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Information Commissioner's Office

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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:

Overall the code is clear and straightforward, however, there are a number of areas where it could be improved. We have listed these below:

Focus on legal/regulatory requirements rather than best practice recommendations. The inclusion of only best practice recommendation examples in the code, rather than also giving lawful examples, causes unnecessary confusion and could be very detrimental as cannot account for nuances in individual organisations. Our view is that the code should focus on the law and clearly explain what organisations need to consider in their direct marketing practices rather than giving opinions on what is 'best'. The summary section should reflect the important distinction between compliance with the law and good practice recommendations in relation to enforcement action.

Interpret the law rather than give opinion. The code makes several sweeping assumptions about what it considers to be 'unlikely' to be fair/lawful. It would be good to give a more balanced view by also including examples of where it was fair/lawful. Currently the way the examples are written gives the impression that any other approaches are inherently unlawful which is not the case.

Understand that the general public is made up of individuals. The code treats the general public as one homogenous group and sets the bar of knowledge and understanding at an extremely low level. It would be more helpful if the code recognised that, while everyone has the same privacy rights, everyone doesn't necessarily have the same knowledge or expectations regarding the use of their personal data.

Make the code enabling rather than prescriptive. It would be more helpful if the code adopted the same approach as the current online guidance which focuses on accountability and evidenced based approach. This code should provide a framework to aid informed decision making and accountability rather than dictating prescriptive practice. This approach would also future-proof the guidance, especially in relation to online advertising and new technologies.

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?

Overall the draft code gives an appropriate level of detail although further clarity is needed in some areas. See answer to Q3. The draft code is long and repeats itself in a number of places. This could be improved by implementing the points in the answer to Q1.

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

⊠ Yes

☐

The draft code covers the right issues, however further clarity is needed in a number of areas:

Social media – currently the codes puts all social activity under one 'social media' umbrella and does not reflect the significant differences in interactions across different platforms.

Privacy notice timing to prospective major donors - We are concerned by the suggestion that using public sources to enrich data held about supporters, brings the data in scope of personal data, which requires notice to be served to the donor in advance of this processing. Our advice has been that in respect of major donors prospect research it would be disproportionate to serve this notice to all donors since it will not apply in most cases, you will not know the relevance of the research until you have done it and it should be adequate to reference that you may undertake these activities in respect of high net worth individuals in your Privacy notice online. Research has also demonstrated the major donors expect some research to have been carried out before the charity makes contact.

'Directed to particular individuals' – greater clarity is required on what this means, i.e. is it only where a specific individual is personally identifiable?

Donor segmentation - We are concerned that donor segmentation using profiling and analysis has been cited as an example of automated processing, when the legal definition suggests that Processing is "automated" where it is carried out without human intervention and where it produces legal effects or significantly affects you. Profiling and analysis can be carried out with significant human intervention and we would welcome examples to support the lawful basis on which these activities can be undertaken. The GDPR also distinguishes between solely automated processing and automated decision

'Intrusive' profiling (p58) – we would welcome more clarity on what is considered to be 'intrusive' and examples of where you can apply legitimate interest for profiling deemed non-intrusive for direct marketing purposes, e.g. postcode sector level.

Direct marketing by post – the code implies that organisations need to have a pre-existing relationship with an individual before they can send them direct mail. Direct mail can be sent under legitimate interest regardless of whether there is an existing relationship or not.

Refer a friend – we would welcome more guidance on refer a friend campaigns in relation to peer to peer fundraising, particularly in respect of high net worth individuals

Foundational data activities – greater clarity is required on processing data for direct marketing purposes such as data hygiene and administering or processing payments.

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:

The code is extensive and lengthy, but the structure is easy to follow so it is relatively easy to access the information needed.

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

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

The guidance is vague around 'Service Messages' (p.19) and the suggestion of 'using a neutral tone, without any encouragement or promotion' is unclear. It would be helpful to include a specific focus on Gift Aid which is a particularly grey area for charities. The advice given to the Charity Tax Group, is that 'legitimate interest' is the legal basis for processing Gift Aid, including any administrative follow up. Some example scenarios where greater clarity would be appreciated are - if a person has asked you not to send them direct mail, can you still write to them to ask if they are eligible for Gift Aid? If a charity is contacting a donor to confirm details on a Direct Debit form they have completed can we about Gift Aid at the same time? In the case of online fundraising, if someone hasn't opted in to receive e-mails, could you use the triggered receipt e-mail to remind them about Gift Aid?

The example given on P27 regarding the supermarket is causing concern as it is not clear where the liability lies. Also the 'where possible' suggestion of it being good practice to screen against the charity's suppression list would mean sharing donor details with the supermarket which would seem to be in breach of current data protection regulation.

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:

> British Red Cross

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:

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Thank you for taking the time to complete the survey