

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

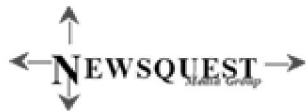
For this consultation we will publish all responses except for those where the respondent indicates that they are an individual acting in a private capacity (e.g. a member of the public). All responses from organisations and individuals responding in a professional capacity (e.g. academics, freelance 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](#).

RESPONSE:

This response is made on behalf of Newsquest Media Group, publisher across the UK of some 200 local newspaper and magazine titles, in print and online.



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.

Although the working title of the new document appears to be "Journalism Code", it is important that the status and purpose of the old document as non-prescriptive guidance to the media is repeated in the new. The ICO has already acknowledged that it does not act as a media regulator. And the legislation is already complicated enough without adding more inflexible rules, unless they are clearly supported by existing law. The document should be an aid to interpretation of the law, not an expansion of it. The document should properly convey that the media's responsibilities under the journalistic exemption are predicated on the 'reasonableness' of the editor's belief in all the circumstances, allowing for that legally-protected margin of subjective editorial discretion that recognises the social and political importance of a free and independent media.

Q2 If you disagree, please explain why?

N/A

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?

N/A

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?

- The existing guidance contains helpful explanations of the wide scope of the public interest in reporting local events and matters of general interest and it supports the principle that there is an inherent public interest in the maintenance of a free press (p34). It is vital that this guidance is maintained and amplified. Much local newspaper reporting covers ordinary everyday matters, which may often appear relatively insignificant. But this is the stuff of reality and it reflects the daily triumphs and tragedies of the communities we support and the lives of the people who live in them. There is an essential public interest in receiving an unhindered flow of information to help people understand the world we live in and aid democratic debate. This has always been the case and, in our view, GDPR is not meant to take us backwards. More could still be done in the new guidance to emphasise the fundamental importance of the right of free expression and information in an open society, because (in our experience) complainants from among the general public have an exaggerated and mistaken understanding of their rights under data protection legislation to restrict or control those freedoms, though they do generally accept the point when it is cogently explained. As Article 10 of the Convention Rights says, any restriction on free expression must always be justifiable as being necessary in a democratic society and proportionate to its proper purpose; it will depend on a balancing exercise that assesses the relative importance of the competing interests in the specific circumstances of each case.
- The new guidance should make clear that press standards are determined in accordance with the Editors' Code under the supervision of the regulator, IPSO, and compliance with the Code is prima facie an indicator of reasonableness. The ICO has acknowledged that it is not there to supplant the media regulator.
- While archives are touched on in the existing guidance, they are mentioned only in passing. This is inconsistent with the high level of demand for Article 17 erasure from archives we receive from the public, particularly in relation to archived reports of wrongdoing of one kind or another. GDPR at Recital 153 now highlights the importance of newspaper archives and this should be adequately reflected in the ICO's guidance. The archives, in print and now online, are integral

to the journalistic purpose, and have been throughout the 300-year history of newspapers. The free press cannot perform its recognised role as “watchdog” of government, judiciary and society in general unless we can give access to the public to a searchable record of past and present that reveals patterns and changes. The archives of local newspapers are especially important because (of course) news always begins locally somewhere. And they are often the only historical record available locally. They serve as the collective memory of each of the communities we serve. They tell us who we are, warts and all. It is vital for health of our democracy that we should protect the integrity of this rich resource for the future.

The old guidance helpfully explains that the journalistic exemption is assessed when the information is collected “with a view to publication” and will apply “end to end” (p32) in relation to all processing before and after publication. But the new guidance should be more explicit that legitimate publication under the journalistic exemption means that a story is legitimately held in the same form in the archive without further obligation to review the exemption after time. It is important to distinguish the exemption from an Article 6 basis for lawful processing, such as the processing of personal data for legitimate interests, which may have to be kept under review. The journalistic exemption expressly excludes the obligations connected with the categories of lawful processing (where they are reasonably believed to be incompatible with journalism) – DPA 2018 paragraph 26(9)(a)(ii) of Part 5 of Schedule 2. Clearer wording in this area will help us to answer those people who contact us insisting on the deletion of an archived report about them because of the elapse of time, changes in their life since publication or simply their personal distress at its retention in the archive.

We accept that the journalistic exemption for archived material is usually qualified by the obligation of accuracy, which is likely to be compatible with the journalistic process in most circumstances (and generally it is the very objective of the journalistic purpose). To that end our privacy notice states that we will take appropriate steps if significant factual inaccuracies are demonstrated to us in archived stories. We use the adjective ‘significant’ advisedly, because that is the level of care set by the Editors’ Code. If there was error at the time of publication, appropriate steps may include direct amendment to the archived copy or suitable

annotation and/or publication of a fresh correcting statement (linking to the original). We will also apologise for a significant inaccuracy arising from our error. Often inaccuracy is not at all the result of any error but rather an absence of information at the time in spite of the newspaper having taken due care. In such cases, the original publication forms part of the evolution of the story and any correction is likely to be by way of annotation, and possibly a follow-up story if circumstances demand it. Our privacy notice also states that we will, if we consider it appropriate, annotate an archived story and/or publish a follow-up reporting a significant new development or update (eg a successful appeal in a court case), but leaving the original story untouched as part of the historical record. Many of our readers do not appreciate that new developments do not re-write history or require the erasure of the historical record.

- The role of news agencies and freelance contributors should be addressed. What is the controller/processor relationship between them? This will vary. The local press may engage freelancers on shift work (eg photographers) who may be subject to newsroom direction, but mostly the local press will receive copy or pictures which have been independently produced and submitted. The question then arises to what extent the editor may be entitled to rely on the copy produced by an experienced and professional independent freelance or agency when assessing the application of the journalistic exemption. Our view is that, in the absence of contrary indicators, it is reasonable to rely on the accuracy of submitted materials from known and trusted agencies with a demonstrable track-record of reliability, though more care may be required in other cases.
- Subject access requests (Art 15 GDPR). The new guidance should clarify that the journalistic exemption will apply to unpublished journalistic material, and also the publisher is not required to provide copies of material that has been published but is available to the applicant in the publisher's online archive.

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 is whole raft of new data subject rights in Articles 16-20, each of which should be assessed in the new guidance in relation to the journalistic purpose and the exemption.
 - Right of erasure under Art 17 is likely to be incompatible with the journalistic purposes in our view, unless possibly an article is shown to be fundamentally wrong in fact or it is unlawful for some reason (and therefore not serving a "necessary" purpose). Where an article is still viable but there is demonstrable and significant inaccuracy, correction is more appropriate, which may be achieved by annotation in archive and/or publication of a statement as the Editors' Code provides.
 - Rights of erasure or of rectification (Art 16) for inaccuracy must be confined to significant factual inaccuracies (to be consistent with the Editors' Code). The new guidance in relation to alleged inaccuracies should also acknowledge the relevance of legal principles in statute and common law such as: privilege (eg for reports of courts, local authorities, police and governmental notices); principles of judicial construction (eg meanings must be understood in the context of the whole article and relevant circumstances); the difference between fact and opinion; and the latitude given for journalism (eg reports of courts or council committees do not need to be comprehensive; a simple listing of a conviction of a criminal offence may in itself be a fair and accurate report).
 - Right to restrict processing under Art 18: the notion that a mere complaint could prevent proper journalistic enquiries in the absence of any proven data protection breach is inimical to the journalistic purpose and the exemption will surely apply.
 - Right to data portability under Art 20: the proposition that an interviewee or other person co-operating with a newspaper might have a right to demand the work product of the newspaper, before or after publication, in order to pass it on to third parties, including perhaps another publisher, is similarly incompatible with the journalistic purpose and conflicts with the copyright of the publisher.

- Right to notification under Art 19: to the extent that the right of notification could apply to journalistic work (bearing in mind the above), the guidance should acknowledge that a published correction or archive annotation is likely to be sufficient.

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?

- Commercial and technological developments, in particular the move online, means that obligations for evidencing or recording a newspaper's reliance on the special purposes exemption (where such recording is required at all), should be flexible and not overly prescriptive. Anything else is likely to be unmanageable because editorial teams are much leaner and the hierarchy much flatter, with many day-to-day decisions being taken by reporters uploading directly online. Obligations to record in writing would be a disproportionate requirement and needlessly disruptive. We believe that in most cases evidence of decision-making by reference to internal policies or relevant editorial codes should be sufficient, and the expectation of a written record should be exceptional. It would not apply to routine or everyday matters, or reports of courts, councils and other privileged occasions where the public interest is obvious. It may be helpful in connection with investigations or other stories involving a serious degree of intrusion or disclosure of private sensitive personal data in the special categories, or other similarly important private interests, but it should not be a prescriptive requirement of the guidance.

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

This would not be appropriate in our view. If the guidance as regards the journalistic exemption is properly based on the interpretation and application of basic principles, allowing for a range of reasonable responses in the circumstances of each case,

then giving judgments made on particular case studies is more likely to be unhelpful than helpful.

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

- Current guidance states (p 10) that data controllers "will need a valid reason" for not notifying the subject of a journalistic investigation that their data is being collected and that this "justification should reflect the privacy intrusion". This suggest that notification is usually required and the justification for not doing so rises according to the degree of privacy intrusion. This is not consistent with law. In *Mosley v United Kingdom (2012)*, the European Court of Human Rights decided that the right of privacy guaranteed by Article 8 of the European Convention on Human Rights does not require the media to give prior notice of intended publications to those who feature in them. The new guidance should be consistent with the law.
- Various references to the public interest in the exposure of "wrongdoing" and /or "incompetence" in the current guidance (eg pages 11, 41, and 42) should be expanded to clarify that they include *allegations* of wrongdoing.
- On the question of incompatibility with the journalistic purpose, the current guidance appears to overstate the case by introducing new hurdles to clear in addition to the editor's reasonable belief. These deny the editor any real latitude for decision-making. At one point on (p37) it is said: "there must be a clear argument that the provision in question presents an obstacle to responsible journalism". The guidance then goes on to say it must be "impossible to both comply with a particular provision and to fulfil your journalistic purpose". And at page 39 it is said that: "...even if a story is clearly in the public interest, if a journalist can reasonably research and present it in a way that complies with the standard provisions of the DPA, they must". It appears to us that these provisions in the guidance impose requirements significantly beyond an ordinary assessment of the reasonableness of an editor's subjective belief. The guidance rather suggests that a publisher will always be wrong if there is an alternative way of doing something which would obviate reliance on the exemption. In our view, this is incorrect. It denies the editorial margin of discretion

and the freedom of the press to report a story in the way that it reasonably considers to be appropriate. This also puts the ICO in the role of editor-in-chief, a role that the ICO has previously acknowledged it does not and should not have. But the law as expressed through Article 10 of the Convention Rights protects both the substance of the information contained in a report and crucially also the *form* in which that information is expressed. We refer in particular to the seminal case of *Jersild v Denmark ECHR 1994*. The European Court of Human Rights found that freedom of expression is one of the essential foundations of a democratic society and the safeguards to be afforded to the press are of particular importance. It went on to say that

"The methods of objective and balanced reporting may vary considerably, depending among other things on the media in question. It is not for this court, nor for the national courts for that matter, to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists. In this context the court recalls that Article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed."

Statute and common law in the UK is infused with this principle wherever it deals with rights of free expression. For example, section 4(4) of the 2013 Defamation Act expressly requires latitude for editorial judgment. In the UK is infused with this basic principle: *In determining whether it was reasonable for the defendant to believe that publishing the statement complained of was in the public interest, the court must make such allowance for editorial judgement as it considers appropriate.*

The new guidance should not repeat the parts of the old guidance which impose a more restrictive interpretation, but should rather explain that a story will qualify for the journalistic exemption provided that the data controller reasonably believes there is an editorial justification for his or her chosen treatment.

- Confidential sources: On page 16 of the current guidance, it is suggested that the media controller might have to disclose confidential sources "if it is reasonable to do so". This seriously devalues the protection given in UK law (section 10 Contempt of Court Act 1981) which protects journalists against such disclosure except where a court

rules that disclosure is actually *necessary* in the interests of justice or national security or for the prevention of disorder or crime. The new guidance should be consistent with the 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.