

Elizabeth Archer

From: [REDACTED]
Sent: 09 January 2022 19:30
To: journalismcode
Subject: Draft journalism code of practice - response from DMG Media
Attachments: DMG Media response to the ICO consultation on its draft.docx

External: This email originated outside the ICO.

Dear Sir/Madam

Please find attached the response from DMG Media to your consultation on your Draft journalism code of practice. I would be very grateful if you could acknowledge receipt.

Best regards

Peter Wright

Peter Wright
Editor Emeritus
DMG Media

Disclaimer

This e-mail and any attached files are intended for the named addressee only. It contains information, which may be confidential and legally privileged and also protected by copyright. Unless you are the named addressee (or authorised to receive for the addressee) you may not copy or use it, or disclose it to anyone else. If you received it in error please notify the sender immediately and then delete it from your system. Associated Newspapers Ltd. Registered Office: Northcliffe House, 2 Derry St, Kensington, London, W8 5TT. Registered No 84121 England.

DMG Media response to the ICO consultation on its draft journalism code of practice

1. This response is made on behalf of DMG Media and Harmsworth Media, publishers of the Daily Mail, Mail on Sunday, Metro and i newspapers; MailOnline, metro.co.uk and inews websites; and the New Scientist magazine.
2. We have read the submission made by the Media Lawyers Association, of which we are members, and which we endorse. We would however like to add emphasis to a number of the points made by the MLA.
3. The MLA draws attention to the fact that the Draft Code is nearly twice as long as the ICO's 2014 guidance *Data protection and journalism: a guide for the media*. The ICO's own Impact Assessment estimates that the Code contains 25,000 words and takes five and a half hours to read¹. It also expects the Code to be read by only one person in each organisation – although the Code itself says it is written for 'lawyers, data protection officers and senior editorial staff'.
4. In contrast, the First Amendment to the American Constitution, which has protected freedom of speech and the press in the US for more than 200 years, is just 45 words. The Editors' Code of Practice, which is the comprehensive set of standards covering all aspects of journalism and followed by all our journalists, runs to only 1933 words.
5. Length and complexity is not a virtue. Every added paragraph is another pasture to be tilled by the lawyers of the rich and powerful, searching for means to chill any journalism which would hold their clients to account. We fully support the MLA's recommendation that the Code should be tightly edited and case law removed. The Editors' Code contains no case law at all, for the very good reason that every news story is different, and journalists' decisions should be judged on their merits, not against a ruling addressing an entirely disparate set of circumstances.

¹ <https://ico.org.uk/media/about-the-ico/documents/4018652/draft-economic-impact-assessment-202110.pdf>
p.27

6. The impression that the purpose of the Code is to regulate and control journalism in unfortunately reinforced by its title: *Draft journalism code of practice*. Prior to publication of the 2014 Guide, there was considerable debate about whether to call it a code of practice. We and other news publishers were concerned that this term would cause confusion with the Editors' Code of Practice and suggest that the ICO was putting itself forward as a regulator of journalism. The ICO listened to those concerns and addressed them by titling its guidance *Data protection and journalism: a guide for the media*.

7. This was then spelled out on page four:

This guide is not intended to take the place of industry codes of practice. It is a guide to data protection compliance, not to wider professional standards or media regulation. It does however refer to existing codes, where directly relevant, to show how everything fits together.

This guide does not have any formal status or legal force. It cannot and does not introduce any new rules or new layers of regulation. It is the DPA itself that places legally enforceable obligations on the media. This guide simply clarifies the ICO's view of the existing law as set out in the DPA. It is intended to help those working in the media to understand fully their obligations, and to promote good practice

8. There has been considerable mission creep since then. The Draft Code makes clear it is a 'statutory code of practice under the Data Protection Act 2018'. It includes a brief statement limiting its remit:

This code is limited to data protection law. It does not concern press conduct or standards in general, which are covered by industry codes.

9. However it then goes on to cover very similar ground to the Editors' Code, which is the industry code our journalists are required to observe. The first and most significant clause of the Editors' Code is its first, which concerns accuracy, and was cited in 55 out of 58 complaints against national titles upheld by the Independent Press Standards Organisation last year. This is what it says:

1. Accuracy

i) The press must take care not to publish inaccurate, misleading or distorted information or images, including headlines not supported by the text.

ii) A significant inaccuracy, misleading statement or distortion must be corrected, promptly and with due prominence, and — where appropriate — an apology published. In cases involving IPSO, due prominence should be as required by the regulator.

- iii) *A fair opportunity to reply to significant inaccuracies should be given, when reasonably called for.*
- iv) *The press, while free to editorialise and campaign, must distinguish clearly between comment, conjecture and fact.*
- v) *A publication must report fairly and accurately the outcome of an action for defamation to which it has been a party, unless an agreed settlement states otherwise, or an agreed statement is published.*

10. The ICO Draft Code covers much the same ground:

5. Take reasonable steps to make sure personal data is accurate

- *Accuracy is a key data protection principle. Taking reasonable steps to make sure that personal data is accurate is fundamental to both journalism and data protection.*
- *Complying with this principle complements journalism by helping to maintain public trust. It will also help you to protect the public from harm caused by inaccuracies, which can be magnified and spread quickly online.*
 - *You can comply with the accuracy principle by taking reasonable steps to correct or erase personal data where necessary.*
 - *Clearly distinguishing between fact and opinion, and taking the context into account, will help you to make sure personal data is accurate.*
 - *You should be able to comply with the accuracy principle in the majority of cases because it complements the public interest served by journalism. Where necessary, the special purposes exemption specifically protects journalism.*

11. Not only is the language very similar (*take care/take reasonable steps; a significant inaccuracy... must be corrected/correct or erase personal data where necessary; distinguish clearly between comment, conjecture and fact/clearly distinguishing between fact and opinion*) but the ICO Code goes on to editorialise on the subject of journalistic values. For instance, it says: *Complying with this principle complements journalism by helping to maintain public trust* – does the ICO have any remit to preserve public trust in journalism? And: *the accuracy principle... complements the public interest served by journalism* – the meaning of this is somewhat lost on us, but it appears to be a pontification on journalism rather than data protection.

12. We are deeply concerned by the growing trend for plaintiffs to use data protection law against journalists, particularly as it lacks the protections for freedom of expression which have been incorporated into libel law in recent years. We fear that the Draft Code as currently presented will exacerbate that tendency. We would strongly recommend that the ICO review its title in line with the 2014 Guide, include a much stronger statement making clear that the ICO does not purport to be a media regulator, and remove elements which cross the line from data protection law into editorial standards.

13. We agree with the MLA that although the Draft Code recognises there is a public interest in freedom of expression itself, there is an over-heavy emphasis on the need to demonstrate a reasonable belief in the public interest for the special purposes exemption for journalism to apply.
14. The Code does not properly recognise that the role of journalism is far wider than just exposing wrongdoing or protecting public health and safety. Of course those are important functions of journalism, but its true role is to hold a mirror to society as a whole, including all the quirks and foibles of the human condition. There is much journalism, even in serious publications, which is published for no reason other than it is amusing or entertaining. In some important sections of the media amusement and entertainment is the purpose of almost all content – and such journalism is no less valid or legitimate than any other kind of journalism. It is also the case that many individuals actively seek media coverage for a very wide range of purposes.
15. For these reasons, under the Editors' Code the right to privacy is defined as '*private and family life, home, physical and mental health, and correspondence, including digital communications*'. Editors must justify any intrusion into an individual's privacy without consent, but even then '*account will be taken of the complainant's own public disclosures of information and the extent to which the material complained about is already in the public domain or will become so.*'²
16. Therefore there are many things which an individual might do or say, and which might be the subject of a news story, which are not private because they are part of that individual's public, not private life, or have been placed in the public domain by the individual's own actions. The public interest is only required to justify reporting where none of those conditions apply.
17. We welcome the fact that the Draft Code acknowledges that the rights to freedom of expression and privacy carry equal weight under the law:
- Freedom of expression and information, and the right to privacy, are both rights enshrined in UK law via the Human Rights Act 1998. In principle, neither is more important than the other. The ICO and the courts must give effect to both these rights as far as possible... it is important to note that not all personal data is necessarily private*³
18. However just as its strong emphasis on the public interest suggests that journalism that is not founded on an obvious and recorded public interest is not legitimate, so the Draft Code tilts the balance between freedom of expression and privacy in favour of privacy.

² Editors' Code, Clause 2

³ Draft journalism code of practice p.19

19. Not only does Draft Code's discussion of the subject focus very heavily on two high profile legal actions – Naomi Campbell v MGN and Cliff Richard v BBC – but its interpretation is weighted towards privacy. For instance, it quotes the judge in the Cliff Richard case as saying:

“...the very act of making certain aspects of oneself public means...that there is a corresponding loss of privacy in those areas which are made public. However, it does not follow that there is some sort of access the board diminution of the effect of privacy rights...It depends on the degree of 'surrender', the area of private life involved and the degree of intrusion into the private life.”⁴

The Draft Code then goes on to assert:

Information will not necessarily lose its private character simply because an individual... has already disclosed personal data relating to the same or similar parts of their life;

In other words, while the judge said that making certain aspects of oneself public DOES mean a loss of privacy, at least in those areas, the Draft Code says the opposite: information may still be private even if the individual has disclosed data relating to the same parts of their life.

20. We endorse the NMA's observations about the very large number of recommendations for policies and record-keeping in the Draft Code. A newsroom is not like the office of a mail order company, where the same limited range of personal data is recorded repeatedly from different individuals, and once a privacy policy is in place a data system can be built around it so it is applied automatically.
21. It is in the nature of news stories that they are all different – that is why they are news. Some clearly involve privacy risks and in these cases decisions about the public interest are considered carefully and a record kept, as required under the Editors' Code. But these are a minority. A very large number of stories involve little privacy risk and the public interest is either self-evident or not relevant.
22. In addition journalists do not work to pre-ordained formulae or under constant close supervision. They are expected to operate autonomously, use their initiative and make their own decisions. A reporter who is dodging bullets in a war zone, pumping a political contact in a Westminster corridor, or knocking on doors on a tough council estate is not in a position to stop mid-flow, ring a lawyer, take advice and make a record of it, then return to the job at hand. The Draft Code is unrealistic. A much

⁴ Draft journalism code of practice p.54/55

lighter touch is needed. The ICO will not be performing a public service if it stultifies journalism by shackling it with policy documents and record-keeping.

23. We also endorse the MLA's point about the use of the word 'allegation' in this passage:

The general starting point regarding criminal allegations is that a suspect has a reasonable expectation of privacy regarding investigations, including the fact that there is an investigation⁵

One of the core purposes of investigative journalism, which of course passes any public interest test the ICO might set, is to uncover and expose criminal activity. Criminal activity cannot be exposed without allegations being made. If there is any privacy in criminal activity, it is in police investigations where no charges have yet been laid. The Draft Code should be amended accordingly.

24. Finally, we have no doubt the ICO will be aware that since the Draft Code was published and this consultation was launched the Government has announced its intention to replace the 1998 Human Rights Act with a modern Bill of Rights⁶.
25. One of the purposes of the proposed Bill of Rights would be to strengthen the legal protection for freedom of expression, which the Government believes has been diluted by the European Court of Human Rights' focus on privacy rights:

Freedom of expression is a unique and precious liberty on which the UK has historically placed great emphasis in our traditions of Parliamentary privilege, freedom of the press and free speech. The Human Rights Act sought to recognise this to some degree in section 12(4) of the Act, which directs the courts to have 'particular regard to the importance of the Convention right to freedom of expression'.

The government believes that the public interest is overwhelmingly assisted by protection for freedom of expression and in a free and vibrant media. Such freedom underpins our democracy, ensures greater transparency and accountability, helps to prevent corruption and preserves the space for wide and vigorous democratic debate.

But at the same time, the case law of the Strasbourg Court has shown a willingness to give priority to personal privacy, including in a recent judgment finding that media reporting about a deceased priest's convictions for child

⁵ Draft journalism code of practice p.51

⁶

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040409/human-rights-reform-consultation.pdf

*sexual abuse and public indecency could interfere with his mother's right to private life, drawing, in part, on the so-called 'right to be forgotten' invented by the Court of Justice of the European Union.*⁷

26. This is likely to include a presumption in favour of upholding the right to freedom of expression and limitations on the ability of the courts to develop competing rights, such as privacy:

*The government would also like the Bill of Rights to provide more general guidance on how to balance the right to freedom of expression with competing rights (such as the right to privacy) or wider public interest considerations. The government does not believe such principles should be merely left to the courts to develop. Instead, it believes there should be a presumption in favour of upholding the right to freedom of expression, subject to exceptional countervailing grounds, clearly spelt out by Parliament. We are considering whether we can draw any lessons or guidance from other strong models of protection for free speech such as those found in the United States, South Africa or other countries.*⁸

27. In our experience, one of the ways the right to freedom of expression has been most consistently undermined in recent years has been through the development by the courts of data protection law as an alternative to libel law for individuals seeking to restrict or suppress media coverage of their activities.
28. Given the Government's proposed Bill of Rights, we would strongly suggest that the ICO reconsiders whether this is the right time to introduce a Draft Code which further emphasises privacy at the expense of freedom of expression, and is heavily based on the very sort of case law which is causing concern to the Government.

Conclusion

29. The ICO says the Draft Code builds on its 2014 Guidance⁹. It has also consistently said it has no ambition to become a media regulator. In our view the Draft Code goes much further than the Guidance, takes the ICO perilously close to becoming a media regulator, and in doing so presents a serious threat to freedom of expression.

7

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040409/human-rights-reform-consultation.pdf para 204-206

⁸ Ibid para 215

⁹ <https://ico.org.uk/about-the-ico/ico-and-stakeholder-consultations/ico-consultation-on-the-draft-journalism-code-of-practice/>

30. The Code is over-long, over-ambitious, and strays beyond the Data Protection Act into making pronouncements about journalistic standards and the state of the media in general. It is weighted in favour of the interests of the individual, and against the public benefits of freedom of expression, which is a vital component of a healthy democracy. It is based on an uninformed view of the way journalists work, and seeks to impose an unrealistic and onerous regime of risk assessment and record-keeping. Data protection law is a serious and growing threat to freedom of expression, which the Draft Code will only exacerbate.
31. Given the Government's stated intention to redress the balance between the right to freedom of expression and individual privacy rights by introducing a Bill of Rights, the Draft Code should be re-examined and redrafted in a simpler and less over-bearing form, similar to the 2014 Guidance.

Peter Wright
Editor Emeritus
DMG Media
January 2022