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Dear Liz,

**Smart Metering Spring Package –  
Addressing Consumer Protection Issues**

Please find the response of the Information Commissioner's Office below.

The ICO has welcomed its involvement in the Smart Metering Implementation Programme so far and hopes that this will continue as the Programme enters its next phase.

Yours sincerely,

Jonathan Bamford  
Head of Strategic Liaison

## Smart Metering Spring Package – Addressing Consumer Protection Issues

The Information Commissioner's Office welcomes the opportunity to respond to the Smart Metering Spring Package, and has been very encouraged by the level of involvement that it has had with the Programme to date, and would be pleased to see this level of engagement continue as the Programme progresses. Being involved from the early stages means that the Privacy by Design approach is being embraced.

The Information Commissioner's Office has expressed concerns about 'aligning' consumers who have been part of the wave of 'early movers,' receiving smart meters, be they as part of a voluntary pilot or otherwise. By definition, these early movers are unable to benefit from lessons learned as the Programme progresses, however, it is important that they are not disadvantaged, and, naturally, it is a legal obligation that their personal data must be processed in compliance with the Data Protection Act 1998 (DPA98). If it is shown that a data subject has suffered detriment as a result of being an early mover, and complaints were received (to date, we have not), then the Information Commissioner's Office would investigate and expect that steps would be taken by the data controller to rectify this. Clearly, the preferred option is that events do not reach this stage and that the supplier instead ensures that they are compliant with the Act, introducing measures as necessary to accommodate consumers who are part of this early movement.

It worth clarifying here that the data being processed on a smart meter falls into the definition of personal data for the following reason: the data being generated by smart meters is linked to unique identifiers such as a meter identification number. This identifier is linked with the living individual who is responsible for the account. In other words, the device enables that individual to be singled out from other consumers, which, in data protection terms means that personal data is being processed and this must be done in compliance with the law.

The step change in ability for meters to process more detailed data about a consumer's lifestyle habits also creates the scope for a new type of privacy intrusion, with the potential to violate human rights legislation, for example there exists the potential for generating patterns suggesting when someone is at home, or having a shower.

Both aspects of data privacy need to be considered when assessing the position of consumers who have smart meters in the early stages of our understanding of them as otherwise vulnerabilities may be exposed.

Our approach to responding to this Consultation is to refer to aspects that are relevant to the DPA98. Many of the specific questions extend beyond our remit. Also, chapter 3, which is most relevant to us, does not have any specific questions assigned to it.

## Chapter 2: Prepayment and remote disconnection

In the smart metering context, just as in the pre-smart context, our main concerns here would revolve around fair processing, ensuring that the data subject understands the way that their personal data is being processed. In the smart meter setting, where the technology presents new and extensive possibilities for processing data, it is important that data controllers retain their focus on the requirements of the DPA98. For example, the ability to switch to prepayment mode may extend beyond the purposes that the supplier / data controller has stated for obtaining data.

With regard to processing personal data related to assessing vulnerability, in the context here of disconnection, this may fall within the definition of sensitive personal data if, for example, the vulnerability relates to health. No doubt sophisticated procedures are currently in place here to safeguard this important area, but there is no harm in reinforcing the fact that in the smart context, it is essential that this personal data is handled appropriately, with schedule 3 processing conditions being present where

sensitive personal data is involved, and appropriate security measures in place. It is worth bearing in mind that this must be properly embedded when the landscape becomes more complex with more third parties being involved in processing data. Furthermore, consumers must be made aware if their data is being processed differently because of vulnerability.

### Chapter 3: Privacy

The Information Commissioner's Office's views broadly coincide with those stated in this chapter, however, there are certain sections where there are additional points to make, or issues need reinforcing, and these are set out below.

Before these issues are examined in more detail, there is one other aspect concerning terminology that needs to be addressed. There has been some discussion between stakeholders about what should be regarded as "regulatory duties" specifically those activities related to meters which act as the justification for collecting consumption data at a given level of granularity. These "regulatory duties" could be mapped onto the DPA98 use of the "legitimate interests pursued by the data controller" as a condition for processing personal data. In other words, a "regulatory duty" might allow the data controller to meet the legitimate interests condition set out at paragraph 6, Schedule 2 of the DPA98. Because of the similarity in meaning, the ICO advises that care should be taken to ensure that each is used appropriately and consistently according to context. They should not be regarded as interchangeable. In any case, the responsibility for compliance with the DPA98 sits with data controller who will need to ensure that the use of both legal terms does not become confusing. It would be helpful for implementation guidance to ease this potential confusion wherever possible.

3.5 We would echo concerns that fair processing may not have been fit for purpose in that simply adapting existing policies may not have been sufficiently transparent in explicitly informing consumers about the differences between the dumb and the smart

context. Indeed we have raised this point in our own separate meetings with suppliers. In particular, there may be particular weaknesses where consumers live in a property where a smart meter is installed, for example a new build, and are not part of a voluntary pilot, where knowledge and engagement is likely to have been greater. For example, it may not be at all clear to consumers how their data is being used and who will have access to it and for what purposes, amongst other questions.

In our meetings with suppliers, we have discussed efficient methods for doing this, for example by ensuring that the meter fitter is in a position to explain the changes and respond to questions, with sufficient time allocated to do so.

3.9 The Consultation Document rightly points out that all data controllers have a legal obligation to process data fairly and lawfully. We see challenges ahead in ensuring that the new framework that will be brought about by the smart environment will sometimes make it difficult to identify the data controller, and their associated responsibilities, for example, when the Data Comms Co is established and as the network of third parties expands. There will need to be formal contractual arrangements in place between data controllers and data processors and a system of accreditation would be recommended for all parties. It has already been suggested that this could fall within the remit of the DCC. It is critical that in the early planning stages these roles and responsibilities are fully understood and are relayed properly to data subjects. As the current situation evolves, there is a risk that those consumers who are part of the 'early mover' wave of installations may be vulnerable in this way, so it is up to suppliers (the data controllers in the existing model) to ensure that these customers are not disadvantaged, and that they fully understand the data processing implications of having a smart meter, and their right to withdraw from this processing if they so choose.

One area that needs particular attention is that when data controllers need to obtain consent from customers to disclose their data, typically where enhanced services are being offered, beyond those which are regulatory duties, this consent must meet the

requirements of the Data Protection Directive 95/46 which sets out that consent must be freely-given, specific and fully-informed. Therefore data subjects must be given sufficient information about the personal data processing to make a genuine choice. The industry will need to devise effective and practical methods to enable data subjects to express their consent. Obtaining informed consent can present particular challenges in circumstances where the context is novel. However, in terms of smart metering, there is the potential for consumers to underestimate the changes as they exist in a familiar setting, i.e. the supply of energy to their homes. It is important that, whilst the supply of energy during the transition from pre-smart to smart will be (presumably) seamless, the way in which personal data is being processed will be entirely different, and this should be realised. The in-home-display will be a useful marker to signify the transition and raise awareness.

3.12 We understand that consumers who have engaged early, by definition, will not have had the benefit of a public information / education programme, but nevertheless should still be properly informed, as set out above.

3.13 Our view has always been that we support the provision of consumer choice where at all possible. But we would not recommend choice where, realistically, this cannot be given. In fact, if unrealistic choice is offered, it runs the risk ultimately of either derailing the programme or having to withdraw options offered to consumer, neither of which are appealing. Furthermore, if personal data is being collected for a purpose for which it cannot fulfil because too many data subjects have made the choice not to participate, then, in data protection law this runs the risk of being inadequate. Expectations must be managed. In terms of the public information campaigns, there needs to be a message that choice must be based on awareness and understanding that may well bring with it responsibilities for individuals for managing their personal data.

In short, realistic choice is to be encouraged, but only after having thought through the various models and the sliding scale of implications where the consumer has chosen to participate.