ICO's call for views on the Data sharing code of practice

Summary of responses and ICO comment

Introduction

As required by the Data Protection Act 2018 (the DPA), we have been working on updating our Data sharing code of practice (the code), which was last published in 2011. The draft updated code explains and advises on changes to data protection legislation that 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 code continues to provide practical guidance in relation to data sharing and to promote good practice.

We are now publishing the draft code for consultation.

We are also taking the opportunity in this document to publish the responses we received to the call for views we issued last year, along with a thematic summary drawn from those responses.

Our work on the code consists of two phases.

- Phase one focuses on the update to the code, including the call for views, this summary, the draft code and consultation process.
- In phase two we will develop further useful guidance and resources on our website, to assist organisations which are involved in data sharing. Our intention is that, in addition to legislative changes, the code and the phase two work will also cover technological and other developments that have had an impact on data sharing since the publication of the last code in 2011.

The DPA requires that before preparation of the code, the Information Commissioner must consult the Secretary of State and others. She is also seeking input from trade associations, data subjects and those representing the interests of data subjects.

Call for Views

In August 2018 the Information Commissioner issued a call for views to inform our work in developing the code. This call for views was the first stage of the consultation process.

Our survey covered some of the key issues we needed to consider in starting to take forward this work, and posed a number of open discursive questions.

101 responses were received to the call for views:

- 75 of these were completed on the web-form;
- 16 were responses to the survey sent via email; and
- 10 were separate email comments from respondents which did not answer the survey questions.

We have only published responses received from organisations; these are available to read on our website.

We said at the launch of the survey we would not publish individual responses. As it was not always explicit on the web-form responses whether submissions were being made on behalf of an organisation or from an individual merely identifying an organisation they worked for, we are only publishing the web-form survey responses that explicitly named the organisation.

No responses were received via post.

The respondents were from across a range of public and private sectors, third sector and voluntary organisations, trade associations and individual members of the public.

Key themes

Scope

Overall, the responses overwhelmingly accorded with the ICO's aim of updating the code rather than replacing it with a completely different document. It was clear that the code is a very well-used tool and respondents are awaiting the update to help them with their day-to-day work.

A major theme emerging from the responses concerned the scope of the code itself and what should fall within its remit. Respondents were very keen for the code to be brought up to date with the new legislation and noted that it should explicitly state that the General Data Protection Regulation (GDPR) turns what was essentially good practice under the Data Protection Act 1998 into a legal minimum.

Many respondents asked for basic definitions of data protection terms such as 'controller' and 'processor', although there was some recognition that the code should not replicate huge sections of the ICO's guidance.

Some respondents requested increased sector-specific guidance. Examples included health and local government. A few wanted a very prescriptive code, but others noted the risk that trying to cover every possible scenario of data sharing might be too ambitious.

A number of respondents asked for a greater emphasis on law enforcement processing. A couple even felt it required an entirely separate code. A number also wanted the code to provide guidance on sharing before and after Brexit, with updated detail on international transfers.

In places there was a sense that respondents were using the call for views to raise more general data protection issues that might not squarely fit within the scope of the code itself.

There was an emerging call for a clearer definition of data sharing agreements to distinguish them from data processing agreements, contracts or Memoranda of Understanding (MOUs).

Some respondents asked for clarification on pseudonymisation and anonymisation, with reference made to the issues of changing technology and true anonymisation.

There was an appetite for a much more modern online document, in line with the formatting of other guidance from the ICO. Respondents were keen for hyperlinks taking them to relevant case studies, checklists, templates and other guidance. There was a sense that the code has an opportunity to be a

more interactive tool than its predecessor. Respondents wanted templates to be accessible and usable, rather than embedded in one large PDF document.

ICO comment

Our aim is to update, not replace the code. We recognise the desire from some respondents for very detailed sectoral advice, but take the broader view that the code must be more generic but helpful and influential in its scope.

Guidance elsewhere on our website covers many of the issues raised by respondents that fall outside the scope of the code. Our preference is not to replicate other ICO guidance.

Since the code is statutory, there are certain restrictions on its format. We aim to address this by providing further guidance and links in our resources in phase two of the work on the code.

Balance

An overarching theme of the responses was whether the existing code strikes the right balance between recognising the benefits of sharing personal data and protecting personal data.

Question 4 of the Snap Survey specifically posed this question and 84 respondents answered it. There was a close result with 39 stating that the code strikes the right balance (46% of those responding to the question) and 45 stating that it fails to do so (54%). Alongside the poll, a number of respondents raised this issue in their comments.

We received one negative comment about the ICO's role in guidance on data sharing, stating it was not for the ICO to discuss the positives or negatives of data sharing, but simply to enforce the law.

Respondents were concerned about the negative consequences of deciding not to share personal data where a lawful basis and good reason allowed them to do. Respondents noted serious scenarios in a health context where deciding not to share personal data could result in risk to life.

ICO comment

We want to provide a code that helps organisations to make an informed decision to share personal data when it is lawful and appropriate to do so.

We recognise that not every situation is clear-cut. We aim to help organisations to get this balance right by focusing on accountability within the code and providing an easy to follow overview of weighing up the balance of the benefits of data sharing and safeguarding rights and freedoms.

Confidence

Building on the theme of balance, there was broader commentary on a culture of risk aversion and a fear of GDPR deterring data sharing. Respondents commented that an increased awareness of GDPR, and some scaremongering, has had a knock on effect, consciously or unconsciously deterring data sharing even when the justifications for doing so are sound. They warned of a culture of organisations being scared to share data, and suggested that the code should be a way of providing confidence to practitioners.

References were made to the 2013 NHS Information Governance 'Caldicott 2' National Data Guardian review on data sharing and her comments that a culture of anxiety permeates the health and social care sector.

There were a couple of other main themes around readers' confidence in using the code.
First, many respondents commented on the readability of the code, emphasising the importance of practitioners being able to understand it and make appropriate decisions based on that understanding. There were comments praising the readability of the 2011 code, but some felt a plainer English approach could be adopted and there could be more pull-out boxes and examples of good practice, to break up large chunks of text. Suggestions included one-page summaries, templates, more case studies and links to other ICO guidance.
Second, the other main area around uncertainty was about relevant lawful bases for data sharing. This came across as a significant area where practitioners wanted to have greater confidence.

Respondents either wanted clear definitions and examples of lawful bases for processing, or guidance on associated documentary requirements. A few respondents indicated that they believe organisations are sometimes using the wrong lawful basis. In particular, some highlighted that there should not

be undue reliance on consent when there is a more appropriate lawful basis for data sharing. Some spoke of experiences where data sharing had stopped because of a lack of confidence in using alternative lawful bases to consent. Public sector respondents particularly wanted more clarity on when they can use legitimate interests. Respondents were keen for more detailed examples of the three-part legitimate interest test.

ICO Comment

We want to increase trust and confidence in data sharing and dispel myths about data sharing, focusing minds on what the law actually says. We believe this will help organisations to avoid undue risk aversion.

We want the code to improve the standards of interpretation of the law by using plain English and an easy to read format.

We want the code to better explain different lawful bases for processing and to be in line with other developments in information rights. However the ICO website guidance should be the main resource on this topic, and we will encourage organisations to refer to that as well.

Guidance

Also emerging from the call for views were specific areas on which respondents wanted greater guidance. Most respondents felt that the code did not go into enough detail on particular types of data sharing, such as ad hoc / exceptional types of data sharing. Some stressed that all heads of data sharing were important and there should not be a perception of a hierarchy. However, it came across that alongside guidance on how to approach everyday data sharing scenarios (ie routine / systematic), there was a call for more detail on how to approach the unexpected or unusual (ie ad hoc / exceptional).

A few respondents referred to administrative issues, such as the challenges for them in terms of time and resources if every strand of systematic data sharing were to need a data sharing agreement. A number of respondents mentioned documentation requirements.

Respondents would like some steer on situations involving joint controllers and those formerly known as "controllers in common".

A number of public sector respondents were keen for a reference to data sharing powers under the Digital Economy Act 2017.

Some respondents were keen to see more detail on the rights of data subjects in data sharing scenarios. They wanted the code to give greater guidance on when practitioners need to inform data subjects about data sharing. There were also comments about exemptions; in particular statistics and research.

There was also a wish for more guidance on various data sharing situations involving law enforcement processing; both domestically and internationally.

Other suggestions on improving guidance included suggesting the use of 'REDS' in examples: reason for processing, expectation of the data subject, documentation, security.

Additional comments stated that little is mentioned in the current code about the transmission of personal data, and also that the new code should say more on risk and on the practical responsibilities of the Data Protection Officer.

ICO Comment

Our ambition is for the code to be an excellent source of guidance, giving clear guidance on difference types of data sharing and data subject rights. However the code is not intended to replicate the ICO's existing website guidance.

We want the code to set the standard on practical guidance on data sharing. We will ensure it is accurate and engaging.

The call for views highlighted a large number of particular and sectoral situations of concern to respondents. We will consider how we can provide both specific and broader generic advice that allows readers to become more knowledgeable in their fields, both in the code and in the planned phase two guidance, in ways that are complementary to existing ICO guidance.

Relevance

Most respondents agreed the code was relevant to their areas but needed tweaking in parts.

A number of respondents mentioned the significance of technological developments relevant to their operations.

Relevance was a recurrent theme in suggested case studies. There was a sense that more varied case studies from a wider range of examples would be welcome.

Respondents were keen to see both the good and the bad. This included suggesting examples to show how good data sharing arrangements can help demonstrate compliance with the legislation and conversely examples where the ICO had to take enforcement action.

Whilst there was some understanding that the code could not cover every data sharing scenario, there was hope from respondents that it could address, even if indirectly rather than explicitly, some of the current issues facing practitioners.

For example, there was reference to a recent Supreme Court judgement on information sharing provisions within the Children and Young People (Scotland) Act 2014 declared incompatible with article 8 of the ECHR, and its ensuing impact on data sharing. The respondent felt an updated code could help to provide clarity as to when data sharing is possible.

Views were mixed as to whether the current code covered everything it needed to in sufficient detail. Some said the code was vague, whereas others said it did provide enough detail and just needed updating with the new legislation.

ICO Comment

Our ambition is for the code to be highly relevant, up to date on current cyber-related privacy issues and to provide a roadmap in anticipating future technological developments.

Some respondents expressed willingness to participate in further discussion on creating appropriate case studies. This will form part of the consultation process which is the next stage.

Next steps

We have used this feedback to contribute to drafting an update on the code, which we are now putting out for consultation.

We recognise that stakeholders are keen to see gaps filled but that the foundations do not need replacing.

We plan a two-phase approach. In the first phase, and following this feedback, we have produced a draft updated code to align with the GDPR and Data Protection Act 2018. We are now engaging again with stakeholders as we put the draft out for consultation. Once the final code has been published, we will develop further useful guidance and case studies.

We understand the importance of getting the code right. Since last year there has been a 'health warning' on the current 2011 code on the ICO website to alert readers that the legislation has changed. We know that organisations in all sectors are keen to have access to an updated version. We are pleased to be able to report to you here on the call for views responses and now look forward to hearing from you in the consultation on the draft code.

We remain committed to designing an effective and useful code that promotes good data sharing and deters the bad, in such a way that fundamentally protects the rights of the data subject whilst supporting the necessary sharing of personal data.