

ICO call for views on a data protection and journalism code of practice

The Information Commissioner is calling for views on a data protection and journalism code of practice (the code).

The Data Protection Act 2018 requires the Commissioner to produce a code of practice that provides practical guidance and promotes good practice in regard to processing personal data for the purposes of journalism. Our intention is for the code to provide practical, pragmatic guidance for journalists on how to comply with data protection legislation, building on the [detailed guidance that we have already produced for this sector](#).

This call for views is the first stage of the consultation process. The Commissioner is seeking input from relevant stakeholders, including media organisations, trade associations, data subjects and those representing the interests of data subjects. For further information on the call for views, please read our blog post [here](#).

We will use the responses we receive to inform our work in developing the code.

You can email your response to journalismcode@ico.org.uk.

Or print and post to:

Journalism Code Call for Views
Policy & Engagement Department
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire SK9 5AF

The call for views will be open until **Monday 27th May 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 (e.g. academics, freelance journalists, sole traders, legal professionals) 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

Q1 We are considering using our current guidance "[Data protection and journalism: a guide for the media](#)" as the basis on which we will build the new journalism code. Do you agree or disagree with this approach?

Agree – but see below

Disagree

Q2 If you disagree, please explain why?

In broad terms I think that the Data Protection and Journalism Guidance is a reasonable place in which to start. However, it is critical to recognise the differences between the Code required under the Data Protection Act 2018 and the previous guidance. In particular: (i) The code must comprehensively cover processing for the purposes of journalism. It cannot therefore appear limited to the "media" as many including actors including individuals do engage in journalistic activities, almost invariably online. (ii) It explicitly must ensure "good practice" in relation to the processing of personal data. This must include compliance with other laws which seek to protect individuals in relation to the processing of certain types of personal data, namely, defamation law and the tort of the misuse of private information. Neither are mentioned in the current guidance. (iii) Unlike the current guidance which "*does not have any formal legal status*" (p. 3), it will need to be taken into account by courts, tribunals and the ICO itself when carrying out its regulatory functions (see s. 127). As the ICO has itself noted, this includes the periodic statutory review required under section 178. The Code therefore must be drafted in more precise and specific terms which enable it perform this legal and regulatory role.

Q3 "[Data protection and journalism: a guide for the media](#)" is split into three sections:

- "Practical guidance" aimed at anyone working in the

journalism sector;

- "Technical guidance" aimed at data protection practitioners within media organisations; and

- "Disputes", aimed at senior editors and staff responsible for data protection compliance.

Do you think we should retain this structure for the code?

Yes

No

Q4 If no, do you have any suggestions about how we should structure the code?

There is certainly a need for a layered and contextual approach to the Code. However, most of the core building-blocks of the Code should have some relevance to anyone processing for journalistic purposes. The current approach rather gives the impression that whole swathes of the guidance only need to be looked at by certain specialised actors. A better approach might be develop a layered approach within each of the building-blocks, possibly with an initial summary at the start. The key building blocks could be (i) scope, (ii) standards – possibly split into default provisions and criteria for exemption, (iii) processes – which must clearly be highly contextual given that appropriate processes for a large media organisation will be extremely different from that of a sole individual, (iv) supervision and dispute resolution.

Q5 Do you think the ICO's existing guidance for journalists addresses the main areas where data protection issues commonly arise?

Agree

Disagree

Q6 If no, what additional areas would you like to see covered?

One important issue which is not addressed in the current guidance concerns the responsibility for online comments which may be facilitated by journalistic organisations such as 'below-the-line' comment sections. These forums can be an important site for public discourse but can also include some of the most troubling content from a data protection point of view. This area involves a complex interface between statutory data protection law, statutory e-Commerce Regulations and competing human rights (protected in the Human

Rights Act and the EU Charter). In this context, it is notable that in a line of cases beginning with C-131/12 *Google Spain* the Court of Justice has sought to lay out the responsibilities of different actors which may in combination be responsible for data protection outcomes. Moreover, in C-346/17 *Buivids* the Court held in relation to an amateur individual that *publishing "on a video website [YouTube] on which users can send, watch and share videos, without restricting access to that video, thereby permitting access to personal data to an indefinite number of people"* could not (as the ICO has suggested) be categorically excluded on the purported basis of the domestic or household exemption but needed to be assessed from the perspective of the data protection framework as a whole. The ICO therefore needs to take responsibility for developing proportionate standards here (including appropriate exemption from technical aspects such as impact assessments and requirements to 'register' with ICO) and also ensure an appropriate apportioning of responsibility between the different actors (e.g. the organisational website, the user).

A related tricky issue concerns the online archiving of not just this but other sensitive content and the dissemination of it to other online actors such as search engines. The existing guidance rightly argues that online archives do fall within the derogations for journalism (p. 13). However, it needs to be emphasised that the public interest and incompatibility tests as well as the interface with other law need to be contextualised to this particular context. There is need for specific guidance as to how to address claims the various data protection issues that may arise, for example, finding content that was initially illegally published *ab initio*, finding material that is likely inaccurate, ensuring that the timeliness or otherwise of the material is clear (e.g. by prominently displaying the date on which it last updated etc.).

The Code also needs to specify in more detail the relationship between statutory supervision through the ICO and other mechanisms of co- or self-regulation (p. 47). Codes of practice continue to be partially addressed but only as regards the public interest test in Sch. 2 of the Data Protection Act 2018. However, this issue has added salience now that the GDPR itself has put in place default criteria for codes of conduct (art. 40) and monitoring bodies (art. 41). The last aspect provide criteria for assessing how the ICO might assess self- and co-regulatory processes.

Q7 The journalism code will address changes in data protection law, including developments in relevant case law. Are there any particular changes to data protection law that you think we should focus on in the code?

There are quite a lot of changes both in case law and legislation which need to be taken into account of in the new Code.

Turning to legislation, it is clearly important to address the specific changes in the statutory regime applicable to journalism including changes to data protection criminal offences, the introduction of reasonable belief defences in relation to these, reforms in the detail of ICO enforcement powers in relation to journalism and the special regime for reviewing journalism's compliance with data protection. There are also some important changes introduced by the GDPR including provisions concerning codes of conduct and monitoring bodies

(art. 40-41) and requirements for impact assessments (art. 35). The former set down default criteria for assessing mechanisms which operate at arms-length from ICO supervision namely (i) independent and expertise, (ii) monitoring and periodic review of controllers, (iii) transparent systems for handling complaints, and (iv) effective management of conflicts of interest. These criteria are in principle as applicable to the supervision of journalism as they are to other activities. The latter GDPR provision on impact assessment could potential play some role in journalism. However, the ICO's current approach to its threshold for its engagement hasn't been thought through fully here and would appear to be manifestly overbroad in the journalistic context. Much the same could be said for the provisions which ICO has participated in concerning requirements to register (and pay a charge) to the ICO. There is a need to ensure that any such technicalities not only serve the purposes of the legislation but can apply contextually across the entire area regulated as journalism under the GDPR in a manner which is not disproportionate. Such a proportionality standard is required by the European Convention, EU Charter and Human Rights Act.

Turning case law the following judgments are of particular note:

- *Delphi v Estonia* (2015) (Application no. 64569/09) – a Grand Chamber judgment from the European Court of Human Rights which explored the interface between article 8 and article 10 of the European Convention in relation to user-generated content on news websites. Subsequent case law from the Court has further explored this vexing issue.
- *Moulay v Elaph Publishing* [2017] EWCA Civ 29 – an important Court of Appeal judgment which confirmed the close connection in individual reputation cases between defamation law and data protection law. Writing for the entire court, Mr Justice Dingemans stated that "*I can see no good reason of principle why a claim under the DPA cannot be linked to a defamation claim, and why it should not be added by amendment if the test for amendment is otherwise met*". Earlier cases had already similarly highlighted a close connection between data protection and the misuse of private information in individual privacy– see e.g. *Weller v Associated Newspapers* [2014] EWHC 1163.
- C-345/17 *Buivids* (2019) (C:2019:122) – a recent judgment of Court of Justice which again interpreted the scope of data protection extremely broadly, holding that there could be no categorical exemption of indeterminate publication by amateur individuals on the purported basis of the personal or household exemption and furthermore that as regards a YouTube video recording "the fact that such a recording was made on only one occasion has no bearing on the issue of whether that operation comes within the scope" of data protection (at [36]). Not only is the ICO's Data Protection Directive guidance in this area (see <https://ico.org.uk/media/for-organisations/documents/1600/social-networking-and-online-forums-dpa-guidance.pdf>, p. 15) clearly not consistent with the Court's approach but this judgment highlights the need to ensure that the journalistic derogation works at national level in a way which can be proportionality and contextually applied to a wide range of situations well outside of the institutional media.

Q8 Apart from recent changes to data protection law, are there any other developments that are having an impact on journalism that you think we should address in the code?

Yes. It is explicit that the Code must promote good practice in addition to requirements of the data protection law. This must include following other applicable laws which protect individuals in relation certain types of personal information processing, notably defamation law and the misuse of private information. The current Guidance makes no mention of these other laws despite the fact that they are at least indirectly integrated into data protection through the default requirement to process data "lawfully". Case law since 2014 has stressed the close connection between data protection, defamation law and the misuse of private information. All these causes of action seek to protect the personality rights of individuals as regards the flow of information. These interrelationships should, therefore, not be ignored in the new Code.

Q9 Are there any case studies or journalism scenarios that you would like to see included in the journalism code?

As suggested above, it would be useful to have more a case study addressing the interrelationship between the data protection provisions applicable to journalism and news archives.

Q10 Do you have any other suggestions for the journalism code?

A few indirectly relevant points come to mind. Once produced (and approved by Parliament) it is important that this Code is promoted to all relevant actors. A layered or targeted approach is likely to be necessary given the very wide range of actors to whom the Code will have relevance e.g. the institutional media, freelance journalists, citizen journalists, the legal community and the general public. Where relevant this guidance should be promoted alongside other activities in relation to journalism e.g. the requirement on the ICO to publish guidance on redress mechanisms against media organisations (s. 177) and the periodic review of journalism's compliance with data protection (s. 178).

It is important also to address how the Code will be kept under review as required by s. 126(3) of the DPA 2018. This is particularly important given that case law may quite radically change the situation here. For example, the outcome of *C-687/18 SY v Associated Newspapers* could lead to pre-publication injunctive relief being available directly under data protection (as it already is in certain circumstances under the misuse of private information).

The Leveson Inquiry recommended that the ICO include regular updates in its annual report addressing its work to ensure the effectiveness of data protection in the area of the Press. This recommendation would seem equally applicable to other types of journalistic activity and has added salience in the context of the new Code and other provisions included in the DPA 2018 which add up to quite a wide-ranging role for the ICO in this area. It would be valuable, therefore, to include a periodic analysis of the implementation of Code and the other related journalism initiatives in each Annual Report. This could be addition to periodic reviews of the Code (e.g. following the end of the first review of journalism under s. 178) and any necessary updates following major developments in case law.

About you

Q11 Are you answering these questions as?

- A media organisation?
- A trade association?
- An organisation representing the interests of data subjects?
- An academic?
- An individual acting in a professional capacity?
- An organisation that regulates press standards?
- An individual acting in a private capacity (e.g. someone providing their views as a member of the public)?
- Other?

If you answered 'other' please specify:

Q12 How did you find out about this survey?

- ICO website
- Social media
- Conference/seminar
- Trade/professional association
- Media
- Word of mouth
- Other?

Q13 We may want to contact you about some of the points you have raised. If you are happy for us to do this please provide your email address:

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