

DATA PROTECTION

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The Institute of Fundraising's Codes of Fundraising Practice

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The Institute of Fundraising's complete set of Codes of Fundraising Practice are structured in order to highlight what is mandatory at law, what the Institute regards as a mandatory requirement for its members and what constitutes advice on best practice.

In this Code a phrase where the word '**must**' is in **bold** indicates a requirement that is mandatory at law, '**ought**' in **bold** indicates a requirement that is mandatory for members and affiliated organisations of the Institute and '**should**' in **bold** indicates a course of action that is recommended as best practice.

Organisations engaged in fundraising **should** join the Fundraising Standards Board and **should** follow their complaints procedure.

This Code of Fundraising Practice is intended to address fundraising activity throughout the UK. Legal requirements can vary between different jurisdictions (England & Wales; Northern Ireland; Scotland). The Institute recommends that organisations adhere to the most rigorous interpretation of the law applicable to an activity.

Users should be aware that this Code addresses the law as it stands throughout the UK at the date of publication. Reviews of the law and the introduction of regulations relating to fundraising and fundraising activities, governance and charitable status are ongoing in Northern Ireland, Scotland, England and Wales. This Code will be revised to take into account any developments or changes in the law that may result from these initiatives.

Download Codes of Fundraising Practice at:

www.institute-of-fundraising.org.uk/codes

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1.0 Introduction

This Code aims to draw attention to those areas of the Data Protection Act 1998 and Privacy and Electronic Communications (EC Directive) Regulations 2003, as amended, that apply to fundraising activities.

Data Protection is an important issue to all fundraisers and impacts on how data is collected, what is done with the collected data and the subsequent relationship with the data subject.

The Information Commissioner's Office (ICO) provides further information on data protection issues. Their helpline number is 01625 545745 or see the website www.ico.gov.uk.

This Code provides a summary of a complex and changing area of law. It is outline guidance for fundraisers and **should not** be relied on as legal advice, which **should** be obtained for specific circumstances.

1.1

Definitions of Terms Used in This Code

Act

Data Protection Act 1998

Data

Information which is recorded:

- with the intention that it be processed by means of equipment operating automatically;
- as part of a relevant filing system.

Data Controller

A person who alone or jointly determines the purposes for which personal data are to be used.

Data Processor

A person processing data on behalf of the data controller.

Data Subject

An individual who is the subject of personal data.

Direct Marketing

The communication (by whatever means) of any advertising or marketing material which is directed to particular individuals.

Explicit Consent

The consent of the data subject **must** be absolutely clear. In appropriate cases it **should** cover the specific detail of the processing, the particular type of data to be processed, the purposes of the processing and any special aspects of the processing that may affect the individual.

Personal Data

Data relating to a living individual who can be identified from the data and includes any expression of opinion about them.

Processing

Obtaining, recording or holding data or carrying out any operation on the data including:

- organisation, adaptation or alteration of the information or data;
- a retrieval, consultation or use of the information or data;
- disclosure of the information or data by transmission, dissemination or otherwise making available;
- an alignment, combination blocking erasure or destruction of the information or data.

Regulations

Privacy and Electronic Communications (EC Directive) Regulations 2003 as amended.

Relevant Filing System

Any set of information relating to individuals to the extent that the set is structured in such a way that, although the information is not processed by means of equipment operating automatically, specific information relating to a particular individual is readily accessible.

A manual filing system will only qualify if it is of sufficient sophistication to provide the same or similar ready accessibility as a computerised filing system. This would ordinarily mean the file is arranged in a way specific to individuals with sub-categories for information relating to the individual. A file based in chronological order without indexing or sub-division would not qualify. Further guidance as to what constitutes a relevant filing system can be found at the ICO website (see 11.0).

2.0 Who Does the Data Protection Act Apply to?

The Act applies to individuals or organisations who process personal data. 'Processing' is given a very wide definition in the Act and will cover nearly all types of activities in relation to data, including obtaining, recording or holding data, or carrying out any operation on the data. 'Personal data' is data relating to a living individual, which allows that individual to be identified from the data. Therefore, data about companies which does not contain information that would enable one to identify any individual is not covered under the Act.

3.0 Processing

3.1 Compliance with the Act

To comply with the Act, processing **must** observe:

- data protection principles;
- data subjects' rights;
- notification.

3.2 The Data Protection Principles

There are eight data protection principles which **must** be complied with when processing personal data.

- Personal data shall be processed fairly and lawfully. See section 3.3 for further information.
- Personal data can only be used for one or more specified and lawful purposes and shall not be further processed in any manner incompatible with those purposes.
- Personal data shall be adequate, relevant and not excessive.
- Personal data shall be accurate.
- Personal data shall not be kept for longer than necessary. See section 5.0 for further information.
- Personal data shall be processed in accordance with the rights of data subjects. See section 6.0 for further information.

- Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data.
- Personal data shall not be transferred to a country or territory outside the European Economic Area (EEA) unless that country or territory ensures an adequate level of protection for the rights and freedoms of data subjects except where consent has been given, for reasons in the public interest, where data is available on a public register or with the approval of the Information Commissioner.

3.3 What is Fair and Lawful Processing? Interpreting Data Protection Principle 1

Data **must** be processed 'fairly'. The Act sets out general requirements that **must** be adhered to in order for data to be processed fairly:

- the data subject has neither been deceived nor misled regarding the purposes for which their data is to be processed;
- as far as possible the data subject **should** be in possession of the following information:
 - the identity of the data controller;
 - the purpose of processing;
 - any other information relevant to the fairness of processing.

In addition, at least one of the conditions below **must** be met for the processing to be fair:

- the individual has consented to the processing (see 3.0);
- processing is necessary for the performance of a contract with the individual;
- processing is required under a legal obligation (other than a contract);
- processing is necessary to protect the vital interests of the individual (reliance on this condition may only be claimed where the processing is necessary for matters of life and death);
- processing is necessary to carry out public functions;
- processing is necessary to pursue the legitimate interests of the data controller or third parties (unless it could unjustifiably prejudice the interests of the individual).

Thirdly, processing **must** be lawful, i.e. not contrary to any law or enactment or done without lawful justification or excuse.

3.4 Processing Sensitive Personal Data

There are more onerous requirements in the Act for those processing 'sensitive personal data'. Sensitive personal data is data concerning:

- the racial or ethnic origin of the data subject;
- the political opinions of the data subject;
- the data subject's religious beliefs or other beliefs of a similar nature;
- whether the data subject is a member of a trade union;
- the data subject's physical or mental health or condition;
- the data subject's sexual life;
- the commission or alleged commission of any offence by the data subject;
- any proceedings relating to any offence committed or allegedly committed by the data subject.

3.5 When Can I Process Sensitive Personal Data?

To process sensitive personal data at least one of the conditions relating to fair processing (see Section 2.3 above) **must** be met and in addition at least one of the following conditions **must** be present:

- the explicit consent of the data subject;
- where there is a legal obligation on the data processor to do so in relation to employment;
- where it is necessary to protect the interests of the data subject and the data controller cannot reasonably obtain consent;
- where a not-for-profit organisation existing for political, philosophical, religious or trade union purposes processes in the course of its legitimate activities (note: it is doubtful whether many charities fall within this);
- where information has been made public by the deliberate steps of the data subject;
- where processing forms a necessary part of legal proceedings, the administration of justice or the functions of any House of Parliament;
- where processing is necessary for medical purposes;
- where processing is necessary for monitoring equal opportunities;
- in the course of legitimate political activities, or research activities that are in the substantial public interest or where the personal data **must** be processed in circumstances specified by the Lord Chancellor.

4.0 Collection of Data and What is Meant by Consent?

Consent is one of the most frequently relied upon conditions for fair processing and appears both in relation to processing personal data (see 2.3) and sensitive personal data (see 2.5). There is no definition of 'consent' contained within the Act. It appears that while the Information Commissioner may accept implied consent under some circumstances, under others it is apparent that a "specific and informed indication" of the data subject's wishes could be considered necessary. The exact nature of the consent will depend upon the particular circumstances including what the data is being processed for and whether personal data or sensitive personal data is being processed. For example, if sensitive data is being processed, specific and informed consent **must** be obtained.

Organisations **ought** to give the collection of data careful consideration. Donors/contacts **must not** be misled or deceived as to how their information will be used and how the organisation may contact them in future. If a donor or contact informs an organisation that they do not wish to be subject to direct marketing, then the organisation **must** act on that information. See 9.1 and 9.2 for further information about a data subject's specific rights in relation to direct marketing via fax, telephone and electronic communication.

If the charity is part of a group and requires the right to pass personal data to trading subsidiaries or other entities within the group, each entity within the group is considered a separate data processor. The charity **must** ensure that data subjects are asked for their specific consent to the sharing of information with the trading subsidiary at the point of data capture. If a tick box is provided to cover each discrete area of interest, consent will have been achieved at little extra cost to the data controller.

It is not clearly stated within the Act to what degree fundraisers may develop a file (when researching major donors, for example) before it becomes necessary to obtain the consent of the relevant individuals. However, provided that the data itself is not sensitive, but freely available and in the public domain, it would be difficult to suggest that such processing could be unfair.

It would be reasonable to expect that at the first point of contact with such a donor, an appropriate declaration **ought** to be made by the person making that approach relating to the data held.

5.0 Exchanging Lists

If personal data is captured from any source other than from the data subject, the data controller **must** ensure that the data subject has been given information regarding the identity of the data controller, the purpose of the processing and any other relevant information either before the data is first processed or before disclosure to a third party.

There is a possible exemption from this obligation if it would entail "disproportionate effort" on the part of the data controller. In deciding whether this exemption is available the factors to take into account are:

- the cost to the data controller of providing this information;
- the time (and therefore cost) it would take to provide the information;
- the ease with which that information could be provided, set against the degree of harm or concern that non-provision of the data might have.

6.0 Keeping Data

The fifth data protection principle demands that data **must not** be kept longer than is necessary. This means that data that is being processed for a particular purpose **must not** be kept unless it is still required for that purpose. However, before deleting any information it is important to consider whether there are any other legal requirements that mean certain elements of the data need to be retained, for example certain information about an employee in order to give future references. It may be necessary to remove unnecessary data or to anonymise data.

7.0 Subject Rights

In addition to the rights set out in the eight data protection principles, data subjects also have the right, following a written request to the data controller, to the following information about data relating to themselves:

- that personal data is being processed;
- a description of that data, the purpose for which it is held and the nature of those to whom it might be disclosed;
- a copy of the data (in supplying any data the data controller **must** ensure that personal data relating to another individual is not disclosed unless that individual has consented to such disclosure, or where reasonable to do so the data controller has edited the data so as to remove personal data relating to other individuals. If neither of these conditions is present the data controller does not have to comply with the request);
- any available information on the source of the data.

This information **must** be supplied promptly and in any event, no longer than 40 days after receiving a request, subject to the payment of a fee set by the Home Secretary (currently at £10 or less). This obligation **must** be complied with by supplying the information in permanent form (e.g. a computer print out, letter or form), unless it can be shown that provision of data in a permanent form would involve the data controller in “disproportionate effort”. If this is the case, then the data controller **must** make other arrangements to provide access to the data.

Under Data Protection Principle 6, the data subject also has the right to:

- require the data controller to stop processing or prevent processing where it can be shown, for specified reasons, that processing data is likely to cause substantial damage or distress to him or to another and that damage or distress is, or would be, unwarranted;
- require a data controller to stop or not to begin processing data for the purposes of direct marketing. Data controllers **should** maintain a ‘suppression list’ (containing details of individuals who have asked not to receive direct marketing material) and always check this against lists for direct marketing;
- seek compensation for distress where damage has also been caused;
- object to decisions made automatically (without human involvement);
- apply to the court to order a data controller to alter, block or destroy inaccurate information;
- ask the Information Commissioner to assess whether the Act has been contravened.

8.0 Notification

Personal data **must not** be processed unless the data controller has notified (i.e. registered with) the Information Commissioner. It is an offence for processing to take place if this has not occurred. Details of the information to be notified to the Commissioner and the notification process are available on the Information Commissioner's website (see 8.0). The duty to notify is on all data controllers, unless an exemption can be claimed. Notable exemptions include:

- manual data which falls outside the definition of a "relevant filing system";
- processing for the purpose of staff administration in relation to staff of the data controller;
- advertising and marketing of public relations – this is processing for purposes of advertising and marketing of the data controller's business, activity, goods or services and promoting public relations in connection with that business or activity, or those goods or services. To be eligible, the personal data being processed **must** be limited to the name, address and other identifiers of information necessary for the processing;

- processing by non-profit-making organisations where the processing is for the purposes of establishing or obtaining membership or support for the organisation, or providing and administering activity for individuals who are either members of the organisation, or have regular contact with it.

Data controllers **should** carefully consider whether the exemptions are available as the conditions are quite restrictive and none automatically cover charity fundraising. In all cases exemptions are only applicable so far as the processing does not involve keeping the personal data after the relationship between the data controller and the data subject ends, unless it is for so long as it is necessary to do so for the exempt purposes.

The duty to notify is on the data controller, who is the person who determines the purposes for which personal data is to be used. The duty does not fall on data processors who are individuals processing data on behalf of the data controller, for example employees of a fundraising business.

9.0 Exemptions to the Rights of Data Subjects

There are a limited number of exemptions that have the effect of waiving various requirements of the Act in certain circumstances, namely:

- crime and taxation;
- health, education and social work;
- regulatory activities;
- journalism, literature and art;
- confidential references;
- legal professional privilege;
- self incrimination; and
- exemptions made by the Secretary of State under Section 28 for the purposes of national security.

The exact scope of the exemptions varies but they are unlikely to be of use to fundraisers.

The Institute of Fundraising is a charity registered in England and Wales (No 1079573) and Scotland (No SC038971) as well as a company limited by guarantee (No 3870883). VAT registration number 547 8930 96.

10.0 Privacy and Electronic Communications (EC Directive) Regulations 2003, as Amended

The Regulations cover compliance with Telephone Preference Services and the sending of unsolicited direct marketing material using the telephone, fax or electronic communication methods including email and text/video/picture messaging.

“Direct marketing” refers to the communication of advertising or marketing materials to particular individuals, and includes the sale of goods and services and the promotion of an organisation’s aims and ideals.

10.1 Telephone and Faxes

For guidance on the law relating to telephoning and faxes please see the following Codes of Fundraising Practice:

- Telephone Fundraising
- Fundraising Through Electronic Media.

10.2 Electronic mail

The Regulations relating to electronic mail refer to email and text/picture/video marketing messages. The Information Commission also considers voicemail and answerphone messages to be included.

- Organisations **must not** conceal their identity when sending marketing messages by electronic mail.
- Organisations **must** provide a valid address for opt-out requests.
- Organisations **must not** send unsolicited marketing material by electronic means to individual subscribers unless the recipient has previously consented to receiving such material. An individual subscriber is a residential subscriber, sole trader or unincorporated partnership in England, Wales and Northern Ireland.
- There is no obligation to screen text, picture or video messages against Telephone Preference Service/Corporate Telephone Preference Service.

10.3 Opt-In and Opt-out

When collecting a person’s personal data, it is important to consider whether or not you would like to contact them again in the future and by what means. It is necessary to obtain the consent of an individual if they are to receive direct marketing by electronic means in the future.

Opt-Out

For direct marketing by post, fax (between two companies), and telephone, it is possible to have an opt-out statement.

For example,

If you do not want to receive further information please tick this box

Alternatively, it is possible to have a statement along the lines of:

I would like to receive further information from XYZ Co
with the customer being required to opt-out by un-ticking the box.

Opt-In

For direct marketing by email or SMS to individuals, or fax to individuals under an automated calling system, it is necessary to get the data subject to opt-in to such marketing. For example,

If you would like to see further information from us by email, please tick this box

Soft Opt-In

If ‘opt-in’ consent has not been obtained, the only way in which direct marketing may be sent by electronic email or SMS to individuals, or fax to individuals under an automated calling system, is if the so called ‘soft opt-in’ provisions are met, that is:

- the recipient’s email address (or a telephone number) was collected in the course of sale or negotiations for sale (where an individual has actively expressed interest in an organisation’s products or services and has not opted-out of further contact);

- the sender only sends promotional material relating to their similar products and services; and
- when the address was collected, the recipient was given the opportunity to opt-out, which wasn't taken. The opportunity to opt-out **must** be given with every subsequent message.

A donation from an individual would not constitute a sale and so the 'soft opt-in' would not be relevant for ordinary fundraising. The 'soft opt-in' would be relevant if a charity's commercial goods and services were being promoted.

Fundraisers and fundraising organisations **should** be careful before relying on this provision.

11.0 Useful Contacts

For further information on the Data Protection Act and the Privacy and Electronic Communications (EC Directive) Regulations 2003 contact:

The Information Commissioner

Wycliff House
Water Lane
Wilmslow
Cheshire, SK9 5AF

Tel: 01625 545745

Email: mail@ico.gsi.gov.uk

Website: www.informationcommissioner.gov.uk

The Information Commissioner's Office

– Northern Ireland

Regus House
33 Clarendon Dock
Belfast
BT1 3BG

Tel: 028 9051 1270

Fax: 028 9051 1606

Email: ni@ico.gsi.gov.uk

For information concerning the **Telephone Preference Service**, contact:

The Direct Marketing Association:

DMA House
70 Margaret Street
London W1W 8SS

Tel: 020 7291 3300

Email: tps@dma.org.uk

Website: www.mpsonline.org.uk/tps

Copies of the Data Protection Act 1998 (ISBN 0-10-542998-8) are available from:

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