

Information Commissioner's Office*Parliament and Government Affairs**Wycliffe House**Water Lane**Wilmslow**Cheshire**SK9 5AF**By email: politicalcampaigning@ICO.org.uk*

11 January 2019

Dear Sir/Madam,

CALL FOR VIEWS: CODE OF PRACTICE FOR THE USE OF PERSONAL INFORMATION IN POLITICAL CAMPAIGNS

I wish to respond to the Information Commissioner's call for evidence on behalf of the Conservative Party.

Need to support democratic engagement

The starting point for any potential new statutory guidance is that it should support and facilitate democratic engagement. As the Government's democratic engagement strategy has noted: 'A thriving democracy depends upon the participation of eligible electors. Their voices are the bedrock of a plural, representative system that reflects the will of the people. The foundations of our government, society and freedoms are made stronger when more people get involved' (Cabinet Office, *Democratic Engagement Plan*, December 2017, p.28).

When the Data Protection Act 2018 was passed by Parliament, both the Government and Parliament, with cross-party support, were clear that the legislation explicitly needed to protect democratic engagement and avoid any gold-plating of the GDPR which could undermine that principle. This is why the Act was amended to state that democratic engagement is a task in the public interest.

Parliament also legislated to ensure that the definition of democratic engagement was a wide one. The *Explanatory Notes* to the Act explain 'democratic engagement is intended to cover a wide range of political activities inside and outside election periods, including but not limited to: democratic representation, communicating with electors and interested parties, surveying and opinion gathering, campaigning activities, activities to increase voter turnout, supporting the work of elected representatives, prospective candidates and official candidates and fundraising to support any of these activities'.

As the *Notes* highlight, democratic engagement is an all year-round activity: it is not restricted to election periods. This is important to bear in mind when considering the application of data protection principles to political campaigning.

The Call for Evidence seems to suggest that the lawful basis of 'democratic engagement' should be clarified or narrowed. Yet this would be in direct contradiction of the legislation intentionally framed widely and passed by Parliament, where Parliamentarians took a different

review to the evidence presented to the Bill Committee by the Information Commissioner.¹ We would observe that Recital 45 of GDPR simply states that processing for a public task should have a legal basis, and Member States have the discretion to determine this.

Data protection law has already changed

The second key point of note is that the Data Protection Act 2018 and GDPR have already significantly overhauled data protection laws. Legislation now provides for substantive fines, a new definition of consent, stronger rights to withdraw consent, revised data protection principles and enhanced requirements for data protection impact assessments and for notifications of breaches.

Rightly, there has been public concern about the actions of Cambridge Analytica. We would note that such activity would breach many provisions of both the 1998 and the 2018 Data Protection Acts, and none of the provisions on democratic engagement in the Act would legitimise such dubious acts. Extra statutory regulation is not necessary because the law has already changed significantly and been comprehensively tightened.

However, there will be unforeseen and unintended consequences from that legislation – such as in the form of gold-plating.

For example, we have already seen how some MPs have wrongly assumed that they need to delete historic constituency casework² (whereas, if there is a business case for retention, it can be retained), and MSPs have faced excessive bureaucracy if they want to work with local schools to run a Christmas Card competition.³

We believe it would be sensible to wait for the new laws to bed in, before any statutory code is introduced. The purpose of any code should be to help clarify any ambiguities – yet, those ambiguities or myths need to be identified first. It is not the role of the Code to try to amend or change the law that Parliament has passed.

Use of the electoral register

The electoral register has a fundamental role in facilitating democratic engagement, and it is important that it can continue to be used and processed inside and outside election time. Political parties also need to retain many years of the marked register data, and it helps parties identify the likelihood to vote, allowing targeting of both frequent *and* infrequent voters, and thus help encourage more electors to turn out to vote as a result. Such data may also be processed in conjunction with other datasets to help political parties identify who to contact (given there are tight spending controls in elections and a ban on television advertising, which therefore inhibit large blanket advertising).

One should also draw a distinction between the activities of elected representatives, candidates standing for office and registered political parties ('authorised persons' in electoral law)⁴ – whose spending and donations are tightly regulated and transparent – and actions of other third parties which are not. Third parties do not have the same access to the full (non-edited) electoral

¹ ICO, Data Protection Bill, *House of Commons Public Bill Committee – Information Commissioner's further written evidence*, 19 March 2018.

² *BBC News Online*, 'GDPR has MPs in a bind', 15 May 2018.

³ *The Times*, 'Grinch of GDPR steals children's Christmas card contest', 18 November 2018.

⁴ As amended by the Representation of the People (England and Wales)(Amendment) Regulations 2002.

register. The ongoing use of the electoral register data by authorised persons under data protection law should reflect the long-standing legal principles and the legal basis for its use in electoral law. Equally, we would note that the legal basis for its use by non-authorised persons would accordingly be weaker.

It should also be noted that political parties must register under the Political Parties Elections and Referendums Act 2000, and candidates for elected office must also meet requirements under the Representation of the People Act 1983 (including requirements to obtain signatures to nominate, pay deposits in some elections, publish imprints on election materials, abide by spending controls and other regulatory prohibitions, and publish returns on spending and donations). In this context, such activity by parties and candidates are already tightly regulated, and therefore access to and use of the full register is necessarily regulated as a consequence. Those pieces of legislation also provide a statutory basis for the task in the public interest. It is important that data protection law and electoral law are not inconsistent.

Electoral law allows for electoral register data to be used for 'electoral purposes' by authorised persons, and Ministers have previously told Parliament that this should be interpreted in a broad and wide manner.⁵ Notwithstanding, the Government has signalled that it intends to amend electoral law to ensure the democratic engagement provision in the Data Protection Act 2018 is also mirrored in electoral law. This will help ensure there is an even clearer legal basis for democratic engagement's task in the public interest. Given the Government's intention to legislate, it would be unwise for any statutory code to pre-empt or contradict that secondary legislation.

We would observe that there is no significant adverse impact on an individual on whether or not they receive a campaign message as a consequence of data analytics and targeting. There is no affect on the provision of, or access to, goods and services. Political marketing is not a commercial activity, but essentially a voluntary sector activity by non-commercial bodies.

Finally, it is important that any Code has the broad support of Members of Parliament and facilitates their ongoing Parliamentary, constituency and campaigning work, given Members of Parliament will be required to vote on and approve any Code.

I hope this is helpful to the Commissioner's call for views.

Yours faithfully

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⁵ Ministers stated: 'It is right not to pin down "electoral purposes" too narrowly. We do not want to omit anything that counts as an important part of what political parties and those seeking to represent the people in a democracy should be able to do to communicate with voters. Voters themselves should have their human right to participate in free and fair elections recognised. In a democracy, it is crucial to sustain those principles' (Yvette Cooper, *House of Commons, Delegated Legislation Standing Committee*, 11 July 2002, Column 21). These principles were also referenced in Electoral Commission's Circular EC 36/2002.