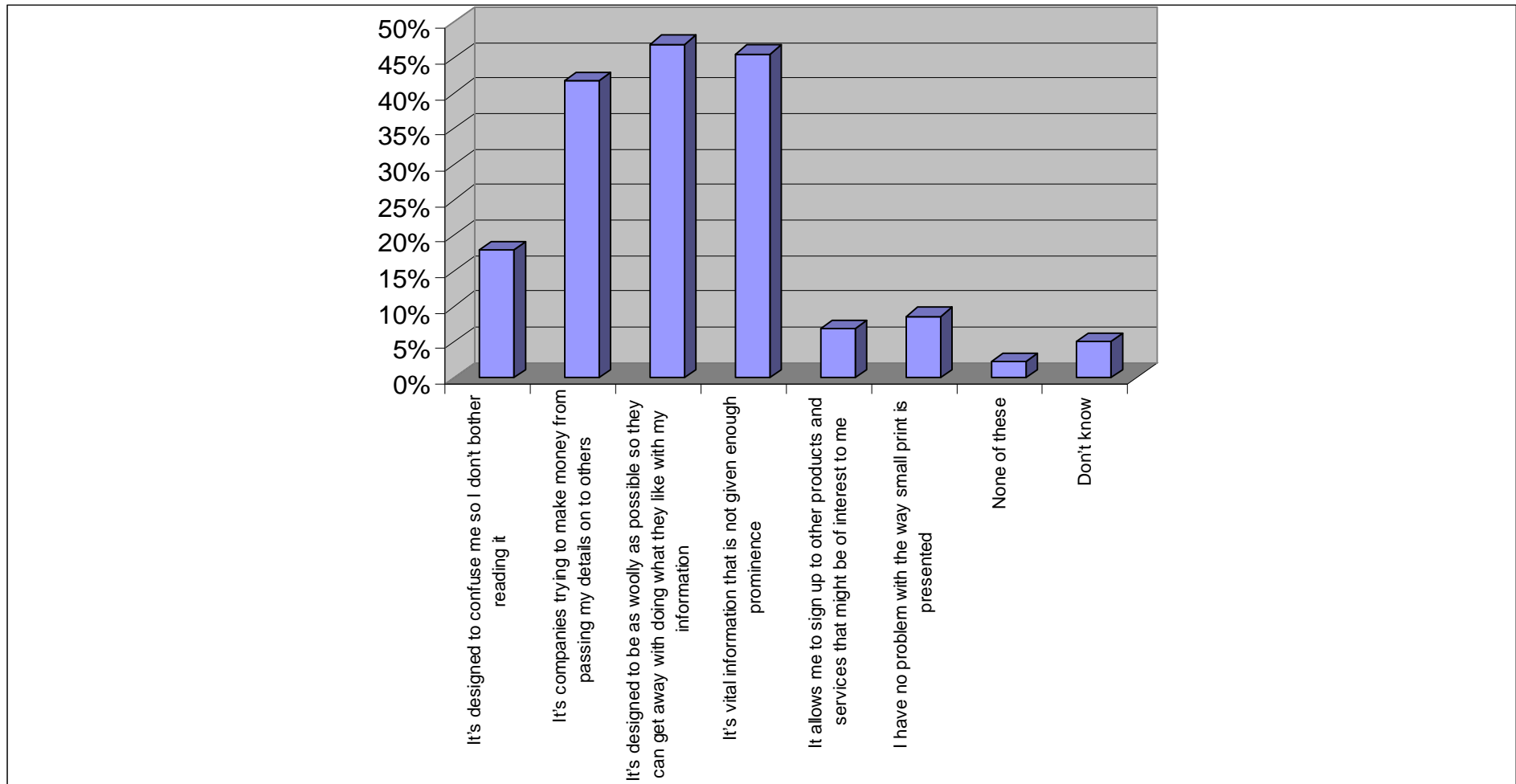


Do you always understand what you are agreeing to in terms of your privacy, and who the organisation will pass your details to, when signing up to a product or service?



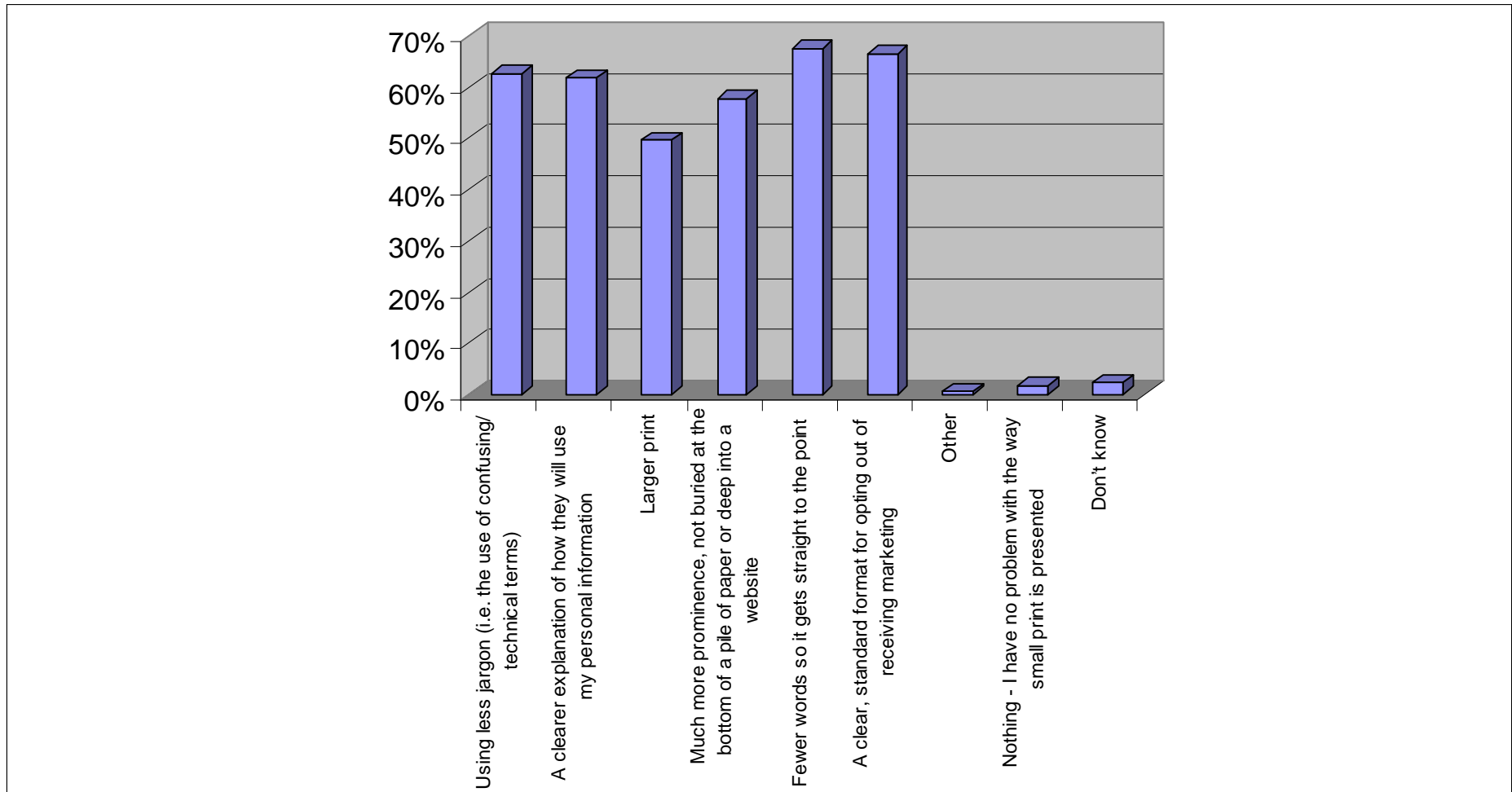
YouGov 2009

What the public thinks (2)



YouGov 2009

What the public thinks (3)



The law - opt in and opt out rules (B2C)



Individual subscribers (e.g. marcdautlich@hotmail.com)

- no unsolicited marketing communications by email unless prior consent
 - *(Privacy and Electronic Communications (EC Directive) Regulations 2003, s22(2))*

What is the difference between prior consent and “opt-in”?

- “Opt-in”: describes a mechanism (typically, a tick box or drop down menu)
- Opt-in is a subset of “prior consent”

Opt in mechanism (1)



Peppermill

Would You Like to Continue Receiving Exclusive Email Offers from the Peppermill?

%%First Name%%, please verify that you wish to receive future email offers from the Peppermill Hotel Casino by clicking on the button below. Respond by 11:59 p.m. PST 9/10/06 to be entered into a drawing for a share of \$1,500 in FREE Play!

CLICK HERE
to confirm opt-in

If you do not opt-in by clicking the button, you will no longer receive promotional emails from the Peppermill Hotel Casino.

The Peppermill Hotel Casino values your privacy and would like your permission to continue sending customized hotel room offers, coupons, and other promotional offers via email. Peppermill email subscribers will receive the following exclusive benefits:

- Customized Casino offers and Hotel discounts
- Notification of Upcoming Tournaments and Special Events

Opt in mechanism (2)

Opt In



Dear %%First Name%%,

The Peppermill Hotel Casino values your privacy and would like your permission to continue to send you special offers and promotions via email.

Please click "Yes" below to verify that you wish to receive future email offers from the Peppermill. Peppermill email subscribers receive exclusive benefits such as customized casino offers, hotel discounts, and notification of upcoming tournaments and special events.

In appreciation of your continued Peppermill Passport Email Club membership, click "Yes" below by 11:59 p.m. PST 9/29/06 to be automatically entered into a drawing for a share of \$1,500 in FREE Play!

Sincerely,
The Peppermill Team



Yes, I wish to continue receiving emails from The Peppermill about special offers and promotions.



No, I do not wish to receive promotional emails from The Peppermill.

Prior consent



Your Pet's Details

Pet's name *

Type of pet

Cat Dog *

Male Female *

Pet's date of birth

/ *

Date of last treatment

/ /

-or-

*

Frequency of reminders

*

Reminders to start from

Note: Reminders will be sent at the selected frequency at 9.30am, starting from the selected start date.

SMS Text Reminder

As part of the service we are pleased to offer a FREE SMS text based reminder.

YES, please also send me an SMS alert

(Please note that the SMS service operates only within the UK)

Mobile Number (no spaces):

Would you also like to subscribe to a monthly flea reminder?

YES, please send me monthly email flea reminders

YES, please send me monthly SMS flea reminders

Email address:





Prior consent (2)



- Prior consent is 'means-neutral' and could be achieved by a well drafted consent statement accompanied by an opportunity for the data subject to opt out

What are the limits on “soft opt-in”?



- PEC Regulations 2003, s22 (3) – Key Features:
- contact details of recipient obtained in the course of sale or negotiations for the sale of a product
- direct marketing material relates to your similar products or services; and
- the recipient has simple, free of charge means of refusing use of their contact details (at the time of initial collection, and on subsequent communications)
- “negotiations for sale” e.g. seeking a quote 
- exchange of correspondence with a retailer about the opening of a new branch 
- “similar products and services” – ICO approach is to focus on failure to comply with opt out requests 
- bought in lists 

Privacy notices code of practice (1)



- ICO consultation, ends 3 April 2009
- “a duty to actively communicate a privacy notice is strongest where the intended use of the information will be unexpected, objectionable or controversial, or where the information is confidential or particularly sensitive”
- “there is no point in informing people of obvious uses of their information”
- “make sure that where people do have a choice, they are given a genuine opportunity to exercise it”
- “[there is a] fundamental difference between telling a person how you are going to use their personal information and getting their consent to this”

Privacy notices code of practice (2)



- Legal status – “the Information Commissioner will use the standards in this code to inform his approach to enforcement action, for example, if he receives a complaint that personal information has been collected unfairly” (see also s51 DPA 1998)
- Code requirements that go beyond the law?
 - consider impact upon trend for parties to relevant contracts to comply with “codes of practice” (*whether legally binding or not*)
- “Layered” communications?
- Different policies for different customer groups?

"Opt in and opt out" - privacy and your brand



- Integrating privacy and your brand message
 - e.g. smile, the internet bank (the first UK online bank to be accredited with the ISO27001 Information Security certification)
- Is there enough competition in privacy?
- Privacy impact assessment
- see www.datonomy.blogspot.com



FAQs - some contract issues

- Who “owns” the customer in joint ventures between marketing parties?
 - Ownership of IP in the customer database v legal rights (under DPA 1998/PEC Regs 2003) to market to customers
 - The importance of appropriate warranties
 - Not “Party A has complied with DPA 1998 and other applicable laws” but “Party A will obtain such permission as party B requires to market to the JV’s customers”
- Should our privacy policy be part of our contract terms or terms of use?
 - ICO powers under Unfair Terms in Consumer Contracts Regulations 1999
 - An aside on social networking site terms and conditions

Facebook terms and conditions



- 4 February 2009
 - “You hereby grant Facebook an **irrevocable, perpetual**, non-exclusive, transferable, fully paid, **worldwide license** (with the right to sublicense) to (a) **use, copy, publish**, stream, store, retain, publicly perform or display, transmit, scan, reformat, modify, edit, frame, translate, excerpt, adapt, create derivative works and distribute (through multiple tiers), **any User Content.**”
 - Amended as follows:
 - “You may remove your User Content from the Site at any time. If you choose to remove your User Content, the license granted above will automatically expire, however **you acknowledge that the Company may retain archived copies of your User Content.**”

FAQs (2)



- Buying and selling customer databases
- Individuals who have signed up for the TPS but agreed to receive marketing calls
- How much marketing information can be put on customer bills
- The role of education – see e.g. the IAB's Online Behavioural Advertising good practice principles, in force September 2009
<http://www.iabuk.com/en/1/behaviouraladvertisinggoodpractice.html>

Datonomy



Data Futures

Average number of online passwords per UK user surpasses six.....	2010
Widespread adoption of ID cards in the UK.....	2011
Electronic ticketing supported by biometric identification.....	2012
New Data Protection Act.....	2013
Subject access rights become preferred means for individuals to store their data	2014
Volunteered personal information replaces marketing databases as dominant marketing paradigm	2015

www.datonomy.blogspot.com

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