

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](mailto: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 (e.g. a member of the public). All responses from organisations and individuals acting in a professional capacity (e.g. 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:

Although on the whole the code is reasonably clear, we believe that the ability to fully understand the content is very much linked to the extent of the readers knowledge and expertise in the technical and legal requirements of data privacy legislation. For many organisations, this is of no concern as they will have subject matter experts on hand to guide staff through the meaning of processing activities however, for SME's and particularly within the Charity sector, very small charities, we feel they will struggle significantly to understand the nuances.

We understand the need for the ICO to develop and implement a Code which provides practical advice and examples however, are concerned that with the new statutory nature of the Code, the mixture of legal requirements and best practice requirements comes across as limiting, and restricting the ability of organisations who may after careful consideration, informed processes and evidence, determine that a different approach is fair and lawful. In particular, we would like to see the Code give much more emphasis on organisations being individually accountable for their decision-making process in processing personal data for direct marketing purposes. We feel this Code differs from previous guidance issued by the ICO which adopts a principles-based approach based on fair and transparent processing and are concerned that the more prescriptive nature of the guidance contained in the Code as drafted, tells organisations what they can or can't do rather than guiding them towards determining how best to embed GDPR into their direct marketing practice.

We feel this is particularly prevalent in the following areas:

- The inclusion of best practice recommendations throughout the document. We feel that with the updated statutory nature of this Code, best practice recommendations should be removed so the Code can focus on how organisations can be compliant. The discretion and accountability for decision-making should be left to the organisation. Where there is more than one legal/valid option, we feel the Code should explain these clearly rather than providing an opinion on which option organisations should adopt. We believe that the recommendations do not provide clarity, in fact they probably do the opposite and would indicate that there is a hierarchy to the lawful bases which isn't correct. In particular, we have significant concerns over the statement quite early on that consent should be used for all marketing activity even if the law does not require it. This is a wide-sweeping statement that we believe will cause confusion particularly in the charity sector. We believe it takes away the accountability for individual organisations and may mean people think about consent as a tick box compliance exercise rather than them taking responsibility for ensuring they use the lawful basis which is most appropriate for their supporters or beneficiaries.
- There are a number of places throughout the Code which make assumptions about what members of the public understand or expect. We are concerned that these assumptions may not be wholly representative of all individuals and although we appreciate everyone has the same privacy rights, we are very aware that not everyone has the same expectations or preferences. We would like to see the Code place more importance on organisations understanding the expectations of their customers, donors, supporters etc. and being able to use this to determine and judge what is fair or expected. This might be done by the Code providing some guidance or check lists on what organisations can do to help them make decisions which treat individuals fairly and best meet expectations.

- We appreciate and are grateful for the level of practical examples contained within the Code and that many of these will help the Charity sector. However, we do note that many appear to focus on practices that aren't considered acceptable practice and we feel there would be huge added value in these examples being complemented by further information or guidance on how the same activity could be done fairly and lawfully. Without that, there is a risk that individual organisations will believe it's the activity which is unlawful as opposed to the way in which it was undertaken. Alternatively, perhaps some of the examples could be positive examples of how a specific practice could be lawful and fair.

Finally, we would ask that thought is given to the glossary of terms at the end with a view to more extensively populating the contents. There are a number of technical abbreviations and descriptions that are not adequately defined. We would also question whether this should be at the beginning of the document as it quite quickly goes into using abbreviations that some less experienced professionals may not fully appreciate. Alternatively, perhaps the first use of the abbreviation should only follow the full description.

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

On the whole, we feel that the code covers a good level of detail – it is certainly a comprehensive document and we wouldn't wish to see it any longer. It is good to see the Code covering more modern examples of marketing activity and attempting to address some of the technological advancements since it was last drafted. Having said that, we feel that there could be improvements in the consistency between the content of this Code and other guidance already available in areas such as fair processing notices, retention etc. In addition, and in line with concerns detailed above, we would also like to see more focus placed on allowing organisations to take ownership of accountability and judgement in the principle-based nature of data protection and marketing practices. Overall, we understand this may mean a slightly less detailed piece of guidance in some areas but feel strongly that organisations should be given the tools to make the decisions right for them and as currently drafted are concerned that some organisations will not consider this fully and instead will just apply best practice recommendations irrespective of whether this is right for their audience.

We would also raise a comment about the social media section. This is a welcome addition to the guidance but we have concerns that the approach taken in this regard is too broad and assumes all social media and social media platforms have the same uses, terms and conditions, audiences etc. Whilst we appreciate it is not necessarily appropriate or possible for the guidance to be platform specific, we do feel it should include more reference to or examples of what to consider when using different platforms that would help organisations inform their internal practices on a more personal level. It would also be good to see some guidance and advice for organisations that are struggling to develop relationships with the social media platforms in relation to the shared legal responsibilities that the Code quite rightly sets out. Practically, many large platforms adopt a take it or leave it approach to their terms of business which can leave some organisations with a compliance dilemma or in a position where they do not have the same level of influence to ensure a fair and truly joint relationship.

see?

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:

Overall, the code covers many issues regarding direct marketing and it has adopted an incredibly broad definition of direct marketing purposes.

As mentioned elsewhere in our submission, we feel there is a need to review this guidance against other advice provided and perhaps this requires some thought as to how to include enough detail that other guidance notes are not duplicated without implying that the method set out in this guidance is the only option available to organisations.

As organisations look for new and innovative ways to market their products, services and organisations to their existing and future customers it is important this guidance can keep up and is reviewed regularly. If the focus of the document can be put on organisations being given the tools to make informed decisions and to take ownership of their accountability, this should help future proof the document.

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

The areas of interest to us in marketing, as a charity, are covered within this document. However, there are some specific areas where we have thoughts, comments or where the Code as written has created questions about interpretation and meaning. These are summarised below:

- Profiling – profiling itself is a term used for a wide-range of activities. This might go from deciding which people to send a marketing campaign to, to attempting to find new audiences, or undertaking research of who may be able to provide a large donation to the Charity for a specific project. Although we understand and appreciate some aspects of profiling can be intrusive, many are there to protect or help the individuals and ensure they do not receive inappropriate or too much marketing material. The guidance doesn't necessarily give enough weight to the variation of profiling activities and it is important this is distinguished much more clearly. We would like to see the organisation being guided in how it can use its discretion and common sense to ensure profiling activity is lawful and fair under a range of circumstances rather than a blanket implication that profiling without consent is "unlikely to be fair".
- Service messages – as a Charity, service messages tend to take on a slightly different interpretation to many commercial organisations. There are some messages which are clearly administrative and others where we consider them to be stewarding those who have a relationship with our organisation, such as thank you letters. It feels inappropriate for us to have to ask for permission/consent to send someone a letter thanking them for their donation because in explaining what difference the donation has made this has become a piece of marketing. We wonder whether this is an inadvertent interpretation based on the guidance and whether there is scope for clarifying the ability for organisations to have independent judgement on the point at which promoting our aims truly becomes marketing.
- Viral marketing / refer a friend – we note with interest the section on refer a friend/viral marketing and the need to have consent from all parties concerned for any electronic marketing to be compliant. Similar to service messages, this may have an indirect impact on the charity sector in, for example, event participation. Would the regulators consider that if a charity asked people to sign up to a challenge event and invite their friends this would then fall within a "tell a friend" campaign? Similarly if a volunteer committee member reaches out to friends and families in relation to the purpose for the committee, does that also count as refer a friend marketing?
- We note that the Code refers to the European Data Protection Board and references financial penalties in €. We would assume that an exercise will take place to review this and ensure it remains relevant in light of the UK's exit from the EU prior to final publication.
- There are some location-based direct marketing tools that we are required to use, for example in excluding certain areas for raffle advertisements. There is some confusion around how these requirements fit with the location-based section on page 96.
- We have concern about the reference to needing a pre-existing relationship with an individual to send them marketing by post which, where organisations choose to use legitimate interests for postal marketing, would not be required. Greater clarity around this would be useful to avoid any misunderstanding or misinterpretation. This is referenced on page 36 and later on page 66.

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:

Overall, for such a large document, it is relatively easy to navigate although we do have some comments around the structure and layout which we believe would help to improve some areas and these are summarised below:

- Although we appreciate the purpose behind having the summaries at the beginning of the document, we have some concern that they could be easily taken out of context resulting in a less personal approach by organisations to their practices.
- There are a lot of abbreviations, not all of which are fully defined for the first use and the glossary doesn't always include all terms e.g. direct marketing is not defined in the glossary. In addition, the glossary is inconsistent including TPS but not MPS.
- We would like to see expanded use of "at a glance" sections perhaps incorporating checklists that can help organisations cover off the basics.
- We suggest changing the ticks and crosses in the table across pages 30-31 to 'Yes' or 'No' values. We feel the 'Live' phone calls line is particularly confusing as is currently written.
- We would like to see more prominence on the restrictions to the use of soft opt-in referenced on page 76.
- There are some areas where we feel the descriptions are confusing e.g. final paragraph on page 17. We would welcome a more succinct/straightforward way of presenting this information.

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 :

We believe that more focus should be had on positive practical examples or on explaining why the example is considered poor practice. This will help organisations to understand that sometimes it is the way a practice is undertaken which makes it unfair or unlawful, not the practice itself. Previous guidance issued by the regulator used to provide good and bad examples, this was always really useful to help inform the distinction of principle-based legislation.

More examples of behavioral advertising or social media marketing would be very much appreciated.

Further, we would like to see examples of how an organisation can ensure its consent asks are granular and specific whilst being concise and easy to understand. Quite often these requirements contradict each other and to understand how the regulator believes it is possible to achieve both simultaneously would be very much appreciated.



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

We would raise the below comments and thoughts having read the draft of the revised Code in depth. These may be points where we believe further clarity would be of use or questions about the potential interpretation of the content and examples as drafted.

- In the summary, 'Profiling and data enrichment' section, the code discusses non-personal data assumptions becoming personal data. In this regard, the context in relation to the point at which it becomes personal data is a little unclear and perhaps clarification would be useful or an example to validate the statement? We would assume that this would be the point at which the "non-personal data assumptions" are actually attached to or associated with a specific individual.
- In the same section, there is reference to buying additional content for existing customers or supporters and the justification for tracing individuals. As mentioned previously, the summary doesn't give any context to these statements (although this comes later in the document) and may well imply if not followed through to the detailed sections that these practices are always unfair or unlawful. However, we would assume that the intention is not to prevent services such as Royal Mail Redirection from continuing (which currently works on permissions managed by Royal Mail and, last time checked, was an opt-out) or registers such as the bereavement registers, which many organisations choose to run their data against to ensure communications are not sent to those who have recently passed away thus causing distress to family and relatives.
- We read with interest your example on page 27 relating to a supermarket marketing its customers about its decision to support a charity. It would be interesting to understand whether the suggested best practice requirement to screen against the Charity's suppression list is something which would apply where the marketing is instigated solely by the supermarket or whether it makes a difference if it's a jointly instigated marketing activity? We would foresee information sharing challenges with the practical implementation of running another organisations customer lists against our suppression list.
- There are many references throughout the draft Code to the Article 13 and 14 requirements for fair processing notice information, including page 33 in relation to how consent applies to direct marketing. In isolation, we would question whether this needs to more closely mirror/reference the previously released guidance from the ICO on Fair Processing Notices and the ability to use layering in the delivery of the information. The current drafting could be considered contradictory and require all information to be given immediately which would result in substantial, long and complex statements appearing on all information unnecessarily. Similarly, we note your advice that the example provided on page 50 is considered too vague. It would be useful to understand what might resolve this as part of the example.
- There appears to be an error near the bottom of page 40, an additional 't' part way through a sentence that can be removed. There are also some grammar errors on page 4 (e.g. it should be "additional" not "addition"), and an unnecessary capital 'B' used in "because" in the example on page 62. Page 56 'At a glance' in the second paragraph should read "...to profile people on the use of their special categories...), and on page 68 it states 'CPTS' instead of 'CTPS'.

- Under the 'Can we use data cleansing and tracing services' section on page 62, the Code advises that PECR confirms consent is non-transferable. We appreciate this paragraph is drafted in specific relation to the use of data cleansing or data tracing services however, there is a risk that this also implies that if an individual advises an organisation of a change in their details such as a new email address or telephone number, any previously obtained consent relating to that channel is no longer valid and the individual must be re-permissioned. This feels overly burdensome, and we'd seek some context or assurances that this relates solely to purchased/traced information.
- We believe the top two paragraphs on page 83 could be misunderstood. We assume these relate to joint data controller relationships or arrangements which were previously understood to be "data controllers in common" and are not intended to suggest that where the data processor sends the marketing as part of a contractual arrangement with a data controller, the data processor requires separate and specific valid consent to send the marketing for its organisation.
- There are a number of terms within the document which we appreciate are taken from general data protection terminology however believe organisations would benefit from some guidance or checks/balances on how to interpret what this means for them. This includes words such as "unlikely", "reasonable" and "intrusive". In addition, further guidance to enable us to interpret terms such as "large-scale", "anti-social" and "frequent redialing" would be useful.
- The definition of 'profiling' in the glossary specifically refers to "automated" processing but there is no definition or quantification of "automated". Not all profiling activity is solely automated, some will be completely manual, some will have degrees of automation within them e.g. a person configures a computer to run a report regularly. Currently there is a need for organisations to pragmatically apply the regulations to activity which is profiling but which happens manually or in a non-automated fashion. We believe there would be benefit in revisiting this to assist organisations in applying the recommendations and legislative requirements appropriately across all profiling activity.
- With regard to the section 'What do we do if someone objects to our direct marketing', and specifically with reference to making individuals aware of their rights to object to processing for direct marketing purposes, we would ask whether including this information within a privacy policy is considered "separately from other matters"?
- We would recommend adding the Fundraising Preference Service (FPS) to the suppression services listed on page 111.
- Under the 'What do we need to tell people if we collect their data from other sources' it notes that we need to provide the source of the data. While we agree with this principle, in practice this will be hard to do as part of the Fair Processing Notice we already use. As the source may vary, we would suggest it is acceptable to provide the specifics on request, or as part of a second tier/layer within the privacy information.
- We would suggest either adding to the table on page 79, or inserting an additional table, to cover whether GDPR applies, as well as PECR to show the interaction between the two pieces of legislation more clearly.

# About you

Q8 Are you answering as:

- An individual acting in a private capacity (e.g. 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:

Great Ormond Street Hospital Children's Charity

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:

Thank you for taking the time to complete the survey