

Elizabeth Archer

From: Lisa Webb [REDACTED]
Sent: 10 January 2022 20:03
To: journalismcode
Cc: Tom Clark
Subject: ICO Journalism Code Consultation Response from Which?
Attachments: ICO Journalism Code Consultation Response - Which.pdf

External: This email originated outside the ICO.

We welcome the opportunity to provide feedback on the draft journalism code of practice (the "**draft code**") and are grateful to the ICO for engaging with media organisations to ensure the draft code can be as practical as possible.

We have provided some targeted feedback in the attachment that is relevant specifically to Which? as a publisher, which we hope will prove useful.

We note that the code is a considerable length, at 93 pages. Within that, significant word count is spent on broad data protection compliance which can be found elsewhere in ICO guidance. We would urge the ICO to reconsider the focus of the draft code to pay particular attention only to the practical application of the journalistic exemption itself.

We believe that the draft code would benefit from a more substantial re-drafting, rather than adjusting piecemeal. If the ICO agrees that a fundamental rethink ought to occur, then we would be happy to provide further comments on any updated versions.

Should you have any questions, please don't hesitate to get in touch.

Which?

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Which?, 2 Marylebone Road, London, NW1 4DF

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ICO consultation: Draft journalism code of practice

Start date: 13 October 2021
End date: 10 January 2022

Introduction

We are seeking feedback on the draft code of practice about processing personal data for the purposes of journalism. This is a statutory code under section 124 of the Data Protection Act 2018 (DPA 2018).

The code provides practical guidance about processing personal data for the purposes of journalism in accordance with the requirements of data protection legislation and good practice.

The code updates our previous guidance, [Data protection and journalism: a guide for the media](#), which was published in 2014.

It will also help us to assess compliance as part of the periodic review of processing for the purposes of journalism that the ICO must carry out under section 178 of the DPA 2018.

Before drafting the code, we launched a [call for views in 2019](#). You can view a [summary of the responses and individual responses on our website](#).

The draft is now out for public consultation. The public consultation will remain open for 12 weeks until 10 January 2022.

Download this document and email to: journalismcode@ico.org.uk

Print off this document and post to:

Journalism Code of Practice
Regulatory Assurance
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

If you have any general queries about the consultation, please email us at journalismcode@ico.org.uk.

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 (eg a member of the public). All responses from organisations and individuals responding in a professional capacity 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

When commenting, please bear in mind that we aim to focus on key points and practical information relevant to journalism where possible. The code does not aim to cover all of the legislation and may assume knowledge of some general data protection terms and concepts. Where relevant, the code may link to further reading such as the [Guide to the UK GDPR](#) but this does not form part of the statutory code.

Please also bear in mind that we intend to provide a 'quick guide', and perhaps other resources, to support day-to-day journalism and smaller organisations, as we did with our previous media guidance. Please let us know if you have any ideas about resources to support this code in the general comment box at the end of this survey.

Q1 To what extent do you agree that the code is clear?

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree

Q1a If the code could be clearer, please tick which section(s) could be clearer.

- Summary
- Navigating the code
- About this code
- Balance journalism and privacy
- Be able to demonstrate your compliance
- Keep personal data secure
- Justify your use of personal data
- Make sure personal data is accurate
- Process personal data for specific purposes
- Use the right amount of personal data
- Decide how long to keep personal data
- Be clear about roles and responsibilities
- Help people to exercise their rights
- Disputes and enforcement
- Annex 1

Please explain your response to Q1a.

- While we value the broad position of the draft code, we would encourage the ICO to consider making the code shorter, simpler and more focused on the practical application of the journalistic exemption. Given the length of the document and the complexity of the drafting, we feel it may not be of practical use to journalists and editors.
- References to the accountability principle would benefit from being in one section of the code, and not referenced throughout it. This information

would then be easier to locate, and it would allow for multiple references throughout the code to be deleted, making the code shorter.

- We acknowledge that the use of case examples can be helpful as guidance, however we have concerns that by including them in the new code, which has statutory force, the examples **must** be taken into account by the courts and the Commissioner (DPA 2018, s.127). This is particularly concerning where the case examples are drawn from first instance decisions that do not have formal value as precedent. It may be preferable to include case examples in complementary material, so that a clear distinction can be made between principles that must be considered, and material that is only illustrative.
- We note that there are some statements of law in the code that may need correcting to ensure clarity for users. For example, page 32 of the code states that *"You can rely on the exemption by demonstrating a reasonable belief that complying with a particular provision is incompatible with the purposes of journalism. In other words, it is necessary to not comply with data protection law in order to achieve your journalistic purpose"* (emphasis added).

The use of the word 'necessary' gives us cause for concern given its strict legal meaning, and we would therefore support the Media Lawyers' Association's submission which suggests the wording should be replaced with *"In other words, it is impractical to comply with data protection law..."*

Q2 To what extent do you agree that it is easy to find information in the draft code?

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree

Q2a If it could be easier to find information in the code, please tell us how it could be easier.

References to the accountability principle would benefit from being in one section of the code, and not referenced throughout it. This information would then be easier to locate, and it would allow for multiple references throughout the code to be deleted, making the code shorter.

Setting information out under headings is a useful way to navigate the document, but we would suggest keeping each section very short to allow a user to quickly access the parts that are relevant to their query and to pick out the most important parts in allowing them to understand and apply the exemption.

Q3 To what extent do you agree that the code provides the right level of detail?

- Strongly agree
- Agree

- Neither agree nor disagree
- Disagree
- Strongly disagree

Q3a If the code could provide a better level of detail, please tell us how it could be improved.

We consider the Code to be too broad in its current form and could benefit from simplification. The volume of information may make it difficult to use for those who do not already have a good grasp of how data protection principles apply to the media. We would therefore suggest shortening and simplifying the code.

Q4 To what extent do you agree that the code provides practical guidance to help individuals processing personal data for the purposes of journalism to understand and comply with data protection obligations?

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree

Q4a If the code could be more practical, please tick which section(s) could be more practical and tell us how it could be improved.

- Summary
- Navigating the code
- About this code
- Balance journalism and privacy
- Be able to demonstrate your compliance
- Keep personal data secure
- Justify your use of personal data
- Make sure personal data is accurate
- Process personal data for specific purposes
- Use the right amount of personal data
- Decide how long to keep personal data
- Be clear about roles and responsibilities
- Help people to exercise their rights
- Disputes and enforcement
- Annex 1

Please explain your response to Q4a.

- While we value the broad position of the draft code, we would encourage the ICO to consider making the code shorter and simpler. Given the length of the document and the complexity of the drafting, we feel it may not be of practical use to journalists and editors.
- References to the accountability principle would benefit from being in one section of the code, and not referenced throughout it. This information

would then be easier to locate, and it would allow for multiple references throughout the code to be deleted, making the code shorter.

- We would urge the ICO to include only *essential* information on compliance that *must* be taken into account. While we acknowledge that the use of case examples can be helpful as guidance, we have concerns that by including them in the new code, which has statutory force, the examples *must* be taken into account by the courts and the Commissioner (DPA 2018, s.127). This is particularly concerning where the case examples are drawn from first instance decisions that do not have formal value as precedent. It may be preferable to include case examples in complementary material, so that illustrative material and compulsory principles can be kept separate and defined.

Q5 To what extent do you agree that the draft code covers the right issues about journalism in the context of data protection?

- Strongly agree
 Agree
 Neither agree nor disagree
 Disagree
 Strongly disagree

Q5a If we have not covered the right issues in the code, please tell us how it could be improved.

We would urge the ICO to include explicit recognition to the principle of editorial decision making and confirmation that the ICO's role is not to be an editor or journalist.

ECHR Art 10 requires that regard should be had to editorial discretion. This ought to be borne in mind when considering both limbs of the journalism exemption (reasonable belief that publication would be in the public interest *and* reasonable belief that the application of the listed GDPR provisions would be incompatible with the purposes of journalism). Like the Media Lawyers' association, we would welcome express references to this principle in Section 1 ("*Why is it important to balance journalism and privacy?*").

Q6 Please provide details of any cases, examples, scenarios or online resources that it would be useful for us to include in the code.

Q7 To what extent do you agree that the draft code effectively protects the public interest in freedom of expression and information?

- Strongly agree

- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree

Q7a If the draft code could protect the public interest in freedom of expression and information more effectively, please tell us how it could be improved (bearing in mind the need to balance competing rights in the code).

- We would urge the ICO to include explicit recognition to the principle of editorial decision making and confirmation that the ICO's role is not to be an editor or journalist.
ECHR Art 10 requires that regard should be had to editorial discretion. This ought to be borne in mind when considering both limbs of the journalism exemption (reasonable belief that publication would be in the public interest and reasonable belief that the application of the listed GDPR provisions would be incompatible with the purposes of journalism). Like the Media Lawyers' association, we would welcome express references to this principle in Section 1 ("Why is it important to balance journalism and privacy?").
- The code refers to 'policies' and/or 'procedures' multiple times throughout it. We believe this type of approach may be too prescriptive and impractical. There is a risk that the resource implications of complying with such a prescriptive approach could negatively and disproportionately impact media organisations' abilities to deliver information to the public.
The law requires that compliance can be demonstrated but we believe it ought to be up to the individual media organisations to decide *how* to demonstrate such compliance.
- We would urge the ICO to broaden the definition of "*with a view to publication*" on page 27 of the code. Currently the code states that "*In this context, 'publish' means you are making it available to the public.*" We (and many other publishers) make some material available only to a section of the public e.g., supporters of our campaigns, or members who are willing to pay/subscribe to receive information that is not free to access for everyone.
We understand that the Media Lawyers' Association and The Financial Times have raised the same concern and we endorse the suggestion made by both that it would be appropriate to amend the definition to include "*making it available to the public, or to any section of the public (including, for example, to any fee-paying or non-fee-paying person or group that is able to access such journalistic material.*"

Q8 To what extent do you agree that the draft code effectively protects the public interest in data protection and privacy?

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree

Strongly disagree

Q8a If the draft code could protect the public interest in data protection and privacy more effectively, please tell us how it could be improved (bearing in mind the need to balance competing rights in the code).

Q9 Could the draft code have any unwarranted or unintended consequences?

Yes

No

Q9a If yes, please explain your answer to Q9.

- The code refers to 'policies' and/or 'procedures' multiple times throughout it. We believe this type of approach may be too prescriptive and impractical. There is a risk that the resource implications of complying with such a prescriptive approach could negatively and disproportionately impact media organisations' abilities to deliver information to the public.
 - By using lengthy discussion of cases in areas where the law is developing (such as first instance decisions), it may lead to the code quickly becoming out of date and harder to follow.
 - The length and complexity of the code will make it difficult to use for those who do not already have a good grasp of how data protection principles apply to the media. This may impact disproportionately on the ability of media organisations to comply with the code and therefore their ability to provide information to the public.

Q10 Do you think this code requires a transition period before it comes into force?

Yes

No

Q10a If yes, please tick the most appropriate option.

3 months

6 months

12 months

Q11 Is there anything else you want to tell us about the draft code?

Section 2 About you

Please see privacy information above.

Q12 What is your name?

Charmian Averty

Q13 If applicable, what is the name of your organisation and your role?

Which? Limited/Consumers' Association. General Counsel.

Q14 Are you acting: Please select the capacity in which you are acting.

- in a private capacity (eg someone providing their views as a member of the public)?
- in a professional capacity?
- on behalf of an organisation?
- other

If other, please specify.

Q14a Are you: Please select most appropriate.

- A member of the public
- A citizen journalist
- A public figure (eg individuals who have a degree of media exposure due to their functions or commitments) or individual with a public role (eg politician, public official, business people and members of regulated professions)
- A representative of a newspaper or magazine
- A representative of a broadcaster
- A representative of an online service other than those above
- A representative of the views and interests of data subjects
- A representative of a trade association
- A representative of a regulator
- A representative of a 'third sector'/'civil society' body (eg charity, voluntary and community organisation, social enterprise or think tank)
- A freelance journalist
- A private investigator
- A photographer
- An academic
- A lawyer
- Other

If other, please specify.

Further consultation

Q15 Would you be happy for us to contact you regarding our consultation on the journalism code?

- Yes
- No

If so, please provide the best contact details.

[Redacted]

Q16 Would you be happy for us to contact you regarding our work to develop a process to review processing for journalism in accordance with the statutory requirement under section 178 of the DPA 2018?

- Yes
- No

If so, please provide the best contact details.

[Redacted]

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