

ICO Call for Views on a Data Protection and Journalism Code of Practice

Response of Channel 4 Television Corporation

Channel 4 is a member of the Media Lawyers Association (the 'MLA'), an association of in-house media lawyers from many of the UK's leading newspapers, broadcasters, book publishers, magazines, and representative bodies, who are also submitting a response to this Call for Views. Channel 4 has had sight of and approves and supports that response. This response is in addition and supplementary to the MLA response.

Channel 4 supports the ICO's stated intention to provide "*practical, pragmatic guidance for journalists on how to comply with data protection legislation, building on its detailed guidance*" on the previous Data Protection Act 1998. As a Public Service Broadcaster subject to a comprehensive statutory regulation regime under Ofcom, we welcome the ICO's acknowledgement that it is not a regulator of press standards and that "*protecting freedom of expression, and the inherent public interest in a free press, is also crucial.*" Under the Data Protection Act 2018, courts and tribunals will take the new code into account when considering data protection cases. It is vital to Channel 4 that these fundamental points are reflected in the ICO's approach when drawing up the code and that constructive dialogue with the media is maintained.

The fundamental human right to freedom of expression and the right of everyone to impart and receive information, ideas and opinions lies at the heart of Channel 4's purpose. As a commissioning Public Service Broadcaster with a unique statutory remit to innovate, present alternative views, inspire change and reflect the diversity of British society we, along with our independent production partners, are responsible for over 35 years of award-winning, public interest content across a range of genres from news and current affairs to scripted drama and comedy, non-scripted documentary and factual entertainment formats, delivered over a range of different platforms, to millions of viewers. As well as a proven track record of compliance with statutory broadcast regulation such as the Ofcom Broadcasting Code, we have significant experience successfully reconciling data protection laws with our obligations to provide British viewers with the very best content, and are familiar with the ICO's guidance on the 1998 Act 'Data protection and journalism: a guide for the media'.

The law clearly recognises the special role of the public right to information and the media's right to provide information / report and sets out specific exemptions protecting the special nature of those rights and journalistic, artistic, literary and academic material. The new code should expressly reflect that many of the changes in the 2018 Act and in recent jurisprudence are highly favourable to the media, placing the media in a stronger position than under the 1998 Act. Any code should not place new restrictions on the media unless there is clear legislative power to do so.

Channel 4 contributed to the creation of the guidance on the 1998 Act through both written submissions and constructive dialogue with the then ICO, Christopher Graham. We hope that a similar consultation process will be followed for the forthcoming guide, and our aim is to make a positive and constructive contribution so that it reflects both good practice and practical application to journalism and editorial content across all media.

Channel 4 agrees with the MLA that a principles-based approach adopted in the 1998 Act guidance. The data protection legislation is already extensive and provides for the balance of rights of data subjects with the rights of others (including the right to freedom of expression and information). It is already highly prescriptive. A code containing further prescriptive rules, contrary to the existing approach, would be counter-productive to the public's right to information.

Key Issues: There are some headline issues underpinning the creation of the code that Channel 4 would like to ensure receive careful consideration (fuller detail of each is set out in the MLA response):

- It is crucial that editorial discretion and editorial judgement are respected and preserved. There must be a margin of discretion afforded to editorial decision makers and (as expressed in the present guidance) the role of the ICO must be to review the reasonableness of their subjective decision making and not substitute its own view.
- Any new code must reflect the importance of protection of sources in line with existing law.
- Recognition of the value in the wide and diverse nature of journalism. "The media" and "journalism" range from an individual blogger upwards.
- Recognition of the fast-moving nature of some media, such as news. Prescriptive procedures are not compatible with this and would cause delay or could even mean that events are not reported.
- The code should ensure that data protection law cannot be inappropriately used to stifle public criticism or otherwise frustrate legitimate media creation.

Current Guidance: In reiteration of the MLA response, Channel 4 supports the following features of the current guidance, in particular, being retained in the new code:

- Research and contact/background information are confirmed in the current guidance as "a vital journalistic resource": see pp.11-12 and guidance on Principles 3 and 5 on p.25.
- The inherent public interest in journalism and the maintenance of a free press is expressly recognised: see p.34.

- It is expressly recognised that the ICO is not a specialist media regulator and that it is “not the ICO’s job to usurp that role” (p.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” (p.21).
- The current 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 maintaining a margin of editorial discretion.
- It is acknowledged in the current guidance that there is a need for flexibility in terms of who must hold the subjective beliefs for the purposes of the exemption, and how this is to be evidenced. (p.35 see also p.13).
- The current guidance confirms the broad scope of the exemption saying it “can potentially cover any information collected, created or retained as part of a journalist’s day-to-day activities” (p.32) and confirms that the special purposes are to be interpreted broadly (p.29).

Section 1: Your views on the code

- 1. 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. Channel 4 are supportive of the principles-based approach to the existing guidance, which is consistent with the approach of other regulators. We support the development of a Code which is similarly pragmatic and flexible, as an effective and practical aid to compliance.

- 2. If you disagree, please explain why?**

N/A

- 3. “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.

- 4. If no, do you have any suggestions about how we should structure the code?**

N/A

- 5. Do you think the ICO's existing guidance for journalists addresses the main areas where data protection issues commonly arise?**

Channel 4 believes there are areas that are not addressed sufficiently. For further details please see the MLA response.

- 6. If no, what additional areas would you like to see covered?**

Please see the MLA response which Channel 4 has had sight of and supports.

- 7. 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?**

Please see the MLA response which Channel 4 has had sight of and supports.

- 8. 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?**

Please see the MLA response which Channel 4 has had sight of and supports.

- 9. Are there any case studies or journalism scenarios that you would like to see included in the journalism code?**

Channel 4 remain supportive of the principles-based approach adopted in the guidance, and are reluctant to introduce specific case-studies or scenarios which will inevitably need to be over-simplified and will therefore have limited utility and/or have a chilling effect on public interest journalism.

- 10. Do you have any other suggestions for the journalism code?**

Please see the MLA response which Channel 4 has had sight of and supports.

Section 2: About you

- 11. Are you?**

A media organisation.

- 12. How did you find out about this survey?**

ICO website

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:



Submitted on 24 May 2019

Hamish Thomson, Senior Lawyer

Channel 4 Television Corporation