

ICO call for views on a direct marketing code of practice



Information Commissioner's Office

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).

The new code of practice will build on our current direct marketing 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.

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.

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?

There are a number of aspects of the General Data Protection Regulation (GDPR) that impact Direct Marketing, and it would be good for the legislation to be referenced where this is the case. These include, the changes in fair processing notice requirements particularly around naming third parties or naming categories of third parties; how the GDPR has impacted on the existing Privacy and Electronic Communications Regulation (PECR); the revised definition of consent; and the increased use of social media as an additional channel for marketing with the complexities that come with this in respect of the data protection relationships between advertisers and platform providers.

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

We would welcome clarity around using the marketing tools of social media sites such as Facebook – the data protection relationship between the organisations can be complex with little room for negotiation; and the targeting aspect to personalised marketing can appear at odds, or at the very least create challenges, with data compliance requirements. A “do’s” and “don’ts” or “pitfalls and/or top tips” for successful social media marketing would be really useful. This is an area which may benefit from case studies or practical examples to help people identify with their situation. It would also be beneficial to provide a full understanding of how external suppression services will sit alongside the Code, specifically the Telephone Preference Service and Corporate Telephone Preference Service (TPS and CTPS), the Mailing Preference Service (MPS) and the Fundraising Preference Service (FPS). One further comment, slightly unrelated, is that of how this Code and guidance fits in to the overarching legislation and regulatory environment. Like many organisations, we have a number of regulators who have all created their own guidance and advice on areas relating to fundraising and marketing and which touch on the data protection aspects of this. This includes organisations such as the Institute of Fundraising, the Fundraising Regulator and other regulatory bodies that sit across sectors, including the Gambling Commission, Advertising Standards Authority and Direct Marketing Association. How does the Code work with, for example, the relevant sections of the Fundraising Regulator’s Code of Fundraising Practice? or the Advertising Standards Authority’s CAP Code? Has the ICO “authorised” these guides and which should take precedent in the event of a difference of interpretation? We know that the ICO has entered into Memorandum of Understanding with many Regulators, but how can the guidance issued be done in a way that doesn’t cause confusion or overlap (particularly fo

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

We need a new and updated Code as soon as possible to take account of the substantial legal changes throughout 2018. We appreciate that further changes are on their way but believe it is appropriate and relevant to not wait for the ePrivacy Regulation (ePR). This is for two reasons. Firstly, there is a delay in approving and pushing through the legislation which leaves a question mark over whether the UK will be subject to this updated legislation following Brexit. Secondly, our understanding and interpretation of the revised ePR is that the marketing sections (apart from updating in respect of consent definition, including social media and the changes to business-to-business marketing) are substantially unchanged.

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?

We believe the guidance to be very relevant to our sector and fundraising activity. However, there is some repetition within the guidance, so perhaps a review of the structure and reduction in repetition would be valuable. Additionally, there are some areas of the guidance which are different depending on sector. It would be beneficial to have some further clarity around these sector nuances. For example, the soft opt-in for marketing is widely known as not being available to the Charity sector as fundraising is not considered a "good" or "service". More clarity around this position and explanation of why it is considered acceptable for a sales or retail environment but not a fundraising environment where you have a pre-existing relationship with a supporter would be incredibly useful. Especially for those new to Direct Marketing, a glossary of terms in plain English would be helpful, which could include some clear descriptions of the legal basis for channels that can be used/is available to send Direct Marketing.

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?

The current guidance, as a simple pdf document, does not make it very easy to search for specific areas. We understand that there is a need to read the guidance as a whole, but it would also be useful to be able to search specific areas for quick access. A digital version would be useful, and we would recommend something similar to the CAP Code, which is very clear and accessible in its online format. Specifically within the code, some suggestions include:

- Providing a glossary of terms
- Separate out more definitively marketing to individuals as opposed to marketing to companies
- Provide a checklist of what marketers need to consider to ensure that their marketing is compliant
- Include FAQs or a quick reference section

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

A definition and explanation, with examples of what constitutes a marketing communication would be useful. Particularly, why does a consent ask amount to marketing if the remaining communication is more administrative or transaction in nature? Some Charity specific examples for fundraising communications would be good and, with particular relevance to the 'soft opt-in' comment above. For example, a previous event participant cannot be emailed about the following years event unless we have marketing consent – why? We also feel some digital case studies would be useful, for example using Facebook custom and lookalike audience functionality.

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

Some more detail and clarity around the business to business marketing rules would be useful, as this section currently is quite small. Especially as social platforms such as LinkedIn and other professional networking tools are becoming more prominent. Generally, social channels and direct marketing is something that is missing from the current code, and some specific guidance on using social media platforms and paid ads through Google would be very beneficial. With regards to our earlier comment in relation to how this works with other regulatory bodies, is it possible to make this Code the definitive Code for Marketing that all regulatory bodies use, as opposed to each body creating their own and separate codes?

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:

- Q13 Please provide the name of the organisation that you are representing:
Great Ormond Street Hospital Children's Charity

- 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:

██████████@gosh.org

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