

Information Commissioner's Office

Consultation:

Direct Marketing Code

Start date: 8 January 2020

End date: 4 March 2020

Introduction

The Information Commissioner is producing a direct marketing code of practice, as required by the Data Protection Act 2018. A draft of the code is now out for public consultation.

The draft code of practice aims to provide practical guidance and promote good practice in regard to processing for direct marketing purposes in compliance with data protection and e-privacy rules. The draft code takes a life-cycle approach to direct marketing. It starts with a section looking at the definition of direct marketing to help you decide if the code applies to you, before moving on to cover areas such as planning your marketing, collecting data, delivering your marketing messages and individuals rights.

The public consultation on the draft code will remain open until **4 March 2020**. The Information Commissioner welcomes feedback on the specific questions set out below.

You can email your response to directmarketingcode@ico.org.uk

Or print and post to:

Direct Marketing Code Consultation Team
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire SK9 5AF

If you would like further information on the consultation, please email the [Direct Marketing Code team](#).

Privacy statement

For this consultation we will publish all responses received from organisations except for those where the response indicates that they are an individual acting in a private capacity (eg a member of the public). All responses from organisations and individuals acting in a professional capacity (eg sole traders, academics etc) will be published but any personal data will be removed before publication (including email addresses and telephone numbers).

For more information about what we do with personal data please see our [privacy notice](#)

Q1 Is the draft code clear and easy to understand?

- Yes
- No

If no please explain why and how we could improve this:

In the UK, lotteries can only be run to raise funds for good causes, including charities. For many members of the Lotteries Council, direct marketing is a very important way through which they raise as much as money as possible for such good causes and charities. It is therefore very important for our members that your statutory code of practice is clear in terms of what members must do to comply. There are various aspects of the draft code which presently seem unclear, which we have listed below.

1. On page 31 of the draft code, the ICO has given a *“good practice recommendation”* that consent should be obtained for all direct marketing, including direct marketing that is not covered by PECR. On pages 34 to 36, however, the draft code outlines how direct marketing might be done under legitimate interests. It is not easy to understand on what basis the ICO is making a good practice recommendation to undertake direct marketing using the basis of consent, given GDPR does not seem to suggest one particular legal basis is better than another.
2. On page 33, in the context of what is required if consent is being used as the basis for direct marketing, the draft code says the request for consent must include naming *“any third party controllers who are relying on the consent for direct marketing”*. This goes further than the current advice on the ICO website under right to be informed which states those that must be named are *“the recipients or categories of recipients of the personal data”*. While the current advice includes *“categories of recipients”* as constituting sufficient naming of a third party who may wish to end up relying on the consent as a basis for direct marketing, the draft code now appears to be suggesting such a third party would itself need to be specifically named, rather than falling within a category or industry sector, such as *“gambling”* or *“charity”*. If data brokers are required to specifically name all of the third parties that they sell data to, as well as to specifically name all the organisations who may ultimately end up wanting to send direct marketing to the data subject, this could lead to long and unwieldy lists. At present, it is therefore unclear, and not easy to understand, what the ICO is saying is required here. If the ICO is suggesting anyone who wanted to use consent as the basis to undertake direct marketing needs specifically named third parties within the request for consent, it would be helpful if this was stated, along with clarity being given on what the ICO envisages here. In particular (i) is there a maximum number of names before the ICO would say such consent is no longer *“specific and informed”* (given many different organisations may want to end up direct marketing based on the consent); (ii) do the third parties have to be named on the first page of the request for consent or can there be a click through; and (iii) is the use of categories no longer acceptable at all in requests for consent and/or privacy notices, or just for direct marketing? Some examples of a compliant request for consent/privacy notice and some specific examples of what is not acceptable would be helpful.
3. On pages 35/36, and despite the present *“good practice recommendation”* on page 31 to use consent as the basis for direct marketing, the draft code does acknowledge that direct marketing may be undertaken on the basis of legitimate interest. Although page 36 of the draft code gives an example of using legitimate interest as a basis for direct marketing, it is a first party example. A large variety of industries and sectors are likely to wish to use legitimate interests as a basis for direct marketing in circumstances where data has been

purchased from a data broker. It would therefore be much more helpful to have an example setting out the ICO's position regarding the applicability of legitimate interests as a basis for direct marketing where data has been purchased from a data broker. In particular, it would be helpful to understand what is required for "*reasonable expectation*" in regard to the data capture notice/Privacy Notice of the party who first collects the data. Does the information provided at the point of data capture need to specifically name every organisation who might end up using the information for direct marketing (including naming anyone providing it on to the organisations who ultimately want to undertake direct marketing)? Is it sufficient for the point of data capture to contain a link to a Privacy Notice, which itself lists every organisation who might end up sending direct marketing based on the data captured? Is it sufficient for the point of data capture/Privacy Notice to refer to industry sectors (eg "*gambling*" or "*charities*") which might end up sending direct marketing on the basis of the information captured, rather than specific organisations? If individual organisations (rather than sectors) must be named at the point of data capture and/or in the Privacy Notice referred to at the point of data capture, if there is a long list of such organisations, does this still satisfy the "*reasonable expectations*" requirement? Or is it the ICO's position that if the list is longer than a particular number it would not give rise to a "*reasonable expectation*" because it would not be reasonable to assume someone would read such a long list? If a large number of industry sectors were named, such that an individual could end up receiving direct marketing from a huge number of different organisations who would fall within such categories, is it the ICO's position this would not satisfy the "*reasonable expectations*" requirement, on the basis someone can't reasonably expect to receive marketing from any organisation in any sector? All of the above questions are unclear from the draft code. These are fundamental issues on which the code needs to clarify the ICO's position. Effectively, the ICO needs to clarify in the code whether it is of the view that legitimate interests may in future be used as a basis for direct marketing in respect of data purchased from a data broker (and if so, what the ICO's expectations are in this regard), or not. At present, this is unclear from the code. It would be helpful if the final version of the code included an example of an organisation obtaining information from a data broker which they wished to undertake direct marketing based on legitimate interests to illustrate the ICO's position.

4. Page 40 of the draft code states that "*it may be sensible to periodically ask individuals to update their own details*". Many of our members do not operate a model where customer can log into an account to update details after initial sign up. It seems likely this would also be the case for operators in a large variety of industries. It would therefore be helpful to have clarity from the ICO on whether in such circumstances the ICO views it as reasonable for organisations to rely on customers telling us when they change address, especially if the organisation periodically reminds customers to contact them to update their details if they have changed address.
5. Page 42 of the draft code contains a good practice recommendation that "*when sending direct marketing to new customers on the basis of consent collected by a third party we recommend that you do not rely on consent that was given more than six months ago.*" If data is purchased from a data broker, it is likely to have different collection dates. This, combined with the fact that good data management can take time, could result in such consents becoming "*invalid*" during the time preparing the data for a mailing campaign. The ICO is therefore invited to consider whether the timescale specified in this recommendation is realistic. Clarification is also requested on whether, if legitimate interest following purchase from a data broker is used as the basis for direct marketing, the ICO is of the view that the "*reasonable expectation*" part of the legitimate interests test would also expire after a similar timeframe.

6. On page 48, in respect of Article 14 Notice, the draft code states that an organisation must provide the information to the data subject within a month of receiving the data, even if the organisation has not sent out marketing to the data subject within that time. In practical terms, as many marketing campaigns may take longer than a month, this seems to state the data subject should be contacted twice. Once with the privacy information, and then with the actual marketing itself. This would seem to defeat the purpose of the clause, as it will increase the number of mailings received by the data subject, in addition to the time and cost implications for the company concerned. We would therefore request that further consideration be given to this in the final version of the code. Furthermore, page 14 of the draft code sets out that direct marketing is not just the act of sending a direct mailing but everything which is done behind the scenes to get to that point. It is therefore unclear whether the code is suggesting organisations obtaining data from a data broker for the purposes of direct marketing have to inform data subjects they obtained their data, even if the organisation decides to screen them out from receiving a marketing communication from them. It would not seem in the data subjects' interests to receive a communication from an organisation informing them their data had been provided by a data provider, in circumstances where the organisation which purchased the data has decided not to actually market to that data subject anyway. Again, we would request this be considered, and clarified in the final version of the code. In particular we would request clarification in the final code whether, if a data subject whose data was obtained from a broker for consideration of direct marketing was screened out by an organisation from receiving direct marketing from them, sending such an individual correspondence that the organisation had obtained their data would fall within the exemption of disproportionate effort. It would also be helpful to have examples of what the ICO considers would constitute disproportionate effort, and therefore fall within the exemption.
7. On page 51, the draft code states "*any unusual or unexpected processing ought to be at the forefront of any layered privacy information.*" It would be helpful to see more clarity and examples of what would be "*unusual or unexpected processing*" to ensure our members can draft their Privacy Policies accordingly.
8. Page 56 of the draft code states that publicly available data can be used for direct marketing, but it is "*not fair game*". We are aware that a number of data brokers use the open version of the electoral register. The ICO goes on to say that you cannot assume that simply because an individual has put their personal data into the public domain, they are agreeing to it being used for direct marketing purposes. It is likely that the personal data from the electoral register would be processed under Legitimate Interest. It would therefore be helpful to understand how this interacts with the statement on page 36 of the draft code that to pass the balancing test for Legitimate Interest would require an option to opt out. As we understand it, there is an option on the Government website to opt out, but the privacy information is very high level and generic. It does not name any category of third party who may purchase the data. It would therefore be helpful if the final version of the code clarified whether the ICO is of the view that direct marketing on the basis of legitimate interest to individuals whose data has been obtained from a broker who obtained the data through the electoral register satisfies the "*reasonable expectations*" requirement of the test. This would seem a significant, cross-industry matter of concern which is presently unclear, and which the final version of the code should specifically address.
9. Page 56 of the draft code states that "*if you use non-personal data such as assumptions about the type of people who live in a particular postcode to enrich the details you hold about an individual it will become personal data*". We understand end users may enrich

householder level data they receive from the Royal Mail (PAF data) in order to target the right areas for their marketing. Currently, this does not appear to fall within "*direct marketing*" as it is partially addressed mail with no name attached. Looking at the statement on page 56, it seems that, if the end user only removes suppressed/vulnerable customers, this would not constitute marketing. If the profiling is wider than this, it is currently unclear whether applying such non-personal assumptions could make such PAF data, personal data. There has been commentary on social media to this effect. It would be helpful for the final version of the code to clarify whether or not non-personal data enriched with assumptions about the type of people who live in a particular postcode would become personal data.

10. Page 74 of the draft code provides that if "*tracking pixels*" are used within direct marketing emails, operators need to be aware that PECR rules on cookies and similar technologies will also apply. It would be helpful for the code to clarify whether the ICO views a tracking pixel within a service email to check whether the email has bounced or been opened as an essential or non-essential cookie. If the ICO's view is such a tracking pixel is non-essential such that consent is required, it would be useful for the code to contain examples of how operators may obtain consent to such pixels from customers who join up online.
11. Page 90 of the draft code provides that where "*look-alike*" audiences are to be targeted, consent is likely to be the basis used. It would be useful for the final version of the code to clarify whether the opposite consideration, described below, would also require consent or whether Legitimate Interest would be an appropriate legal basis. That is the situation where existing customers' email addresses are provided to ensure they don't receive undirected social media marketing from the organisation for which they are already a customer.

Q2 Does the draft code contain the right level of detail? (When answering please remember that the code does not seek to duplicate all our existing data protection and e-privacy guidance)

- Yes
 No

If no please explain what changes or improvements you would like to see?

Please see the answers to Q1 above, in respect of which further detail is requested in the final code.

Q3 Does the draft code cover the right issues about direct marketing?

Yes

No

If no please outline what additional areas you would like to see covered:

Please see the answers to Q1 above, which details the areas which we would like addressed in the final version of the code.

Q4 Does the draft code address the areas of data protection and e-privacy that are having an impact on your organisation's direct marketing practices?

Yes

No

If no please outline what additional areas you would like to see covered

Please see the answer to question 1 above, which sets out the areas having an impact on our members, which we would request are addressed in the final version of the code.

Q5 Is it easy to find information in the draft code?

Yes

No

If no, please provide your suggestions on how the structure could be improved:

Q6 Do you have any examples of direct marketing in practice, good or bad, that you think it would be useful to include in the code

Yes

No

If yes, please provide your direct marketing examples :

Q7 Do you have any other suggestions for the direct marketing code?

Please see the answer to question 1 above, which details our suggestions for the final version of the code.

About you

Q8 Are you answering as:

- An individual acting in a private capacity (eg someone providing their views as a member of the public)
- An individual acting in a professional capacity
- On behalf of an organisation
- Other

Please specify the name of your organisation:

The Lotteries Council

If other please specify:

Q9 How did you find out about this survey?

- ICO Twitter account
- ICO Facebook account
- ICO LinkedIn account
- ICO website
- ICO newsletter
- ICO staff member
- Colleague
- Personal/work Twitter account
- Personal/work Facebook account
- Personal/work LinkedIn account
- Other

If other please specify:

Gambling Commission

Thank you for taking the time to complete the survey