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Cookies – Your Obligations

It has been over a year and a half since the Information Commissioner's Office issued revised guidance on how websites should use cookies for storing information in users' browsers. Now seems as good a time as ever to remind you of your obligations.

Background

By way of background, a cookie is a small file of letters and numbers sent from a website and stored in a user's web browser that collects information about users, such as their names, addresses, e-mail details, passwords and user preferences. Generally speaking, cookies can be divided into four groups:

- strictly necessary cookies - these cookies are required for the operation of a website (they include cookies that enable users to log into secure areas of a website, use a shopping cart or make use of e-billing services);
- performance cookies - these cookies allow a website to recognise and count the number of visitors and to see how visitors move around the website;
- functionality cookies - these cookies recognise users when they return to a website and enable personalisation of content and preferences; and
- targeting cookies - these cookies record the browsing history of each user and can be used to personalise advertising displayed on a website.

Legal requirements for using cookies

A website may only place cookies in a user's browser if:

- the user has been provided with clear and comprehensive information about the purposes for which the cookie is stored and accessed; and
- the user has given consent.

Information to be provided

There is no set way in which information should be provided. The key is that users must have an understanding of the potential consequences of allowing storage of a cookie in a browser.

We recommend that a two-tier approach is taken to providing information. Firstly, a short form cookie notice should be used, which can be done in a number of ways:

- by way of a static information banner at the top or bottom of a page (this method is currently used by the Information Commissioner's Office itself);
- by way of an easily identifiable, clickable icon to link to the information about cookies; or
- by way of popup windows or splash pages.

Secondly, the short form notice should link to a full cookie policy on a separate page (this could be included in a website's privacy policy) that includes a table or list of the cookies used and their purposes.

Consent

The EU's position on obtaining consent requires a user to give affirmative consent before a cookie is placed in a browser. The Information Commissioner's Office initially endorsed this approach before reversing its position to allow implied consent.

Although the Information Commissioner's Office acknowledges that an explicit opt-in mechanism would provide regulatory certainty, its guidance permits a website to rely on implied consent in connection with the storage of information or access to information using cookies (at least for non-sensitive personal data).

By way of a warning, the consensus view is that the Information Commissioner's Office's guidance is inconsistent with the majority of data protection regulators in the EU (who do not accept the use of implied consent). This could cause difficulties for UK websites that rely on implied consent to place cookies in equipment used by other EU citizens.

Enforcement

The Information Commissioner's Office has made it clear that it expects any provider that has not yet achieved compliance to be able to show that it has taken steps towards compliance already and it has a realistic plan to achieve compliance within a foreseeable timeframe.

The Information Commissioner's Office has stated that it will continue to take a practical and proportionate approach to enforcing the rules on cookies. If an organisation refuses to take steps to comply, or has been involved in a particularly privacy-intrusive use of cookies without adhering to its obligations, the Information Commissioner's Office will consider issuing monetary penalty notices.

Data Protection

For the sake of completeness, where the data contained in cookies can be linked to a name, a postal address or even an e-mail address, that information will amount to personal data and be subject to the Data Protection Act 1998.

For further information, please contact Paul Palik by telephone on 01473 298226 or by email at ppalik@prettys.co.uk

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