

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](mailto: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:

See response to Q2.

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?

**Page 30: How do we decide what our lawful basis is for direct marketing?**

The following statement needs clarity.

***If you have obtained consent in compliance with PECR (which must be to the GDPR standard), then in practice consent is also the appropriate lawful basis under the GDPR.***

Whilst this may be suggested as best practice from the ICO, it is not how the GDPR has been interpreted or should be. A lawful basis should be applied to each purpose. Sending an email is one purpose. Other purposes maybe profiling, analysis and segmentation.

When consent is required to send an electronic communication under PECR, this drafting would suggest consent should also be obtained for profiling, analysis, etc. Whilst this can be handled via a separate consent mechanism which would make the user experience challenging, a basis for processing for profiling/analysis could be legitimate interests subject to a positive assessment via a balance test. The data subject can be informed via the privacy notice, the organisation can process personal data to operate effectively (for example building a segmentation model) and send relevant communications to their customers, even if the data subject opts-out of receiving email communications.

Recital 47 clearly states legitimate interests can be used for direct marketing purposes [subject to the correct acceptability measure being conducted, such as a balance test].

More clarity is required on the different purposes for using personal data for direct marketing purposes and if/that it is possible for use consent for some purpose and another basis such as contract or legitimate interest for other purposes.

**Clarity required for sending emails to corporate subscribers.**

The draft text suggest that emails can be sent to business contacts (corporate subscribers) using a legitimate interest basis, subject to the correct tests being conducted and opt-out mechanism being available. Potential for confusion. Is a business contact an individual at a business (corporate subscriber) or just an organisation? The assumed definition is an individual, due to the use of the words 'business contact' is [persons.name]@[company.name].co.uk rather than [info]@[company.name].co.uk. It would be good for this to be clarified in this way. The glossary refers to a Corporate Subscriber as a Corporate body with separate legal status - includes companies, limited liability partnerships, Scottish partnerships, and some government bodies.

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:

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

As a data analytics business supporting charities, it would be useful to have examples to provide greater clarity, especially surrounding the use of profiling for direct marketing.

The following statement on P.59 would need further clarity to define *intrusive* profiling.

*If explicit consent is not required and you are considering using legitimate interests as your lawful basis, you need to give careful consideration to the three-part test. It is unlikely that you will be able to apply legitimate interests for **intrusive** profiling for direct marketing purposes. This type of profiling is not generally in an individual's reasonable expectations and is rarely transparent enough.*

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:

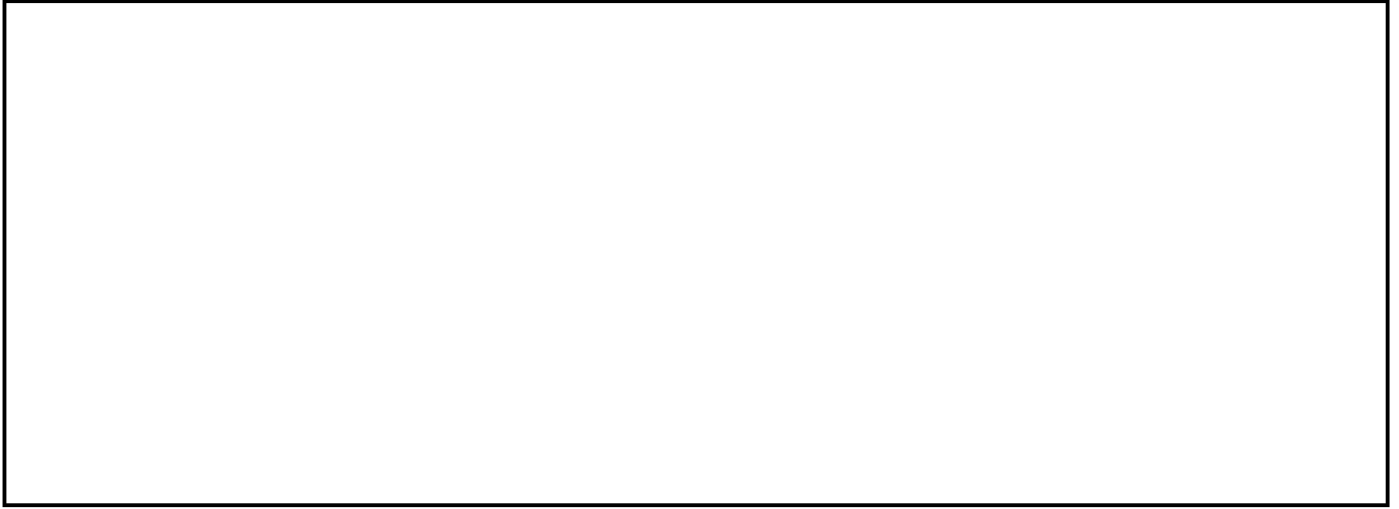
Q6 Do you have any examples of direct marketing in practice, good or bad, that you think it would be useful to include in the code

Yes

No

If yes, please provide your direct marketing examples :

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

A large, empty rectangular box with a thin black border, intended for the user to provide suggestions for the direct marketing code.

# 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:

MyLife Digital Ltd and Wood for Trees 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