

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.

Overall, we consider that the document is inaccessible: it is over-long and confusingly arranged. We are concerned that readers will find it off-putting and it may therefore fail in its objective to support appropriate sharing of personal data. We consider that as law enforcement processing is very much a niche activity the code could be simplified by having law enforcement data sharing covered in a separate document. Similarly, it may be helpful to provide separate guidance for public and private sector organisations.

In our view the Guidance mixes up the requirements where sharing takes place between 'controllers in common/separate controllers' and joint controllers. This is confusing: there should be a separate section for joint controllers.

We also note that there is a section on data ethics and data trusts but it is not clear why these are deal with together as no clear connection is made between them.

See further comments below.

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?

Overall, we consider that there is too much focus in the draft guidance on public sector sharing and not enough on what private sector/commercial organisations should be thinking about. (See, eg the "real life examples" on page 17, only one of which refers to non-public sector sharing and that example is arguably more likely to be a controller/processor relationship than a controller/controller one.) Indeed, it may be preferable for the ICO to consider publishing guidance for non-public sector organisations.

We also note the recent decisions about websites being joint controllers with social media platforms (*Fashion ID GmbH & Co. KG v Verbraucherzentrale NRW eV* (Case C-40/17)). This type of data sharing also need to be addressed.

Finally, we consider that the guidance could be clearer about what sharing is **not** covered, ie sharing with a data processor. This area is confusing and again the explanation would be bolstered by examples.

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?

See comments in response to question 4 above.

We are concerned that there is little mention of exceptions and exemptions in the guidance which would allow data to be shared in certain circumstances where compliance with some of the DPPs is not required. This appears to us to be a significant omission as much of the day-to-day sharing that takes place is based on those exceptions and exemptions.

We also consider that the section on mergers and acquisitions is too brief. In particular, it should cover how to share personal data in advance of a merger happening; we are aware that this is an issue which lawyers commonly encounter.

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

The transparency requirements can adequately be dealt with on a collective basis where parties to a data sharing agreement agree to collective privacy statements covering all parties to the agreement. This makes for a more efficient process and one which avoids data subjects being bombarded with multiple privacy statements relating to the same activity. However, the code does not address this.

The code makes references to consent throughout, without recognising that much data sharing takes place under other legal bases.

In the section on individual rights, the part relating to rights in terms of law enforcement processing notes that there are exemptions and restrictions applicable. There are also exemptions and restrictions in terms of GDPR individual rights but these are not signposted in the same way.

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.

In the political party section, we note the reference to sharing data with an organisation that sends out campaign material; in our view this is a controller to processor arrangement but it does not seem to be treated as such in the guidance as it is mentioned separately. It might be clearer to merely use this scenario as an illustrative example within one of the standard sections to make it clearer that the general guidance applies in a party-political context also.

In the security section, we note that information security covers confidentiality, integrity and availability of information but the narrative is almost exclusively in relation to confidentiality. We also note that security must cover data at rest, data in motion and data in use. Again, the code only covers data in use. In our experience a good data sharing agreement will cover all of these parameters and is a useful place to set out practical matters such as the agreed secure method by which data will actually be exchanged.

A number of the case studies quoted are actually examples of bad practice rather than good. For example, the case study on page 35 identifies an example where things went wrong but does not give practical advice as to how relevant parts of data could have been shared in an appropriate manner in the same scenario. Likewise, the example on page 63 identifies a case of the police asking for excess information. We consider it would be more helpful to focus on good practice as an informative model for those seeking to comply.

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?

Overall we consider that the code is reasonably balanced but there could perhaps be greater focus on the benefits of data sharing.

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.

As noted above, the majority of the examples are public sector-based. As suggested in response to Q4, it may be helpful to consider a separate code for private sector organisations but if not it would be helpful if the examples covered a broader range of scenarios to assist non-public-sector organisations.

The section on sharing in urgent situations is a welcome addition, although we think it would benefit from inclusion of a warning that people may use the existence of a major incident as an opportunity to try and obtain information unlawfully. The existence of an urgent situation should not remove the need for at least some sort of validation check before releasing sensitive information.

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:

The Law Society of Scotland

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