

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:

Overall the layout is very clear and straightforward to understand, and the language is easy to read and interpret. It is relatively easy to navigate around the document.

The use of examples and case studies is very helpful, and it is good to see several which relate to charitable organisations.

However, several of the examples feel prescriptive and give ICO opinion rather than a statement of the law. This may encourage charities to go "the ICO way" (this feels slanted towards consent), rather than be confident in their own interpretation of the law and their legitimate interest assessment.

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 see?

In general, the level of detail is right but there are two specific areas to mention where more detail would be helpful.

**Social Media:** Social media platforms have been addressed as a whole, but the range of social media activities is wide. Consent for everything to do with social media seems too broad. For example, if a supporter has a relationship with a charity and also with Facebook, they will reasonably expect the charity to appear in their newsfeed. (Assuming of course that this would be in the privacy policies). More detail relating to individual channels would be helpful.

**Children (p43)**

It would be helpful to provide a definition of a 'child'. Different regulations have different age thresholds, which can be quite confusing. E.g. at one charity the Data Protection Office have recently advised that while GDPR has special protections in for people aged 16 and below for ISS (which the UK has lowered to 13), the ICO consider anyone under 18 to be a child.

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:

**Profiling** – there is reference to “intrusive” profiling without clarity on what that is. This para. On p.58 give a very negative view of profiling as does the general tone of the profiling section which seems to suggest that any profiling is high risk. Some more specific clarity and detail would be helpful.

**Lawful basis (p31)**

The ‘good practice recommendation’ of using consent for all direct marketing is unhelpful in this instance.

Elsewhere the ICO have emphasised that no one lawful basis is inherently better than others and have been clear to note that consent is not a ‘silver bullet.’

This kind of guidance muddies the waters and it would be much more helpful if the advice was consistent.

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

**Comment relating to impact:**

The code suggest that running names through the National Change of Address register is not possible – even when this is clearly stated in a privacy policy – and when the individual has agreed with Royal Mail for this to take place – as I don’t believe that the Royal Mail COA captures consent for direct marketing redirection (as per para 2), p.61. This will have a negative impact on fundraising.

Clarity on this would be helpful and also please note the negative impact of this direction.

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:

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 would welcome more examples in addition to those already included and this would add to the practical usability of the guide.

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

**Working with third parties (p27)**

The example (of the supermarket sending emails about a charity) creates more confusion rather than clarifying the guidance. The last sentence about screening against the charity's suppression list seems to contradict earlier bits of the example where it states that the supermarket is not passing its customers' details to the charity. Either that, or it's suggesting the charity will share its suppression list with the supermarket. It's very ambiguous which is unhelpful and based on the guidance in this document and elsewhere, sharing data between organisations for any reason is not to be taken lightly, so further guidance on this particular point would be valuable.

It reads as if it is suggesting that a supermarket would need to have specific consent to contact their customers about a particular charity, which has significant implications – so guidance on what constitutes 'appropriate consent' would be invaluable here. As it stands there is too much room for different interpretations of the example.

**Social Media (p90) Question the basis/evidence that individuals are unlikely to expect that processing takes place.**

With such statements there should be evidence which supports this claim as it feels too heavily based upon opinion. An alternative view would be that individuals would in fact expect their data to be used for targeting on social media platforms.

A comment from one of our Forum members on this section is as follows:

There has been a great deal of media attention on Facebook in particular and on this basis, I think the general public are quite aware of how such companies tend to use personal data. That is not to say that people are comfortable with it, but I think to say they wouldn't expect it is at best one perspective, at one end of the scale, and worst hyperbole, and I think it undermines the otherwise helpful guidance in this section. Linked to this, I am concerned that there is such a strong statement about how it is 'difficult to see how it would meet the three-part test of the legitimate interest's basis.' This has significant implications but is not expanded on here. I doubt many organisations are currently using consent as their lawful basis for this activity, so this would represent a fairly major shift how organisations work in this area, and robust guidance on this would be extremely helpful.

# 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:

If other please specify:

Response on behalf of the Fundraising and Regulatory Compliance Forum, a group of 9 medium and large charities.

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