CHURCHES' LEGISLATION ADVISORY SERVICE

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# CLAS CIRCULAR
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**CLAS is not qualified to advise on the legal and technical problems of members and does not undertake to do so. Though we take every care to provide a service of high quality, neither CLAS, the Secretary nor the Governors undertakes any liability for any error or omission in the information supplied.**

It would be very helpful if members could let us know of anything that appears to indicate developments of policy or practice on the part of Government or other matters of general concern that should be pursued.

# ODDS & ENDS

## Data protection: the GDPR and the PECR

**For information and possibly for action**

As members are well aware, the General Data Protection Regulation (GDPR) comes into operation from 25 May 2018 and several Churches have already issued guidance to their member congregations on what they should be doing to plan for it. There are two basic possibilities: that the data subjects give their active and unambiguous consent to their data being processed or that the organisation in question has a "legitimate interest" in holding the data.

***Data protection and "legitimate interest"***

The Information Commissioner's Office (ICO) advises that, though "legitimate interest" is the most flexible lawful basis for processing, you cannot assume that it will always be the most appropriate. It is likely to be so where you use people's data "in ways they would reasonably expect, and which have a minimal privacy impact, or where there is a compelling justification for the processing"; however, if you choose to rely on legitimate interests, *you are taking on extra responsibility for considering and protecting people's rights and interests*.

There is a three-part test for "legitimate interest". You need to:

- identify a legitimate interest;
- show that the processing is necessary to achieve it; and
- balance it against the individual's interests, rights and freedoms.

The legitimate interests can be your own interests or the interests of third parties. They can include commercial interests, individual interests or broader societal benefits. However, *the processing must be necessary*. If you can reasonably achieve the same result in another less intrusive way, legitimate interests will not apply. You must balance your interests against the individual's: if they would not reasonably expect the processing, or if it would cause unjustified harm, their interests are likely to override your legitimate interest.

Finally, if you are relying on it, you should keep a record of your legitimate interests assessment (LIA) to help you demonstrate compliance, if required, and you must include details of your legitimate interests in your privacy information.

Furthermore, *active consent means exactly what it says*: Recital 23 of the GDPR states that:

> "Consent should be given by a clear affirmative act establishing a freely given, specific, informed and unambiguous indication of the data subject's agreement to the processing of personal data relating to him or her … Silence, pre-ticked boxes or inactivity should … not constitute consent."

Getting the consent of the data subjects is probably the simpler and more foolproof option – the ICO's Guidance on it is here – because a plea of legitimate interest can be overridden by the adverse effect on the interests or fundamental rights and freedoms which require the data to be protected. On the other hand, from the point of view of the organisation, consent can also be seen as the least useful legal basis on which to hold information, given that the data subject can withdraw consent fairly easily.

Some member Churches are therefore operating on the basis that those who are in formal membership of a congregation – for example, members of a Church of England parish electoral roll – have given their implied or actual consent to their church's holding their information and that the church in question has a legitimate interest in holding that information – that the data is used "in ways they would reasonably expect and which have a minimal privacy impact, or where there is a compelling justification for the processing."

***The Privacy and Electronic Communications legislation***

However, the GDPR (along with the Data Protection Bill currently going through Parliament that will incorporate it into domestic law) is not the only legislation in play: there is also the Privacy and Electronic Communications Directive, as amended, which was transposed into UK law by the Privacy and Electronic Communications (EC Directive) Regulations 2003 (PECR). The ICO's guidance is here.

Under the PECR, you may make contact with members of the congregation for the purposes of marketing *in writing or in print* without any sort of prior consent. However, as soon as you attempt to do so by electronic means – even a one-line covering e-mail for a pdf newsletter, you attract the provisions of the PECR 2003. In order for it to send e-mails and texts for marketing purposes or (however unlikely) to use automated calls with a recorded message, *an organisation must have the recipient's consent* and, crucially, *there is no "legitimate interest" alternative justification*.

A new version of PECR is currently in gestation and it may well come into force after the UK leaves the EU. Nevertheless:

- Organisations are still bound by the existing 2003 Regulations, and

- Like the GDPR, it is at least a reasonable supposition that, in order to trade freely with the EU after Brexit, the UK will have to maintain something very like EU data protection standards in relation to electronic communications.

And Article 16 Paragraph 1 of a leaked version of the draft Directive currently under discussion states that:

> "The use of electronic communications services by natural or legal persons for the purposes of transmitting direct marketing communications is allowed only in respect of end-users who have given their prior consent."

What the final version of revised Directive will cover, we obviously cannot predict; however, the critical issue for CLAS members even under the current Directive is, "What constitutes marketing"?

A weekly e-mailed newsletter or parish magazine is not marketing if, for example, it simply advertises times of services, reports on church activities and muses on the Sunday readings. If, however, it includes advertising for local tradesmen – as many do – or even future events for which a charge will be made such as a parish supper *and you e-mail it to your members*, that almost certainly will constitute 'marketing' for the purposes of PECR (or, at any rate, it would be extremely unwise to assume that it does not).

So, in our view, if you do *anything* that might possibly be construed as e-mail marketing – however innocuous it may appear to you – *you should seek the consent of each and every e-mail recipient*, however burdensome that may seem.

[Source: CLAS Summary – 17 April]