

ICO consultation on the draft updated data sharing code of practice

Data sharing brings important benefits to organisations and individuals, making our lives easier and helping to deliver efficient services.

It is important, however, that organisations which share personal data have high data protection standards, sharing data in ways that are fair, transparent and accountable. We also want organisations to be confident when dealing with data sharing matters, so individuals can be confident their data has been shared securely and responsibly.

As required by the Data Protection Act 2018, we are working on updating our **data sharing code of practice**, which was published in 2011. We are now seeking your views on the [draft updated code](#).

The draft updated code explains and advises on changes to data protection legislation where these changes are relevant to data sharing. It addresses many aspects of the new legislation including transparency, lawful bases for processing, the new accountability principle and the requirement to record processing activities.

The draft updated code continues to provide practical guidance in relation to data sharing and promotes good practice in the sharing of personal data. It also seeks to allay common concerns around data sharing.

As well as legislative changes, the code deals with technical and other developments that have had an impact on data sharing since the publication of the last code in 2011.

Before drafting the code, the Information Commissioner launched a call for views in August 2018. You can view a summary of the responses and some of the individual responses [here](#).

If you wish to make any comments not covered by the questions in the survey, or you have any general queries about the consultation, please email us at datasharingcode@ico.org.uk.

Please send us your responses by **Monday 9 September 2019**.

Privacy Statement

For this consultation, we will publish all responses except for those where the respondent indicates that they are an individual acting in a private capacity (e.g. a member of the public). All responses from organisations

and individuals responding in a professional capacity will be published. We will remove email addresses and telephone numbers from these responses; but apart from this, we will publish them in full.

For more information about what we do with personal data please see our [privacy notice](#).

Questions

Note: when commenting, please bear in mind that, on the whole, the code does not duplicate the content of existing guidance on particular data protection issues, but instead encourages the reader to refer to the most up to date guidance on the ICO website.

Q1 Does the updated code adequately explain and advise on the new aspects of data protection legislation which are relevant to data sharing?

Yes

No

Q2 If not, please specify where improvements could be made.

In our view most of the aspects of data protection legislation which are relevant to data sharing are well explained in the updated code, and we welcome the approach of providing in-depth guidance which is written in an approachable and easy-to-read fashion.

However, we do have concerns that the updated code still does not adequately deal with the use of data sharing agreements. Please see our responses to Questions 6 and 8.

Q3 Does the draft code cover the right issues about data sharing?

Yes

No

Q4 If no, what other issues would you like to be covered in it?

Q5 Does the draft code contain the right level of detail?

Yes

No

Q6 If no, in what areas should there be more detail within the draft code?

In our view there is insufficient clarity in the code as to which requirements are considered to be "best practice", and which are compulsory requirements in all circumstances. We appreciate that the code is not intended to be binding, but given the indication that failure to comply with the code may create difficulty in demonstrating compliant data sharing, more detail is needed as to which areas the ICO considers to be necessary in all cases, as opposed to those areas which may apply depending on the circumstances. This particularly applies in respect of the section on data sharing agreements; see our response to Question 10 for further comments.

Q7 Has the draft code sufficiently addressed new areas or developments in data protection that are having an impact on your organisation's data sharing practices?

Yes

No

Q8 If no, please specify what areas are not being addressed, or not being addressed in enough detail

We would welcome further guidance as to the requirements for joint controllers pursuant to Article 26 GDPR. In our view the requirements of Article 26 themselves are very brief and “broad brush”, and we had hoped that the expectations of the ICO in this regard would be detailed in the new code. However, there seem to be only minimal references to joint controllers (6 references in total), and these predominantly restate the contents of Article 26.

We would like to see further guidance as to what arrangements are expected in respect of joint controllers; for example, would it be sufficient to comply with Article 26 if joint controllers simply agree that they will each be responsible for complying with their own obligations under GDPR/DPA? In such a case, each controller would be responsible for compliance with the data subject requests they each receive. Alternatively, does Article 26 require that a mechanism is put in place for the parties to produce a joint response to data subject requests?

Q9 Does the draft code provide enough clarity on good practice in data sharing?

Yes

No

Q10 If no, please indicate the section(s) of the draft code which could be improved, and what can be done to make the section(s) clearer.

We would like to provide feedback relating in particular to the “Data sharing agreements” section, and the associated scenarios in Annex D.

We feel that there is a significant degree of ambiguity in this section as to what the expectations would be in the case of the common scenarios involving data sharing between 2 commercial organisations, where data is being disclosed by one controller to another, with no need to contemplate third parties being involved. This raises three questions for us:

1. ARE THERE SITUATIONS WHERE A DATA SHARING AGREEMENT IS NOT REQUIRED AT ALL?

The wording in the third bullet point on page 48 of the draft code suggests that there may be circumstances where this is the case (“... your data sharing agreement, *where you have one*”). We can envisage situations in a commercial setting where personal data is transferred, for example between a supplier and a customer, which is of such low sensitivity (for example the contact details of

those responsible for managing the contract) that contractual arrangements to cover that sharing might be considered unnecessary. Some guidance as to when contractual provisions are expected would be welcome, particularly as there is no requirement in the legislation for data sharing agreements beyond the Article 26 requirements.

2. WHERE A DATA SHARING AGREEMENT IS REQUIRED, WHICH OF THE ITEMS LISTED UNDER "WHAT SHOULD WE INCLUDE IN A DATA SHARING AGREEMENT?" OUGHT TO BE INCLUDED IN ALL AGREEMENTS, AND WHICH ONLY APPLY TO MORE COMPLEX ARRANGEMENTS?

In our view, there is a distinction between agreements where the data sharing is the main purpose of the agreement, and those where the data sharing is incidental to an agreement that is being put in place for another purpose (typically for the provision of services by a supplier).

In the latter case, there are a number of the items listed in the guidance as "should explain / identify / deal with" which would not be appropriate for a more straightforward customer / supplier arrangement. For example:

- "should also contain procedures for including additional organisations in the data sharing arrangement",
- "are recording data in the same way",
- "have common rules for the retention and deletion of shared data items" etc.

In our view, these types of requirements are likely to be more relevant to a multi-party-type arrangement of a kind entered into by public sector agencies (such as police, social services, education, and organisations dealing with drug abuse or domestic violence), and we would welcome some more clarity in the guidance as to the circumstances in which the various requirements should be considered.

3. WHAT LEGAL REQUIREMENTS DOES THIS SECTION SEEK TO SATISFY?

As noted above, there is no requirement in the legislation for data sharing agreements beyond the Article 26 requirements. In our view it would be helpful for those considering the application of the code to their activities to understand which legal requirements the items relating to data sharing agreements seek to comply with, particularly since the guidance appears to apply a level of detail at least equivalent to that required by Article 28 in respect of data processor agreements.

Following on from the above, the case studies in Annex D that relate to data sharing agreements are similarly aimed at complex, multi-party-type arrangements (one referring to an information sharing framework amongst various healthcare partners, and another to sharing information between a variety of public sector bodies for a combined approach to supporting young people). We would welcome the addition of examples relating to more "mainstream commercial" data sharing arrangements and the expectations the ICO has in relation to those. By way of example, such an arrangement arises when a business shares recipient information with a courier company to deliver packages on its behalf (i.e. as described in paragraph 39 of the ICO guidance document "*Data controllers and data processors: what the difference is and what the governance implications are*").

Q11 Does the draft code strike the right balance between recognising the benefits of sharing data and the need to protect it?

Yes

No

Q12 If no, in what way does the draft code fail to strike this balance?

Q13 Does the draft code cover case studies or data sharing scenarios relevant to your organisation?

Yes

No

Q14 Please provide any further comments or suggestions you may have about the draft code.

Q15 To what extent do you agree that the draft code is clear and easy to understand?

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree

Q16 Are you answering as:

- An individual acting in a private capacity (e.g. someone providing their views as a member of the public of the public)
- An individual acting in a professional capacity
- On behalf of an organisation
- Other

Please specify the name of your organisation:

Freeths LLP

Thank you for taking the time to share your views and experience.