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

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:

In most respects it is clear. However, we are concerned about the following aspects of the guidance:

1. We believe the guidance could be improved significantly in respect of the examples in boxes. To do this you would match poor practice examples with compliant examples, clearly differentiating between the two. On reading the boxed examples one had to anticipate early on whether one was reading an example of compliant practice or non-compliant practice. And where non-compliant practice was shown, there was no corresponding example of how to comply with the law, which is surely the point of the guidance.

2. One specific boxed example is highly problematic for two reasons. This is the university alumni example at the foot of page 62.

   Reason 1. The example claims to be one of non-compliant practice. Yet at the foot of page 61 bleeding over to page 62 the general guidance text gives an instance when the same practice "outlawed" in the boxed example on page 62 can, in fact, comply with the law. This is contradictory and hence unhelpful in understanding what is lawful practice.

   Reason 2. The final sentence of the example box pre-judges the conclusion of a properly conducted LIA. Clearly this practice would be unfair if not subject to proper privacy notice provision and an LIA. But we struggle to understand how the ICO can assert that this amounts to the failure of an LIA in the absence of specific circumstances, and in the context of research which shows that when this practice is brought to the attention of the relevant data subjects, only a very, very small proportion objects.

3. The assertion referred to above, about the inherent unfairness of buying new contact information, is repeated at the bottom of page 4 and the top of page 5 in the summary section. It appear to prejudge the result of completion of an LIA or DPIA in this respect. For this reason we regard the guidance on this matter as unhelpful and insufficiently contextualised or specific.

4. We are very concerned about the "good practice" guidance in the box on page 31 which suggests it will be "good practice" to get consent for all direct marketing. While we understand this from the point of view of the simplicity of dealing with only one ground for processing, it is a fundamentally flawed statement for two substantial reasons.

Firstly, it conflicts with your own guidance on consent which says *"Consent is one lawful basis for processing, but there are alternatives. Consent is not inherently better or more important than these alternatives. If consent is difficult, you should consider using an alternative."* Our particular concern is that charities, in an effort to be compliant, will regard this "good practice" box as a specific recommendation from ICO that consent is its preferred ground for processing.

Secondly, while consent-only might provide regulatory simplicity in respect of privacy law, it may also harm the charity's ability lawfully to pursue its objectives by diminishing its ability to communicate with both its supporters and its beneficiaries (e.g. as has happened at the RNLI). If other solutions which allow more beneficiaries to be served, albeit in a more complex but still compliant privacy context, then the question of what is "good practice" for the charity and its beneficiaries as a whole is unlikely to be a decision to opt for consent-only.

Thus this box and its content should be removed entirely.

5. In the guidance which discusses processing leading up to the delivery of direct marketing information, (for example on page 14) no allowance is made for the possibility that an organisation might hold personal data for both direct marketing and non-direct marketing purposes. Some further discussion of this scenario may well be useful.

6. The guidance uses the term "unlikely" throughout the document, often in respect of people's expectations.

   We are concerned that the ICO does not have an evidence base for asserting what people do and do not find "likely" or "unlikely." (A number of FoI requests concerning the ICO's compliance action against a number of charities, and then in respect of its letter to universities in 2018, show that ICO has carried out no specific research to discover what charity donors do or do not regard as likely or unlikely.)

   Further, the examples given are not contextualised. For example there is a significant difference in the charity-supporter relationship between someone who has only ever made a £5 gift by SMS and who not disclosed their name or address to the charity and someone who has been a donor for twenty years and is about to be approached for a £1m gift. No attempt is made in the guidance to differentiate between these two scenarios. Instead, very broad statements are made about what ICO believes is, or is not, likely. We do not believe this aids good compliance with the law, risking needlessly restricting lawful processing by some, and not explaining the context for non-compliance by others.

7. The guidance refers in a number of places to the requirement to deliver privacy information obtained from a third party within one month. On page 49 there is a discussion of two circumstances in which this information does not have to be provided. However there is no discussion of the other exemptions detailed in GDPR Article 14.5.(b)

8. The example on page 32 concerning a text message does not allow for the charity to have asked for consent to send marketing as part of the donation process. This should be made clear in the guidance – that the process followed by the donor had

not given them any opportunity to provide consent, and, having not done so, any further direct marketing by SMS would be unlawful.

9. The example on page 33 is difficult to understand. The discussion above the example talks about "not crossing the line" in respect of incentivisation. The example then, without any explanation, suggests that withholding a benefit from those who do not consent is not unfair. What are the reasons for arguing that this is not a detriment?

10. While the overall discussion in the example on page 36 is clear and uncontroversial, the second paragraph is deeply problematic. Aside from a few for-profit theatres in London and one or two in some other major cities, almost all theatres are not-for-profit organisations which exist to provide a variety of charitable public benefits. Such a theatre's purpose in carrying out direct marketing is to fulfil its charitable objectives, not to increase its revenues. Since the theatre is using legitimate interests to carry out this processing, the underlying purpose of doing so is fundamental to the proper completion of an LIA and therefore it is important that this is properly articulated.

11. Page 40 contains a paragraph which begins "You must take reasonable steps…" Its second sentence concludes *"you do not need to take extreme measures to ensure people's contact details are up to date such as using tracing services."* Use of the work "extreme" is pejorative and unhelpful. ICO might regard this as extreme. Hundreds of data subjects have been alerted to this practice by not-for-profits who hold their data, and the opt-out rate at less than 1/10 of 1% suggests that the data subjects do not share this view.

12. The second sentence of the first paragraph on page 52 says "However you should not assume that such data is 'fair game'." Use of the term "fair game" is quite unclear and, we suspect, a colloquialism which will not be easily understood by all of the readers.

13. Page 56 and the following section repeats the view that updating address details and other information is unfair because it removes choice. We wonder why this matter is so "totemic" for the Information Commissioner. After all, the guidance does not argue that obtaining information for the very first time on a data subject, so long as it was lawfully obtained by the provider, is inherently unlawful. It would add to the readers' understanding if ICO would explain why it takes the view that adding information to that already obtained (either from the data subject or elsewhere) is so intrusive as to require consent, while obtaining someone's name and address from a third party in the first place is not.

14. Page 58 contains the following sentence: *"It is unlikely that you will be able to apply legitimate interests for intrusive profiling for direct marketing purposes. This type of profiling is not generally in an individual's reasonable expectations and is rarely transparent enough."* We have already rehearsed our concerns about the ICO's judgement about the likelihood of a particular group of data subjects expecting something, or not. This is already problematic. But here, this sentence adds the ICO view that information about such processing is "rarely transparent enough." We want to challenge this on two counts, firstly by example and secondly on regulatory principle.

    The example is this: I was present at a conference in 2016, before the announcement of the RSPCA and BHF fines, at which an ICO senior policy officer asked those present to raise their hand if the institutions they work for actively said in their privacy notice that they carry out research on people's wealth. He was

incredulous when a significant number of people raised their hands, going so far as to challenge them about whether they were telling the truth. There appeared to be an unwillingness to accept that these charities were entirely transparent about this practice. Since then, especially following the fines and the introduction of GDPR, the vast majority of charities which carry out this practice have included detailed descriptions in their privacy notices. Arguably this is an example of the impact of fines achieving education and correction as the ICO is charged to do. It therefore very disappointing to hear this mantra about a lack of transparency repeated in this guidance.

The regulatory principle follows: that if ICO is right, then surely ICO's duty is to help rectify this so that the activities can be lawfully carried out, not to implement a ban?

15. Yet again, on page 61, the guidance makes assumptions that are not backed up by evidence. "*Even if they had forgotten* [to provide new information]*, they still would not reasonably expect you to contact them via contact details they never gave you.*" Where is the research carried out by ICO to back up this assertion?

16. Page 62ff makes some assertions about consent being specific to an address or email address. We acknowledge that PECR is specific about this in respect of telephone numbers, (PECR S 21.4 - *"he does not, for the time being, object to such calls being made on that line"* (our underlining) we see no such specificity in respect of email (i.e. it does not say "to that email address") and no such specificity in GDPR in respect of mail. We therefore question whether it is possible to argue in this section that in no circumstances is consent transferrable from one address to another unless supplied directly by the data subject. (It is worth noting in this context that new contact information is sometimes obtained on an individual basis from friends of the data subjects, not just from data bureaux.)

17. Page 74 has a sentence which starts "Because an email address identified a unique user…" This is not universally true. Some email addresses refer to a function (e.g. accounts@somecompany.com) or an office (e.g. alumni.office@university.ac.uk) It would be worth clarifying this.

18. The document twice uses the term "intrusive" but does not define it. What is and is not intrusive is a matter of judgement and will vary from person to person. It might be helpful to define it, or use a different term more easily calibrated against an objective test of intrusiveness.

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?

1. Mostly, but as detailed above we have concern that some of the examples are specific, but not specific enough, especially those which show non-compliant practice. As former senior policy officer [redacted] commented, the ICO is the

"Department of 'It Depends'". Unless examples in the guidance are set in context, especially those where the law does not, *de facto*, require consent, they risk being used as normative, rather than properly contextualised.

2. We have significant concern about the section on viral marketing. Campaigns which encourage people to "send this email to everyone in your email list" were common when PECR was written but are few and far between now, and we understand that PECR outlaws these.

   However we believe the language used by the guidance appears to outlaw almost all forms of viral marketing, except the most passive (i.e. the friend passing on details entirely of their own volition) and it is not clear about what marketing it actually covers.

   Is it the ICO's intention that this should include, for example, encouraging someone to share content on social media? We do not believe this constitutes direct marketing, and maybe this is why it is not included at all in the guidance. But it's easy to imagine that some organisations will assume that it is covered by the guidance.

   Fundamentally, the problem with this section of the guidance is ICO's definition of the viral marketing which is regards as unlawful. The term Viral Marketing usually covers a far wider range of activity than "asking individuals to send your direct marketing activity to their family and friends."

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:

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

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 have suggested above that examples should be given in pairs, of compliant and non-compliant practice. We imagine these might be next to each other in the text with a green tick and a red cross, or similar. Or even an amber ”OK in some circumstances” flag.

It is critical that these examples be properly contextualised.

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

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:

More Partnership, Fundraising Consultants.

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