
Legal and Regulatory Update

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The implications of the Data Protection Act 1998 and the UK market research industry

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Abstract

This paper discusses how the market research industry in the UK has responded to the UK Data Protection Act 1998.

Introduction

In common with all sectors in the UK economy processing personal data, the market research industry has had to reappraise the codes of conduct, guidelines and processes which govern its activities to ensure compliance with the 1998 Act. Unlike direct marketing, the European legislation does not impose additional requirements upon organisations undertaking traditional, or 'classic', market research activities (defined in the ICC/ESOMAR Code of Conduct as confidential survey research), and in fact this industry can in theory take advantage of certain exemptions available to those processing personal data for statistical and scientific purposes — where the data are used with all personal identifiers removed.

Differentiating 'classic' market research

However, to ensure that the industry can claim this status and remain exempt from the clauses applicable to, for example, direct marketing, the UK market research industry needed to demonstrate to the Office of the Information Commissioner (OIC) that its standards and processes did not lead to personal data processed as confidential survey research being subsequently used for other purposes — such as database enhancement.

Maintaining a distinction between confidential survey research and data used at a personal level to support direct or database marketing and customer service activities therefore remains a very necessary and fundamental element within the codes and process standards governing the two sectors of the marketing industry. For example, both the Market Research Society (MRS) and the DMA in their respective codes of conduct outlaw practices under the overall heading of 'sugging' — selling under the guise of market research — and have publicly condemned such practices undertaken by non-members.

New challenges facing the industry

However, there is nothing illegal in using personal data collected as confidential survey research for other purposes, providing that these uses

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Customer databases and market research

are fully transparent to the data subject when they consented to provide the data (informed consent), and they were given the opportunity at the time of collection (interview) to opt out of these other purposes.

This latter point has become an increasingly important issue, as many market research companies are finding that clients are asking them to undertake data collection projects using confidential survey research techniques where some or all of the results will be used at a personal level. However, the MRS did not provide any framework, advice or guidance to enable members to undertake these types of projects without breaking the code of conduct.

This issue was therefore a key aspect of any review, but a further concern was the increasing use of customer databases, particularly those owned by clients, as sampling frames for confidential survey research projects and the need to ensure that this usage met the letter, and spirit, of the Act.

Project categories

Following discussions with the OIC, the MRS developed a comprehensive set of new guidelines for members covering all aspects of survey research and the legislation. Subsequently, these have been used to develop a set of MRS/BMRA process guidelines and as an appendix to the Market Research Quality Standards Association (MRQSA) BS7911 document developed as the quality standard for the supply side of the market research industry. The following paragraphs summarise the key points, the full details being available on the MRS website (www.mrs.org.uk).

The new guidance effectively splits market research data collection processes into two broad 'types' of project. Firstly, there is a framework for projects which meet the following 'classic' market research purposes, where the data from individual interviews will be aggregated and all personal identifiers removed:

Definition of confidential market research

'The application of scientific research methods to obtain objective information on people's attitudes and behaviour based usually on representative samples of the relevant populations. The process guarantees the confidentiality of personal information in such a way that the data can only be used for research purposes.'

The second broad type covers projects which, while meeting the first sentence in the above definition, would not meet the second key requirement of confidentiality as the resulting information will be used for other purposes (either in addition to or instead of the full 'classic' definition) such as database enhancement, analysing individual customer contact experiences, training etc.

Research data used for other purposes

'Projects where some or all of the data will be passed to the client at a personal level for purposes in addition to or instead of those defined in the 1998 Act and the MRS Code of Conduct as confidential ("classic") market research.'

For example, if a project contains a mix of questions where some answers will be presented in an aggregated form with all personal identifiers removed, while for other questions the information will be used

to generate sales leads, then the whole survey falls into this second type. The conditions covering these types of projects are:

- respondents must give their informed consent to all the purposes for which their data will be used and must be given the opportunity to opt out of purposes to which they object
- clients must be appropriately registered with the OIC for all the purposes for which the data will be used
- any samples drawn from a database must be screened through the DMA preference services, and all ‘do not contact’ markers on the database must be respected (while screening is not required for ‘classic’ confidential survey research projects, any markers indicating that customers do not wanted to be contacted for market research purposes should be respected, as should any to prevent over-researching of individual customers)
- projects must not be described or positioned as ‘classic’ (confidential) market research and interviewers must not show an MRS interviewer identity card, refer to the MRS code of conduct or the freephone MRS service (which enables respondents to check whether the interviewer works for a genuine market research company) or use a standard market research ‘thank you’ leaflet.

However, agencies can conduct these projects using their ‘research’ brand, rather than adopting a different persona.

Feedback to clients

Equally crucial in terms of the spirit within the legislation is that the new guidance allows an increased level of feedback to clients for research projects meeting the full definition of ‘classic’ research, especially when they are based on samples drawn from customer, or other, databases holding personal data.

- Agencies must notify to database controllers instances where an individual is either no longer at an address (but *not* the new address) or has died.
- An agency can, if requested by the client, provide a list of all those contacted in a project solely for the purpose of setting up ‘do not select for research’ markers (including those who declined to be interviewed on that occasion) to prevent over-researching individual people.
- Details of an individual complaint or dissatisfaction expressed by a respondent can be fed back to the client solely for investigation and resolution, providing that this feedback is completely separate from the information contained within the survey questionnaire, and that the respondent has consented to both this feedback taking place and the content of the feedback. If the client then subsequently uses this data for other purposes, they would be contravening the 1998 Act.

Addressing complaints or dissatisfactions

Strengthening the current rules

The new legislation has led to some other key changes or strengthening of existing rules covering 'classic' research.

- If there is any possibility that a respondent may need to be re-interviewed (other than for quality control purposes), then permission for this must be gained at the initial interview.
- If group discussions, or any interviews, are to be recorded (video or audio), then respondents must be made aware of this before they consent to be interviewed.
- Any video or audio tapes of interviews or group discussions provided to clients must be used for research purposes only (eg they must not be used for staff training or to illustrate points at a sales or service conference, etc).
- While merging 'classic' research data with other data at an individual record level does not breach the guidelines or the law, as long as the final dataset projects the identity of the data subject, care needs to be taken to ensure that matches using techniques such as postcodes do not lead to individuals being identified (eg only one customer in a defined postcode range).
- In 'business-to-business' research, the 1998 Act will apply if a respondent is being interviewed as an individual in their own right rather than simply as filling a role (eg finance director). If the interview collects personal details profiling that individual or collects information about their attitudes, behaviour etc, then it is likely that it will be covered by the 1998 Act.
- If a sample is drawn from a database, then respondents have the right to be told the source of their name and address if they request it. However, this information can be disclosed at the close of the interview if the identity of the database owner might influence answers to any questions.
- Respondents obviously have the right to withdraw at any point in an interview, and if they do then they have effectively withdrawn their consent to take part in the survey.

Respondents' rights

Defining explicit consent

Sensitive data and market research

One distinction between data collected as 'classic' market research compared with that collected for other marketing-related purposes relates to the collection of what the Act defines as 'sensitive' data. The legislation requires 'explicit' consent when collecting this type of data, and while 'explicit' is not defined clearly in the 1998 Act, in many cases this is viewed as requiring written consent, or the equivalent. However, in the case of 'classic' research this is not deemed to be necessary if the respondent has given their informed consent to being interviewed solely for confidential survey research purposes. Obviously, this does not apply to the second type of project where some or all of the data will be used for other purposes.

Client-supplier contracts

Notified purposes

The advice to those commissioning and undertaking market research projects is to ensure that there is a clear contractual relationship which clearly identifies where the data controller responsibilities lie (these could be joint client/agency in many cases), and ensures that any personal data provided by the client (such as a customer file) for use in a particular survey are used solely for that purpose throughout the whole research process. Clients also need to ensure that confidential survey research is a notified purpose in respect of customer databases before using them as sampling frames for market research. Obviously, the regulations covering the transfer of data outside the EEU apply equally to 'classic' research data, as long as they contain personal identifiers.

Using the Internet

International dimension

The guidance provided by the MRS and through the MRQSA obviously applies to all research methodologies and data collection channels — including research through the Web, where it is especially necessary to adopt a very transparent approach in order to gain and maintain the trust of would-be respondents. The international dimension is a bigger issue than for other data collection methods, and the European Society for Opinion and Marketing Research (ESOMAR) has produced detailed guidelines conforming to the EU directive for developing an effective strategy when using this channel (www.esomar.nl).

Transparency is the key

The emphasis throughout the MRS guidelines is to ensure that firstly there is a clear distinction maintained between 'classic' confidential research and other data collection purposes, and secondly that the principles of 'transparency' and 'informed consent' are fully embedded in the market research process. However, the increased flexibility described above provides the industry with a new framework to pursue a wider spread of projects while still maintaining the vital element of differentiation.

The next steps will be to contribute to any review of the EU directive, and to keep a watch on the proposed communications data protection directive.