

## ICO call for views on a direct marketing code of practice

The Information Commissioner is calling for views on a direct marketing code of practice.

The Data Protection Act 2018 requires the Commissioner to produce a code of practice that provides practical guidance and promotes good practice in regard to direct marketing.

While direct marketing is an important and useful tool to help organisations engage with people in order to grow their business or to publicise and gain support for their causes, it can also be intrusive and have a negative impact on people if done badly. This can cause reputational damage to organisations and, in some cases, result in fines or other regulatory action for breaking data protection laws.

So it is important that organisations ensure their marketing activities are compliant with data protection legislation (the General Data Protection Regulation and Data Protection Act 2018) and, where necessary, the Privacy and Electronic Communications Regulations 2003 (PECR).

We have previously published detailed [direct marketing guidance](#). The new code will build on that guidance and address the aspects of the new legislation relevant to direct marketing such as transparency and lawful bases for processing, as well as covering the rules on electronic marketing (for example emails, text messages, phone calls) under PECR.

The European Union is in the process of replacing the current e-privacy law (and therefore PECR) with a new ePrivacy Regulation (ePR). However the new ePR is yet to be agreed and there is no certainty about what the final rules will be. Because of this we intend for the direct marketing code to only cover the current PECR rules until the ePR is agreed. Once the ePR is finalised and the UK position in relation to it is clear we will produce an updated version of the code which takes this into account as appropriate.

This call for views is the first stage of the consultation process. The Commissioner is seeking input from relevant stakeholders, including trade associations, data subjects and those representing the

interests of data subjects. We will use the responses we receive to inform our work in developing the code.

You can email your response to [directmarketingcode@ico.org.uk](mailto:directmarketingcode@ico.org.uk)

Or print and post to:

Direct Marketing Code Call for Views  
Engagement Department  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire SK9 5AF

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

Please send us your views by **24 December 2018**.

### **Privacy statement**

For this call for views we will publish responses received from organisations but will remove any personal data before publication. We will not publish responses from individuals. For more information about what we do with personal data please see our [privacy notice](#).

## Questions

Q1 The code will address the changes in data protection legislation and the implications for direct marketing. What changes to the data protection legislation do you think we should focus on in the direct marketing code?

- It would be helpful to have some clarity regarding whether the 'soft opt-in' approach under PECR is compatible with the lawful basis for processing under GDPR. The 'soft opt-in' could be considered a legitimate interest for sending marketing information. However, confirmation of this approach would be useful. Additionally, examples of the types of marketing processing that can be based on legitimate interests would be helpful.
- We understand that the GDPR right to object and PECR right to opt out of direct marketing are compatible. However, confirmation of this approach would also be helpful. Additionally, it would be helpful to understand whether under the right to erasure, enough data can be retained on suppression lists to make sure marketing is not accidentally sent to an individual who has opted out/objected.
- It would also be helpful to understand whether a new opt-in overrides a previous unsubscribe/objection request.

Q2 Apart from the recent changes to data protection legislation are there other developments that are having an impact on your organisation's direct marketing practices that you think we should address in the code?

Yes

No

Q3 If yes please specify

- In order to ensure compliance with the principles of fair treatment of customers (TCF). The FCA increasingly expects firms to proactively contact clients to advise them of products that could be better for them, such as deposit accounts with a better interest rate. We would welcome confirmation that such communications can be made to individuals who have opted out of receiving marketing material.
- From time to time, our firm will acquire additional businesses. It would be helpful to understand to what extent we are allowed to rely on the soft-opt in to provide information about those subsidiaries to existing clients.

Q4 We are planning to produce the code before the draft ePrivacy Regulation (ePR) is agreed. We will then produce a revised

code once the ePR becomes law. Do you agree with this approach?

Yes

No



Q5 If no please explain why you disagree

n/a

Q6 Is the content of the ICO's existing direct marketing guidance relevant to the marketing that your organisation is involved in?

Yes

No

Q7 If no what additional areas would you like to see covered?

- There are certain kinds of marketing contact that are not covered by the guidance such as social media. The definition of direct marketing does not specify whether posting something on social media, where the audience might be known (e.g. LinkedIn contacts) is considered direct marketing.
- Additionally, the current direct marketing definition covers any messages which include some marketing elements, even if that is not their main purpose. Some more context surrounding this would be helpful. For example, a call may be made to a client for administrative purposes, however, on making the call, we become aware the client is in the wrong product and we want to explain the other options available to them. In this example, we are complying with our regulatory obligations but the client may have opted out of receiving marketing information.
- In relation to business to business communications, it would be helpful to understand how emails sent to an individual's professional email address (e.g. [REDACTED]) are viewed under GDPR and PECR. The current guidance would indicate that the individual may need to opt-in. However, in many cases, there is not a general email to contact (e.g. [info@abcfirm.org](mailto:info@abcfirm.org)).
- Additionally, in relation to business to business communications, the current examples for corporate subscribers and on-corporate subscribers is narrow and should be expanded to explain how different types of firms (e.g. LLPs, credit unions, trusts, clubs and societies) should be considered under PECR and GDPR.
- There is very little in the current code regarding self-generated target name lists. Whilst it mentions Lead Generation & Marketing Lists it notes that these can be formed in house "from customer contacts" or be a list of prospects that has been "bought" in. Additionally, how are lists generated from information already in the public domain (e.g. utilising email addresses listed on LinkedIn, company website, and

Companies House) viewed under PECR and GDPR. If this is information someone has expressly made public can it be used for marketing purposes.

- We would be interested to understand how contact lists brought over from previous employment would be viewed under PECR and GDPR. The area in which our firm operates is highly customer service focused and many clients will follow their relationship manager from firm to firm because of the personal relationship built up. New joiners to the business might bring a client contact list with them in the knowledge that those clients are likely to follow them to their new company. How such a scenario would be viewed under GDPR and PECR. Is it reasonable to argue that contact can be made based on legitimate interests and the clients would reasonably expect to hear from the individual? Additionally, it would be helpful to understand the expectations regarding how long Target/Marketing Lists should be retained. For example, where a non-compete clause exists in an employee contract would it be reasonable for them to retain the list until the non-compete period has passed.
- It would be helpful if the new code could provide some guidance on future-proofing marketing strategies. For example, where the medium for certain marketing campaigns changes from postal to electronic. Guidance on the steps businesses should take when they wish to move a marketing strategy from postal to email would be helpful. Specifically, would new consents be required simply because a new contact method is being used.

Q8 Is it easy to find information in our existing direct marketing guidance?

Yes

No

Q9 If no, do you have any suggestions on how we should structure the direct marketing code?

- It would be helpful if business to business guidance was in one place as opposed to dotted around separate sections.
- It would be valuable for the guidance to include a decision tree to help organisation assess compliance. Such a decision tree should consider the types of relationship (client, business to business, third party), the lawful basis for processing and the method of contact (email, post, telephone etc.).

**ico.**  
Information Commissioner's Office

Q10 Please provide details of any case studies or marketing scenarios that you would like to see included in the direct marketing code.

- A new staff members joins a company with a contact list. How should they contact the clients? How long can they retain the data? Does the firm have a legitimate interest given that it likely the client is expecting to be contacted by the staff member?

- Creating target/marketing lists from information already made public by the data subjects.

Q11 Do you have any other suggestions for the direct marketing code?

n/a

### About you

Q12 Are you answering these questions as?

- A public sector worker
- A private sector worker
- A third or voluntary sector worker
- A member of the public
- A representative of a trade association
- A data subject
- An ICO employee
- Other

If you answered 'other' please specify:

n/a



Q13 Please provide the name of the organisation that you are representing.

Arbuthnot Latham & Co., Limited

Q14 We may want to contact you about some of the points you have raised. If you are happy for us to do this please provide your email address:

[Redacted]

Thank you for taking the time to share your views and experience.