

The Information Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow SK9 5AF

May 27th, 2019

Dear Information Commissioner,

Consultation on Data Protection and Journalism Code of Practice

[REDACTED]

I hope it is not too late to be taken into consideration.

Yours sincerely,

[REDACTED]

Adam Christie
(as chair of the NUJ Newspapers and Agencies Council)

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ICO call for views on data protection and journalism code of practice; submission on behalf of the National Union of Journalists

Q1 We are considering using our 2014 Guide for the Media as the basis on which do build the new code. Do you agree or disagree with this?

Disagree

Q2 Why?

Journalism is not solely a task performed by journalists for “news outlets” (or “news brands”).

Increasingly the editorial skills recognised as membership criteria by the National Union of Journalists are used by individuals working in the public/press relations and communications sector.

Such material may well be, eventually, intended for publication but intermediaries are involved between the journalist creating content or material (be that words, images, audio or a combination of all three) and the publisher.

Journalists are also increasingly involved in the production of material for internal corporate or organisational use.

While copyright in material produced by staff journalists, whether they work in corporate communications or for news brands, customarily belongs to the employer, freelancers should retain copyright, issuing licences for the use of material. The clients acquiring such licences may be (intermediary) organisations, such as communications organisations, news agencies or photo libraries.

The 2014 Code does not include the words “communications” or “wire service”. The word “agency” appears once, in the context of the police and National Crime Agency. The word “photograph” appears just once. A rare reference (page 30) says “public relations would not usually be considered as journalism”.

A significant proportion of those engaged in journalism in 2019 do not work for “news brands” but either for themselves as digital publishers or in (corporate) communications and new guidance should reflect this as the trend away from “news brands” being the major employer of journalists or the users of freelance journalistic skills or material is widely forecast to continue.

The 2014 Guidance also considers journalism solely in terms of “publication” by news brands. Journalistic work commissioned by organisations whose primary business activities do not include “news publishing” may also “publish” material internally or to communicate with (potential) customers, clients and (service) users. A report may be “published” but the circulation limited to relatively few individuals. Such documents may include material presented in a “news brand” style. Does publication (of, say, a newsletter) by an organisation that is not a newsbrand constitute journalism even though it may be compliant with editors’ codes of practice, the NUJ code of conduct, and the law regarding, for example, defamation and contempt of court?

NUJ members working in PR and communications say that: “While there is good content there, it concentrates on a traditional view of journalists as reporters, typically working for traditional media. It would be good for the guidance to reflect the broad range of roles and responsibilities considered as journalism, as highlighted by the NUJ’s breadth of membership.”

Q3 The 2014 guidance is in three sections – practical, technical and disputes. Should this be retained?

No

Q4 If no, what do you suggest?

The Code appears entirely inadequate for journalists “doing journalism” and producing content and material for the (expanding) communications (“comms”) sector.

The code needs an entirely new, enlarged and comprehensive section covering data protection for journalists dealing with “communications intermediaries”

The code needs greater clarity on what constitutes “publication”. Is this “to the world” – by making material available online – or to a limited number of people. An implication of *Brunswick v Harmer (1849) QB154* is that communication takes place whenever words are heard or read (without any qualification of number) and, ergo, whenever an image is seen (whether by one person, several or many).

The code should also now be predominantly digital and the document structures therefore less important. The breakdown of responsibilities between different roles (such as senior news brand editors and others) is increasingly flexible and roles in non-traditional media make targeting roles less relevant.

Q5 Do you think existing guidance addresses the main areas where data protection issues commonly arise?

No

Q6 What additional areas would you like to see covered?

Data protection for journalists dealing with “communications intermediaries”, news agencies and photo libraries as well as for corporate clients.

For example: A (freelance) journalist creates a piece of copyright work which is published by a news brand under licence. The journalist is then asked for a second license to allow publication of the work in a corporate report. The journalist then discovers that the piece of work has been used internally by the organisation for training purposes. Clarification of data protection obligations in relation to licensing copyright work is essential.

The document should also encompass social media; marketing and PR; other print – including books and non-news publications (such as academic journals, specialist and trade journals and websites); digital media (such as blogs, not-for-profit writing and commentary); photography, video and audio (noting the explosion in podcasting).

Q7 Are there any changes to data protection law that you think we should focus on in the code?

Many (freelance) creators of journalistic material are, because they retain copyright in their work, data controllers.

Many publishers – or their staff (agents) – also consider themselves to be data controllers and therefore the relationship and obligations between creators (as rights owners) and users (as licencees) needs clarification.

Q8 Apart from recent DP law changes, are there other developments affecting journalism that should be addressed?

The trend for fewer journalists to be employed in “news” and for journalistic skills to be used far more broadly in “comms” is greatest.

The move towards automated content generation – so far mainly sports results and financial/business data-related news – is likely to extend further and could soon include, for example, “narrative” stories – rather than lists or tables – of individuals who have appeared in court, the charges and sentences. The implications of this should be considered.

Again, the document should also encompass social media; marketing and PR; other print – including books and non-news publications (such as academic journals, specialist and trade journals and websites); digital media (such as blogs, not-for-profit writing and commentary); photography, video and audio (noting the explosion in podcasting).

Q9 Are there any case studies you would like to see included?

1. The same piece of data may be personal data in the hands of one organisation, while it may not be personal data in another organisation's hands. This depends on the purpose the organisation is processing the information for.

Example: A journalist takes a photograph of the beach on a sunny day to publish in a local newspaper alongside a story about record-breaking temperatures. The photograph includes some individuals who are relaxing on the beach and is of sufficient quality that some of the individuals may be identifiable. The journalist is not processing the photograph to learn anything about any of the individuals whose images were captured, nor is it likely that the journalist would ever process the photograph for that purpose. Whilst processed by the photographer, the photograph would not be personal data as it is not used to record, learn or decide something about the individuals.

One of the individuals photographed on the beach had told their employer they needed to attend a funeral and had taken compassionate leave from work on that day. Their colleague sees the photograph published in the newspaper, scans a copy and e-mails it to the manager of the individual photographed. The photograph is added to the individual's personnel file in order to start disciplinary proceedings for taking compassionate leave under false pretences. When being processed by the individual's employer, the photograph is being used to record, learn or decide something about the individual. For this reason, it would be personal data when processed by the employer.

It is therefore necessary to consider carefully the purpose for which the controller is using the data in order to decide whether it relates to an individual.

<https://ico.org.uk/for-organisations/guide-to-the-general-data-protection-regulation-gdpr/what-is-personal-data/what-happens-when-different-organisations-process-the-same-data-for-different-purposes/>

This was logged as case ENQ0819295

Case officer Melissa Sammarro replied: "The guidance you have attached is correct and would apply to any situation or public event where the controller of the data cannot identify the data subject and is not using it to record, learn or decide something about the individual. However, please note that the data may become personal data in the future, for example if the individual identified himself to the controller.

Regarding the exemption, I am unsure what you mean by public relations purposes. However it would be the controller's responsibility to decide whether these purposes fall under the "purposes of journalism", whether the publication of the material would be in the public interest and finally, whether compliance with the GDPR provisions listed would be incompatible with these purposes.

"Public relations" and "communications" purposes require clarification. The 2014 Guidance statement that "publication relations would not usually be considered journalism" is out of date and out of keeping with current and, likely, future journalistic practice.

2. Re Contracts/model releases;

What happens if a person (whether paid or unpaid) has signed a contract or model release for images of them to be used for PR or advertising, and then tries to exercise their right to remove their data (the image) under the DPA and GDPR. This could wreck a PR or advertising campaign if someone wants their image pulled before the campaign has concluded. So which has primacy, a contract/model release (which also identifies the person by name), or right to removal of data under the DPA/GDPR?

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

It should also cover:

- non-fiction books covering contemporary history (as long-form journalism);
- images taken for organisations' internal documents;
- data used by writers in preparing such documents.

One comment has been that clarification is needed with regard to the implications for those "doing journalism" and WHEN they are doing it, and we feel the ICO should consider "publication" to be as well as this being "in the public interest".

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The document should also include practical and realistic guidance on the use of digital devices – across all “platforms” for the collection, storage, transmission and eventual publication or distribution of journalistic material.

Adam Christie



