

### **ICO Consultation on a new Direct Marketing Code**

This is a draft response from the Institute of Fundraising which is informed through our ongoing conversations and engagement with members.

We are sharing it with members for comment and feedback and welcome all responses to inform our final response which will be submitted on 4<sup>th</sup> March

Please send through any comments to [samb@institute-of-fundraising.org.uk](mailto:samb@institute-of-fundraising.org.uk)

DRAFT

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 (eg a member of the public). All responses from organisations and individuals acting in a professional capacity (eg 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 draft code is clear and straightforward to understand, but we believe there are a number of areas where it can be improved to be a useful a resources as possible to help charities comply with GDPR and PECR in their direct marketing practice.

Our strong view is that to be the most useful guide possible, the Code should follow the existing guidance on the ICO's website. We believe that the presentation of the online guidance, with its focus on accountability, good decision-making, evidence-based approach, is much more helpful as a guide to help charities understand the legal requirements and adopt a principles-based approach based on fair and transparent practice. We are concerned that this draft Code differs from that approach, and is much more prescriptive in telling organisations 'what' they can or can't do, rather than 'how' to embed the principles of GPPR into their direct marketing practice, or guide them through what to consider as they make decisions that are right for them and the individuals whose data they process.

While we understand that the draft Code is intended to provide practical advice and examples, often this comes across as limiting and restricting the ability of organisations who may, fairly and lawfully, take a different approach based on informed processes and evidence. The current online guidance is more straightforward in explaining GDPR, lawful basis, and embedding accountability and we recommend that this existing approach is adopted for the draft Code. While that might mean, in places, this Code has less detail, we believe that this would be a much more helpful and enabling approach which would allow charities to take forward their compliance and direct marketing practice in a responsible way.

Our key recommendations and comments on this draft Code which we hope will be considered and taken on board as the final version is produced are:

- **Removing the 'good practice' recommendations throughout the Code**

We strongly believe the Code should focus on explaining the law, and making clear to organisations what they need to consider in their direct marketing practice to make an accountable and responsible decision based on fairness. Where there are different, legal and valid options of how to comply, the Code should explain these clearly – and not give a view on which option organisations should adopt. That is a decision only they can make, and what is right for one organization may well be different from another. The inclusion of 'good practice' recommendations muddies the water – if there are different lawful alternatives than these should not be presented as a hierarchy.

For example, and most obviously, the 'good practice recommendation' on getting 'consent for all your direct marketing regardless of whether PECR requires it or not' causes much concern. While the Code does say that good practice is 'optional' and that there is no penalty if it is not followed as long as the law is complied with, the inclusion of the recommendation to get consent is very likely to mean that charities will read this as being 'the only real choice available' and adopting a consent approach by default which may not be in the best interests of the organisation or the data subjects. It also intimates that anything other than consent is 'bad practice' which is simply not true. We strongly believe that the existing ICO guidance on the 'Lawful basis for processing' webpage is much clearer for organisations and that explaining that 'no single basis 'is better' or more important than the others' gives a clearer explanation of the law.

The consequence of this inclusion of this recommendation will, in all likelihood, lead to more confusion among charities who will be confused why they are being led towards one lawful basis over another. It will mean that charities will be less likely to be thinking about what basis is most appropriate for them and their supporters or beneficiaries, and adopting one model by default which would also go against the general principle of accountability – and active decision making – and one of more 'tick box' compliance. This would be a regrettable, and negative, consequence.

However, we believe that articulating the risks/benefits of different approaches, and the ICO explaining these clearly (such as on consent and legitimate interest) would help provide charities with a sound basis to take informed decisions – we would then understand the ICO’s thinking and concerns, but still enable charities to make an accountable and responsible decision.

- **Clarity of language – ‘unlikely’**

The word ‘unlikely’ is used 26 times in the code. We understand that the ICO is mindful of what it believes are intrusive processes or the impact on individuals, but we believe the presentation could be improved.

If something is ‘unlikely’ to be fair in broad terms, it inherently means that there are some specific areas and contexts where it is ‘likely’ to be fair. Yet these are rarely, if at all, acknowledged. Rather than using a term like ‘unlikely’ we believe a much more constructive and helpful approach would be to articulate a risk-based approach which breaks down why something might be more or less likely. This would help charities understand the thinking and inform their decision, rather than lead them to a pre-determined conclusion.

For many individuals reading the code, this will effectively come across as though you cannot carry out these elements of direct marketing. An explanation of the circumstances and considerations where processing could still be allowed would be useful, or the factors that might make it less unlikely.

We recommend that if something is deemed ‘unlikely’ in general terms, there should be at least two examples provided in specific areas to help organisations understand where it might be more likely to be fair – or to provide key questions and considerations for organisations to be mindful of when they do their DPIAs or LIAs so they can make an informed decision, based on evidence and understanding of individuals preferences and expectations.

Alternatively, rather than ‘individuals are unlikely to understand how you target them on social media’ we wonder whether an approach such as ‘you will need to be mindful of people’s expectations and understanding of social media and targeted online advertising and ensure that if they are appropriately informed so as to treat them fairly’ would be more constructive.

This could help charities actively think about their processing and its effects, rather than adopt an approach by default and make the code much more useful to aid decision-making processes.

- **A more nuanced view on ‘individuals’ and their understanding and expectations**

Often the Code makes an assertion about what individuals are unlikely to understand (e.g, online advertising and social media). This seems to put the bar of knowledge/understanding at a low level, which may reflect a proportion of the population, but we do not believe is representative of all individuals. For example, an individual who is an active supporter of a charity, engages on all social media channels, and has expressed certain preferences to the organization or undertaken certain actions or behaviours is likely to have a very different understanding and expectation than someone else (e.g, expectations of philanthropists tend to be different from an everyday supporter, which in turn are likely to be different from a general member of the public). While of course everyone has the same privacy rights, not everyone has the same expectations or preferences – we strongly recommend that this is given some prominence within the Code and again key considerations or factors provided to help organisations make the decisions which best meet the expectations of individuals while treating them fairly.

- **An enabling Code to aid responsible decision making and fair practice that meets supporter expectations**

The examples in the Code can help to illustrate points and put general assertions into context. However, we believe that the use of the examples could be enhanced. Often an example is given at the end of a section which tells you how an activity would not be likely to be compliant, such as:

- Pg 50, on an insufficiently transparent statement in relation to wealth screening
- Pg 32, a text donation not being sufficient to provide consent for further contact

The way these are written make it seem that these activities in themselves are therefore inherently unlawful. However, both can be done in a lawful and fair way. The examples should acknowledge that and then provide the factors that would need to be considered to determine whether something is fair/likely. The guidance would be hugely enhanced if the examples showing how one practice done one way is deemed unfair were complemented with an example to show how that same activity could, potentially, be done fairly and lawfully. In the absence of that, charities are only being shown half of the picture, which leads to a risk-averse approach and the impression that they can't do some areas of direct marketing which they in actual fact could do if they do it in a different way.

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

Overall the draft code does contain the right level of detail thorough – although some areas can be approved.

A greater level of consistency with the online GDPR guidance would be helpful, as well as an enhanced focus on accountability and informed and fair decision-making would be helpful. This might mean some level of detail is reduced, but we believe that this would make for a more constructive resource which enables organisations to appropriately embed the Code into their practice and decision-making.

We do think that more thought and guidance needs to be given to how 'social media' is referenced in the guidance. It is currently presented as almost being one homogenous thing, whereas social media is made up of hugely different platforms, each with different uses, terms & conditions, and differing levels of privacy expectations from people. We think that a blanket 'social media' category is not sufficient to properly reflect the different interactions and engagement with people across a range of platforms. While we do not believe it would be appropriate to list and go through every social media platform and area of activity, we think that providing organisations with a basis of what to consider when using different platforms would help to guide appropriate practice for each.

We also have some concerns that there are whole areas of marketing which are covered in quite short and cursory ways – for example 'refer a friend'. While intrusive viral marketing is not to be encouraged, the way it is presented means that it is unclear what counts or not in this area. We do not believe that the intention of this section is to stop charities, for example, talking to someone who is running the London Marathon for them about talking to their friends, family, or colleagues about getting sponsorship, or recommending a charity's services to a friend, or indeed a trustee to invite their friends and contacts to a gala ball. However, we are concerned that including this section as currently presented will leave charities with questions about how legitimate this activity is and lead to unintended negative consequences. Of course it is not possible to go through every example of 'refer a friend' marketing or provide a definitive list of activity that is fair or is not, but we do recommend that again a list of risk factors or key considerations to help determine what is fair or not is provided.

Q3 Does the draft code cover the right issues about direct marketing?

Yes

Yes, we believe that overall the draft code does cover the right issues about direct marketing.

However, we believe that the consistency with existing ICO guidance needs to be addressed.

A further consideration is that, as ever, practice and technology will move ahead at pace. Therefore, once the code is published, it will almost immediately (and unavoidably) be out of date. We recommend that thought is given as to the suggested approaches/steps/considerations for organisations to consider as they adopt and adapt to new technologies in the future. Our overall recommendation of this Code being a framework to aid informed-decision making and provide a framework for understanding and managing risk, rather than prescriptive practice, would aid in making the Code as future-proof as possible.

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

While the above responses have focused on our general comments on the Code, we also have had some specific concerns, comments, questions raised with us by a range of our members in relation to data protection and an impact on direct marketing practice. In this section we report those concerns for consideration:

**Tell a friend (refer a friend) campaigns-** According to the guidance 'tell a friend' campaigns are hard to justify under PECR. Pg. 83 of the code says 'it is very likely therefore that viral marketing and 'tell a friend' campaigns by electronic mail would breach PECR'.

As above, we believe that this could have unintended negative consequences on a whole range of charitable fundraising, campaigning, and service delivery work. We feel that the information on what is 'incentivising vs instigating' should be clearer, and a framework provided for charities to make decisions on a range of practices that this could inadvertently impact.

**Data matching/profiling- pg.62-** Parts of our membership have expressed concern that the draft code says that it is unlikely that organisations will be able to justify tracing an individual to send direct marketing to a new address. This will have a major impact on universities as it is likely that alumni will change their addresses multiple times during their lives.

Requiring universities to refresh consent when updating alumni addresses could significantly reduce the numbers of potential supporters they have - even if these individuals have not indicated that they no longer consent to direct marketing. Given that this is not new practice, and many have updated and provided clear privacy notices to individuals around this area of direct marketing, and with very little negative impact or complaints from people, we believe this should be considered again.

**Profiling-pg.58-** the text says profiling can be intrusive- 'they might not know it is happening or fully understand what is involved'. This might be true in the case of some prospect research, but this is not true universally. There is a huge amount of research on the expectations and preferences of donors,

and in particular philanthropists and high net worth individuals, do consistently report that they expect a charity to have done their homework on them. This element of expectation, and informing supporters of profiling in an appropriate and timely fashion, should be included in the Code

**Social media and consent- pg.52-** the guide states 'an individual may want as many people as possible to read their social media post but that does not mean they are agreeing to have that data collected and analysed to profile them to target your direct marketing campaigns.'

- We wonder whether this assertion is too general to properly encompass all social media platforms and activity. The code treats all social media as the same but platforms like Facebook and Twitter have different functions, and users are likely to have different expectations of how their data may be used.
- We are concerned that the code might be using the most restrictive interpretation of PECR possible. For example, many organisations use public platforms like Twitter as a publishing platform. Would organisations and influential individuals see profiling as invasive if they use Twitter for business purposes? The current interpretation outlined in the guidance will negatively impact major donor fundraisers as it effectively bans wealth screening on these platforms.
- **Direct marketing by post-pg.36 and later on pg.66** -the draft code seems to imply that organisations will need to have a pre-existing relationship with an individual to send them marketing by post. But organisations can send post using legitimate interest, irrespective of whether they have a pre-existing relationship with the individual. We ask that this is looked at again and reviewed where necessary.

Q5 Is it easy to find information in the draft code?

Yes

Yes. As with any comprehensive guide, there is a lot of information to digest. However, the structure is easy to follow, and it is reasonably straightforward to find relevant information.

However, we have heard comments from some of our members that the language and style of the code seems to be aimed at data protection professionals rather than a wider audience. For charities who do not have staff with this type of training (especially small charities) the code could be difficult to understand and interpret.

We also believe that online guidance, which can be accessed and navigated by subject, pop-up boxes, and key considerations is often a more accessible and easier to use way of producing guidance. It would be positive to see the ICO taking an approach which that best suits online navigation and engagement.

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

Yes, to complement our general point about better use of examples, (and the provision of alternatives and risk factors) below are some examples provided in the Code which we would like to see addressed.

Examples:



- Data matching- pg.60 -the text (-second paragraph under -Can we match or append data?) says 'in most instances, buying additional contact details for your existing customers or supporters is unlikely to be unfair, unless the individual has expressly agreed'- We would like to see an example of a situation where buying additional contact details would be acceptable.

- Data enrichment-pg.60- the code says it is unlikely that individuals will anticipate you seeking to learn more about them using enrichment or indeed understand what enrichment is.' Whilst we agree that obtaining additional information about individuals might not always be expected by them, enrichment can be legal when individuals are given sufficient information to understand what this entails.

It would be useful to have examples and/or checklists of this to help organisations understand how they can carry these types of processing out lawfully.

- Telling people that we want to use their data for direct marketing -pg.51-the text in the draft says, 'any unusual or unexpected processing ought to be at the forefront of any layered privacy information.' An example to show how charities could put together in practice would be helpful.

- Ensuring consent is specific and informed-p.33- The code makes it clear that where possible, organisations should provide granular consent options for different types of processing. But it also says that requests should be concise and easy to understand. It would be useful to have examples of how organisations could achieve both of these aims simultaneously, as this is likely to cause confusion & uncertainty for many charities.

- Refreshing consent and third parties -pg.42.- The code suggests that when sending direct marketing to new customers using consent collected by a third party, it would be good practice to not rely on consent given more than six months ago.

The use of 'good practice' and the provision of a set time (which is not used elsewhere in the Code) makes this hard for some organisations – does that mean if the contact was made after 7 months it would be automatically unlawful? Our understanding is not, and sometimes due to coordinating work and activity, an initial contact might not be possible within 6 months. We also ask whether all third parties are included in this – as some are very different from others, (for example an individual using a donation platform such as JustGiving is likely to have a different expectation than they would with a different third party).

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

No

## About you

Q8 Are you answering as:

- An individual acting in a private capacity (eg 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:

Institute of Fundraising

If other please specify:

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

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