

# ICO consultation on the draft updated data sharing code of practice

Data sharing brings important benefits to organisations and individuals, making our lives easier and helping to deliver efficient services.

It is important, however, that organisations which share personal data have high data protection standards, sharing data in ways that are fair, transparent and accountable. We also want organisations to be confident when dealing with data sharing matters, so individuals can be confident their data has been shared securely and responsibly.

As required by the Data Protection Act 2018, we are working on updating our **data sharing code of practice**, which was published in 2011. We are now seeking your views on the [draft updated code](#).

The draft updated code explains and advises on changes to data protection legislation where these changes are relevant to data sharing. It addresses many aspects of the new legislation including transparency, lawful bases for processing, the new accountability principle and the requirement to record processing activities.

The draft updated code continues to provide practical guidance in relation to data sharing and promotes good practice in the sharing of personal data. It also seeks to allay common concerns around data sharing.

As well as legislative changes, the code deals with technical and other developments that have had an impact on data sharing since the publication of the last code in 2011.

Before drafting the code, the Information Commissioner launched a call for views in August 2018. You can view a summary of the responses and some of the individual responses [here](#).

If you wish to make any comments not covered by the questions in the survey, or you have any general queries about the consultation, please email us at [datasharingcode@ico.org.uk](mailto:datasharingcode@ico.org.uk).

Please send us your responses by **Monday 9 September 2019**.

## Privacy Statement

For this consultation, we will publish all responses except for those where the respondent indicates that they are an individual acting in a private capacity (e.g. a member of the public). All responses from organisations

and individuals responding in a professional capacity will be published. We will remove email addresses and telephone numbers from these responses; but apart from this, we will publish them in full.

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

## Questions

Note: when commenting, please bear in mind that, on the whole, the code does not duplicate the content of existing guidance on particular data protection issues, but instead encourages the reader to refer to the most up to date guidance on the ICO website.

Q1 Does the updated code adequately explain and advise on the new aspects of data protection legislation which are relevant to data sharing?

Yes

No

Q2 If not, please specify where improvements could be made.

It is appreciated that the Code of Practice when finalised will cover processing under the GDPR and Part 3 of the DPA 2018. However, there are times when terminology in relating to these different regimes overlap and used inconsistently.

For instance, reference to processing of personal data under Part 2 of the DPA, refers to processing primarily governed by the GDPR. Also there is reference to "sensitive personal data" which actually refers to personal data undergoing sensitive processing under Part 3 of the DPA. Further on page 27 there is reference to sensitive data within the meaning of Parts 2 or 3 of the DPA, which is incorrect. It is the GDPR that defines "special category personal data" and Part 3 of the DPA refers to "sensitive processing".

The interchanging of these terms may result in confusion to those without an understanding of the data protection legislation. It is suggested that terminology should be consistently used and be consistent with the legislation that applies to it.

Q3 Does the draft code cover the right issues about data sharing?

Yes

No

Q4 If no, what other issues would you like to be covered in it?

Q5 Does the draft code contain the right level of detail?

Yes

No

Q6 If no, in what areas should there be more detail within the draft code?

It is suggested that there are some areas in which there should be a little more detail. These are in relation to

- the rights and freedoms of children
- the powers of public bodies to share personal data in all forms and
- the inability of the public sector to rely on certain processing conditions.

**Rights and Freedoms of Children**

It is suggested that it should be made very clear that the risk to children's interests can be higher than the same processing relating to adults as a result of their vulnerability. This means that "high risk" scenarios requiring a DPIA are more likely where the processing involves the personal data of children.

**The powers to share**

It is suggested that it should be made clearer that the gateways to data sharing can be restricted by other laws. These restrictions can be contained within the legislation providing the gateway but are more likely to be external. This is referred to in relation to human rights but this strikes at the power of the public body rather than a data protection issue. However, there are others such as the Common Law Duty of

Confidentiality and/or the Law of Privacy (as referred to in Scots law although there are counterparts within English law).

However, by failing to link the often external restrictions on the use of gateways mentioned previously in relation to the paragraph "**What is the purpose of the data sharing initiative**" when referring to the public sector and the layout of the section entitled "**Other legal requirements**", may not reflect their fundamental importance to the purposes of data sharing. For instance, the sharing of personal data of children in relation to "welfare" concerns (note these concerns do not amount to the severity of matters that would be viewed as being child protection issues). Even with a potentially usable legal basis for this processing set down in the DPA 2018, the issue of human rights issues do not allow a public authority to use the gateways provided (see the Christian Institute Supreme Court decision).

It is suggested that it is stressed in the draft Code on Page 60 that non-compliance with the HRA or other laws such as the common law duties mentioned previously will always breach the lawful data protection principle.

As an aside, it is suggested that the Code of Practice should refer to the Laws of Privacy developing in both jurisdictions as a correlation to the Common Law Duty of Confidentiality.

### **Processing conditions**

It is suggested that in the section relating to the public sector and data sharing that the (potential) inability to rely on the legal bases of processing for consent (Recital 43 of the GDPR) and legitimate interests (Article 6(1) of the GDPR) should contain specific reference to these issues in relation to having a legal basis for data sharing.

It is suggested that the Code re-iterate matters that have been referred to elsewhere in the Code so for instance in the section relating to Data Sharing Agreement there is reference to inclusion of a model consent form. It is suggested that this reference should be qualified to include the inability of the public sector to rely on consent so that a consistent message is being provided.

- Q7 Has the draft code sufficiently addressed new areas or developments in data protection that are having an impact on your organisation's data sharing practices?

Yes

No

Q8 If no, please specify what areas are not being addressed, or not being addressed in enough detail

It is suggested that the idea of Data Trusts is a new concept that can provide for the safe sharing of personal data etc. for the purposes of research etc. The ODI have referred to examples of where this could be useful – such as the Kent Integrated Data Set. This data set appears to be referred to in the example provided on page 101 of the draft Code. However, it is suggested that it is relevant to state that the risks arising from that sharing have been reduced by other measures such as pseudonymisation carried out in the dataset. Experience has shown that this governance measure tends to be overlooked when creating such datasets.

It is suggested that pseudonymisation through the use of Data Trusts could be referred to in relation to the question “Could we achieve the objective without sharing the data or by anonymising it?” In fact, it may be relevant to include specific reference to pseudonymisation rather than anonymisation as an option to facilitate data sharing.

In the section relating to Data Sharing Agreements the Commissioner states that such agreements should be “regularly” reviewed. It is appreciated that how often this means will depend upon the sharing concerned. However, it may be useful for the Commissioner to consider some guidance as to how to approach the determination of the review periods.

Q9 Does the draft code provide enough clarity on good practice in data sharing?

Yes

No

Q10 If no, please indicate the section(s) of the draft code which could be improved, and what can be done to make the section(s) clearer.

It is possibly a minor point but it is suggested that there is more emphasis based upon the use of pseudonymisation and/or the use of Data Trusts in respect of data sharing for research and related projects.

In relation to the section on Data sharing agreements, there is a concern that following the Code as it stands in relation to the content of such agreements may be viewed as over prescriptive. It is appreciated that the references to content are referred to as being "helpful" but it is highly likely that in order to be protected that controllers will follow the guidance strictly. It is suggested that the Commissioner consider a possibility of the information described being set down in a separate document such as the DPIA.

Q11 Does the draft code strike the right balance between recognising the benefits of sharing data and the need to protect it?

- Yes  
 No

Q12 If no, in what way does the draft code fail to strike this balance?

There is a risk that the purpose of the data sharing can be assumed as outweighing the rights and interests of data subjects – this is potentially more prevalent in the public sector "in the public interest".

It is suggested that there be further explanation as to what is meant by "adverse" effects. It is suggested that in terms of the GDPR, adverse effects may not have a particularly level of harm – and could include unhappiness about the personal data being used (similar to the level of detriment in relation to the Common Law Duty of Confidentiality – disclosure to someone to whom the data subject would not want it disclosed). Including this clarification should mean that proper consideration of such matters are taken into account in relation to data sharing.

Q13 Does the draft code cover case studies or data sharing scenarios relevant to your organisation?

- Yes  
 No

Q14 Please provide any further comments or suggestions you may have about the draft code.

It is suggested that there should be a scenario that reflects the interaction between laws that may prevent data sharing and their effect upon the lawfulness data protection principal. This scenario does not need to result in the refusal to share personal data but show how these matters are important to considerations regarding data sharing.

The most obvious scenario would be the use of a Data Trust for research etc. purposes

Q15 To what extent do you agree that the draft code is clear and easy to understand?

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree

Q16 Are you answering as:

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

Please specify the name of your organisation:

South Lanarkshire Council

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