

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

Disagree

Q2 If you disagree, please explain why?

The British Broadcasting Corporation (the "BBC") welcomes this opportunity to consult on the Information Commissioner's (the "ICO") new Code of Practice. We look forward to having the opportunity to participate in workshops to discuss the new Code at a later stage of the consultation process.

The BBC also supports the submission made to the ICO's consultation by the Media Lawyers Association. We make this submission in addition to the MLA's paper in order to raise issues specific to the work of the BBC.

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?

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?

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?

Yes. The BBC notes the following changes in the law since the commencement of the Data Protection Act 2018 (the "DPA 2018") that should be reflected in the new Code of Practice (the "Code").

1. Journalism exemption

The scope of the journalism exemption has been expanded in the DPA 2018 in the following ways:

- a) The previous journalism exemption in section 32 of the Data Protection Act 1998 (the "DPA 1998") provided that personal data that are *only* processed for the special purposes are exempt, whereas the exemption in schedule 2, part 5, paragraph 26 of the DPA 2018 does not include the term *only*; and
- b) The exemption in paragraph 26 of the DPA 2018 is broader than the exemption in the DPA 1998 as the former applies to a range of requirements in the GDPR (listed in paragraph 26(9)) beyond the Data Protection Principles.

2. Stay procedure:

The journalistic stay at section 176 of the DPA 2018 has been narrowed to apply *only* to personal data which has not previously been published, whereas under s32(4) of the DPA 1998 the stay could apply where the processing was with a view to the publication of journalistic material which had not previously been published.

3. Disclosure of information to journalists

The existing Guidance does not explain that certain data protection provisions can be relied on by third party individuals, public bodies or other organisations who act as sources for media organisations in the provision of information they reasonably believe is in the public interest. These provisions should be identified in the Code as important protection for journalistic sources.

The DPA 2018 includes a new 'special condition' for processing special categories data that may be relied on by individuals and organisations in circumstances where they provide information containing personal data to a media organisation. This appears in schedule 1, part 2, paragraph 13 of the DPA 2018 where the processing of special categories data is carried out for 'journalism etc in connection with unlawful acts and dishonest etc' applies to 'any person'. This condition may apply where a source, acting independently of a media organisation, forms a reasonable belief that information containing personal data is in the public interest

and should be disclosed to, and investigated by, a media organisation.

Specific defences have been introduced to the criminal offences of knowingly or recklessly obtaining personal data (section 170 DPA 2018) and re-identifying de-identified personal data (section 171 DPA 2018). These defences are applicable where a person was acting for the special purposes, with a view to the publication of journalistic material and with a reasonable belief that their conduct was justified as being in the public interest. These defences may apply to individuals, such as sources, where they provide information containing personal to a media organisation in pursuance of their reasonable belief in the public interest value in disclosure of the information.

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?

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

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

It is the BBC's view that the following principles identified in the current Guidance must be retained, and strengthened, to promote and protect the editorial independence necessary to produce public interest journalism.

1. Importance of freedom of expression:

The existing Guidance recognises that there is an inherent public interest in journalism (see page 34) and explains the function of the journalism exemption in the DPA 1998 as a way to protect freedom of speech. As the ICO's blog that accompanied this consultation made clear, the media, particularly traditional media, face many complex challenges in the digital age that have made newsgathering and publishing/broadcasting more challenging. These challenges include the speed of publication and increased competition for readership and viewers from new social media platforms. The necessity in underscoring freedom of expression in the new Code is clear from Section 124(5) of the DPA 2018 which provides that when devising a new Code of Practice for the media the Commissioner should promote;

'good practice in the processing of personal data for the purposes of journalism means such practice in the processing of personal data for those purposes as appears to the Commissioner to be desirable having regard to –
(b) the special importance of the public interest in the freedom of expression and information'.

2. Purpose of the Code of Practice:

The Code of Practice should not be overly prescriptive in nature to allow for editorial independence for media organisations when processing personal data for the purposes of journalism. The new Code should stress the principle expressed in the existing Guidance which provides it is a "guide to data protection compliance, not to wider professional standards or media regulation" as is made clear in the existing Guidance" (see page 3).

3. Role of the ICO with regards to the media:

The existing Guidance recognises that the ICO is not a specialist media regulator and that it is "not the ICO's job to usurp that role" (page 47). It notes that industry codes of practice already address the balance between privacy and freedom of expression and states that "if you comply with industry codes, this will go a long way to ensure you also comply with the DPA" (page 21). This reflects paragraph 26(6) of the new exemption in schedule 2 of the DPA 2018. As the ICO will be aware, the BBC's Editorial Guidelines are a prescribed code of practice in paragraph 26(6) of the DPA 2018 and the BBC provides additional practical guidance, training and advice to editorial teams on how to comply with

those standards.

4. Standard of review for reliance on the s.32 exemption:

The Guidance repeatedly recognises that the ICO's role is to review the reasonableness of editorial decisions regarding the exemption and not to substitute its own view (see pp. 32, 35 and 48). This is important in underscoring editorial independence.

5. The scope of the exemption:

The Guidance confirms the breadth of the former exemption in section 32 of the DPA 1998 providing that it "can potentially cover any information collected, created or retained as part of a journalist's day-to-day activities" (page 32).

Further, on page 31 the Guidance helpfully explains that personal data need not be being processed with a view to publication of a particular story and that it may be "retained with a view to it being used in a different story or in updating a story that has already been published". It would be useful for the new Code to explain that while there can be no single definition of 'journalism', the Supreme Court in *Sugar (Deceased) v BBC* [2012] UKSC 4 upheld the Upper Tribunal's tripartite definition of the 'special purposes' [at paragraph 39 of *Sugar*]. This tripartite analysis is important to explain the breadth of editorial content that may be processed by a media organisation for 'the special purposes'. Page 29 of the Guidance explains that while *Sugar* "was a case about the Freedom of Information Act, the court drew a direct and explicit parallel with the words in the DPA".

Further to the Court's analysis of the meaning of 'special purposes' in *Sugar*, the BBC draws the Commissioner's attention to the processing of personal data for the purposes of responding to an editorial complaint. Such processing is captured by the third limb of the following definition of 'journalistic activity' at §§107-109 of the Supreme Court's decision:

"The first is the collecting or gathering, writing and verifying of materials for publication. The second is editorial. This involves the exercise of judgement on issues such as the selection, prioritisation and timing of matters for broadcast or publication; the analysis of, and review of individual programmes; the provision of context and background to such programmes. The third element is the maintenance and enhancement of the standards and quality of journalism (particularly with respect to

accuracy, balance and completeness). This may involve the training and development of individual journalists, the mentoring of less experienced journalists by more experienced colleagues, professional supervision and guidance, and reviews of the standards and quality of particular areas of programme making.”¹

The third limb clearly includes data processed for the purpose of reviewing and responding to editorial complaints. Given the Court’s conclusion in this regard, the existing Guidance is incorrect. While it rightly points out that “the exemption cannot apply to anything that it is not an integral part of the newsgathering and editorial process” the Guidance goes on to give the following example of data processing that would *not* fall within the exemption: “information created in response to a complaint” (page 32). As explained above, following the judgement in *Sugar*, the ‘editorial process’ includes reviewing and responding to editorial complaints, therefore this must be corrected in the new Code.

6. Obtaining Information

The BBC draws the Commissioner’s attention to existing parts of the Guidance that, in the BBC’s view, provide inadequate protection for journalists to obtain sensitive information and protect confidential sources.

The treatment of confidential sources in the existing Guidance does not accurately reflect the legal position vis-à-vis source protection in the Contempt of Court Act 1981. The Guidance suggests that there may be cases where it is ‘reasonable’ to reveal the identity of a confidential source. The legal threshold for disclosure is necessity. The BBC is concerned that the existing Guidance sets a dangerous presumption by implying that it may be mandatory in some cases to reveal the identity of sources. The BBC suggests the following changes to paragraph 2 of the section dealing with confidential sources on page 16 of the Guidance:

The text currently provides that “you only have to disclose information about individuals who are sources (or anyone else identified in the information) if that individual consents, or if it is reasonable to do so”. The BBC suggests that the term *reasonable* should be replaced with “or if there is a legal reason to do so”. This change would protect the importance of source confidentiality, providing that it will only be necessary to disclose

¹ *Sugar v The Information Commissioner* (EA/2005/0032), access at: <http://www.informationtribunal.gov.uk/DBFiles/Decision/i186/sugar%20derogation.pdf>

the identity of such sources where legally required.

Further, the Guidance does not afford adequate protection for journalists obtaining sensitive information in the course of an ongoing investigation.

The first bullet point on page 9 of the Guidance provides:

"People should know if you are collecting information about them where it is practicable to tell them. We accept that it will not generally be practicable for journalists to make contact with everyone they collect information about".

While the following bullet point explains that "you do not need to notify individuals if this would undermine the journalistic activity", the use of the term "practicable" in the first point assumes that practicality is the only consideration needed when assessing whether to notify an individual they are being investigated. This is not the case as other considerations will apply such as whether it would prematurely notify a subject of a covert investigation thus undermining that investigation. Given this, the BBC suggests the text change to;

"People should know if you are collecting information about them where it is reasonable in the context of an investigation to do so".

The fourth bullet point on page 9 the Guidance provides;

"... you should only collect information about someone's health, sex life or criminal behaviour if you are confident the public interest in doing so justifies the intrusion into their privacy".

This text misunderstands the nature of some investigations where journalists may receive or proactively gather information where they cannot assess its value until further investigations are carried out. Moreover, requiring journalists to be "confident" that the public interest in obtaining the information justifies the privacy intrusion assumes an intrusion has occurred. This is not an accurate reflection of the law of privacy in the United Kingdom as the first step in assessing whether a person's privacy has been invaded is to consider whether they have a reasonable expectation of privacy in the circumstances. A court will then move to a balancing test weighing up any privacy intrusion against the public interest in obtaining and/or publishing the information in question.

Given this, the BBC suggests replacing the text with; "if it is

relevant to an investigation and the public interest in doing so justifies any intrusion into their privacy”.

About you

Q11 Are you answering these questions as?

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.