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:

The use of specific examples for each section would be extremely helpful. In particular, there are some sections where the example applies to a first party collecting personal data, it would also be useful for there to be an example and clear guidance on how the section would apply to a data broker who will sell the data to third parties and to third-parties who may wish to purchase that data.

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?

There are several areas that we would like to see further detail, clarity, examples or guidance and these have been documented below.

(1) We would like to understand the basis for the good practice recommendation that companies should get consent for all direct marketing. Under the GDPR, all legal bases are deemed equal and this statement seems to contradict what is set out in the GDPR (page 31).

(2) To allow us to undertake effective due diligence we would like further guidance, clarity and specific examples of what is acceptable and what is not acceptable to meet "Your request for consent must cover the name of the controller who wants to rely on the consent – this includes you and any third party controllers who are relying on the consent for direct marketing". In particular, we would like to understand:
- If the use of category or sector is no longer sufficient at the point of data capture or on privacy notices and if so, does this just relate to direct marketing or is this a wider narrowing of the previous guidance?
- Are data brokers expected to name all recipients of data at the point of capture, and if this results in a long list, how could this meet the transparency requirements?
- Does the name of the controller have to appear at the point of data capture, or could this be within a linked Privacy Notice? If this results in a long list, how could this meet the transparency requirements?
(page 33)

(3) We would like further guidance, clarity and specific examples of what is acceptable and what is not acceptable to meet "the purposes of processing" at the point of consent capture to allow us to undertake effective due diligence. In particular, we would like to understand:

- If wider terms such as "marketing services" are not acceptable, how could a data-broker draft a compliant privacy notice if collecting data for a number of clients – we would like to see examples of what would be acceptable (page 33)

(4) We would like further guidance, clarity and specific examples of how a data broker and any third-party purchasing data, could meet the legitimate interest test. In particular we would like to understand:

- What is required at the point of data capture and/or in the Privacy Notice of a data broker who is relying on legitimate interest?
- Is it sufficient to have a category or sector and if so, does a long list of sectors dilute the "reasonable expectation"? Can the ICO give guidance on what meet the "reasonable expectation" requirement.
- If individual companies are required to be named, does a long list of companies dilute the "reasonable expectation"? Can the ICO give guidance on what meets the "reasonable expectation" requirement. (page 35/36)

(5) Could the ICO please clarify whether it is acceptable to rely on individuals telling us when they change address if there is no ability for individuals to log into an account and update their own details or does the ICO believe we should be proactively contacting individuals by email or post to check their details are correct? (page 40)

(6) We would like to understand the basis for the good practice recommendation that "when sending direct marketing to new customers on the basis of consent collected by a third party, we recommend that you do not rely on consent that was given more than six months ago". We would like further guidance and clarity and specific examples of how companies who may purchase data from data brokers can comply with this good practice recommendation while at the same following ethical data practices i.e. ensuring that data is screened and accurately targeted to avoid sending unnecessary or unwanted marketing, all of which take time and could result in the consents passing the six-month mark. Could the ICO please clarify how these tensions could be resolved. In addition, could the ICO advise whether the six-month timeframe extends to the "reasonable expectation" part of the Legitimate Interest test? (page 42)

(7) We would like further guidance and clarity and specific examples in respect of Article 14 Notice. In particular we would like to understand:

- If a marketing campaign takes longer than a month, is the ICO stating that the data subject should be contacted twice. Once with the privacy information, and then with the actual marketing itself? Can the ICO explain why this would be beneficial to the data subject and has any consideration been taken of companies who are trying to be sustainable and reduce the amount of paper used?
- Is the ICO suggesting organisations obtaining data from a data broker for the purposes of direct marketing have to inform data subjects they obtained their

data, even if the organisation decides to screen them out from receiving a marketing communication from them? If so can the ICO explain why it is in the data subjects' interests to receive a communication from an organisation informing them their data had been provided by a data provider, in the circumstances where the organisation who purchased the data has decided not to actually market to that data subject. (page 48)

(8) We would like further guidance and clarity and specific examples of what would constitute "Any unusual or unexpected processing ought to be at the forefront of any layered privacy information."

(9) We would like further guidance and clarity on whether the ICO are of the view that direct marketing on the basis of legitimate interest to individuals whose data has been obtained from a broker who obtained the data through the electoral register satisfies the "reasonable expectations" requirement of the test. In addition, we would like specific examples of a compliant Legitimate Interest Assessment to allow us to undertake sufficient due diligence on third-party data brokers who obtain data through the electoral register. (page 56)

(10) We would like further guidance and clarity on whether applying non-personal assumptions about the type of people who live in a particular postcode to enrich data, could make householder level data (such as PAF data from the Royal Mail), personal data. It would be helpful for the final version of the code to clarify whether or not non-personal data enriched with assumptions about the type of people who live in a particular postcode would become personal data. (page 56)

(11) We would like further guidance and clarity on whether the ICO view a tracking pixel within a service email to check whether the email has bounced or been opened as an essential or non-essential cookie. If the ICO's view is such a tracking pixel is non-essential such that consent is required, it would be useful for the code to contain examples of how operators may obtain consent to such pixels from customers particularly from customers who do not sign up online e.g. by telephone. (page 74)

(12) We would like further guidance and clarity on whether consent is also required where a list of existing customers' email addresses are provided to the social media organisation to ensure they don't receive undirected social media marketing from the organisation for which they are already a customer or whether in this situation, Legitimate Interest is appropriate (page 90).

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:

> Please see Q2 above.
>
> It would also be helpful to have clarity on and further examples what types of marketing fall out-with the GDPR.

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

> Please see Q2 above.

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:

It would be helpful to build in detail about how companies can comply when purchasing third party data through-out the code and not confine it to a section on selling data.

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 :

As noted above in Q2, clear examples and clarity of what is and is not acceptable would be very helpful.

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

See Q2.

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:

Postcode Lottery Limited

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