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From: [REDACTED]
Sent: 10 January 2022 11:00
To: journalismcode
Cc: Nigel Hanson
Subject: FT response to ICO consultation on draft Journalism Code
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External: This email originated outside the ICO.

Dear ICO Regulatory Assurance & Journalism Code team,

I am an in-house lawyer employed by The Financial Times Limited ('FT').

Please find **attached** the FT's response to the consultation on the draft Journalism Code.

We look forward to hearing from you in due course.

Yours faithfully,

Nigel Hanson
Senior Legal Counsel
Legal Department

[REDACTED]
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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.

At the outset, as a general point, please note that The Financial Times Limited also endorses and supports the consultation submission provided to the ICO by the Media Lawyers' Association, of which the FT is a member. We believe that media organisations should be given a further opportunity to participate in a further consultation exercise on the proposed code in due course (e.g. later in 2022), once the draft code has been revised in light of the current submissions that have been requested by the deadline of 10 January 2022.

In this FT response document, we reiterate a number of the points that are being made in the MLA's submission (which we have seen) and we also provide some additional comments.

We believe the code should be principles-based, and should demarcate clearly between binding principles and any (non-binding) practical examples which are given for illustrative purposes and which, it should be made clear, should not be read as any form of binding precedents because every scenario is fact-sensitive and the correct application of data protection law will depend on the particular circumstances.

There is a lot of repetition in the current draft code that could be reduced, and the three pages titled 'Navigating this code' are not actually clear or user-friendly.

The section no.10 ('Help people exercise their rights') would be improved if it specifically mentioned the importance of freedom of expression and information, and the latitude that must rightly be afforded to editorial discretion in that area. That would assist in keeping the expectations of data subjects at appropriate and realistic levels.

In addition, on page 85 in relation to 'Right of access', we believe that instead of stating (as it currently does) "...*Provide any information you are able to without undermining your journalistic activities. ...*" the code should, more accurately and properly, state: "...Provide any information you are able to, except to the extent that you have a reasonable belief that it would be incompatible with your journalistic purposes to do so. ..."

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.

We believe the code would be easier to navigate if the relevant numbering of the Articles of UK GDPR were included in the 'Contents' list on page 2, and if the 'Navigating this code' section, on pages 12 - 14, mirrored the Contents more closely and also included the relevant UK GDPR's Articles' numbers.

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.

As has been recommended by the MLA in its submission, we believe the content of the code should be fundamentally re-thought and revised. It should, for example, be far less prescriptive and contain fewer case law citations.

Some of the privacy cases it currently cites were 'difficult' cases whose rulings many observers considered to be borderline decisions that were appealable. One case (ZXC v Bloomberg LP) is currently the subject of on-going appeal before the Supreme Court.

Omitting various case law citations and summaries would be a wise precaution in order to try to 'future-proof' the code against potential changes in case law, which will inevitably happen.

In addition, we are concerned that the definition of "with a view to publication" in the context of the 'journalism exemption', on page 27 of the draft Code, is far too narrow. It currently states:

'... "With a view to publication" means that you are processing personal data with the intention or hope of publishing journalistic material. In this context, 'publish' means you are making it available to the public. ...'

However, many publishers in the digital era publish material only to a section of the public, e.g. to subscribers who are willing to pay and/or subscribe to receive quality or specialist journalism that is not made freely available to all without such payment or subscription. Accordingly, we consider it vital that the definition be amended along these lines:

*'... "With a view to publication" means that you are processing personal data with the intention or hope of publishing journalistic material. In this context, **['publish'] 'publication' means you are 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).** ...'*

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.

The code should reduce the amount of repetition it currently contains, and expressly acknowledge the important principle of editorial discretion in the context of data-processing for the purposes of journalism.

The code should also emphasise less the significance of written records recording decisions, approaches and policies about journalistic data-processing, and should highlight more the simple importance of being able to demonstrate compliance (i.e. demonstrate compliance by *any* relevant means) with UK GDPR and the UK Data Protection Act 2018 Act rules.

Further, we believe the code should be much shorter, less prescriptive and easier to navigate.

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.

As we have stated, we believe the code should include greater acknowledgement of the important principle of editorial discretion, having regard to the importance of freedom of expression and information in a democratic society.

We believe the draft code is wrong, on page 32, in explaining the crucial phrase "incompatible with journalism" (in the 'journalism exemption' in para 26, Part 5 of Sched 2 to the UK DPA 2018) as meaning:

'...In other words, it is necessary to not comply with data protection law in order to achieve your journalistic purpose. ...'

We believe that such a concept of 'necessity' has no proper role in the correct interpretation of the phrase 'incompatible with journalism'.

In this instance, we consider it would be sensible if the code relied simply on the actual words of the 'journalism exemption' in the UK statute - i.e. it should refer simply to the statutory requirement, which is as follows:

'...The listed GDPR provisions do not apply to the extent that the controller reasonably believes that the application of those provisions would be incompatible with [journalism] ...'

However, In contrast with the above point about removing 'necessary' from the code's text, we consider that the word 'necessary' *does* need to be inserted and included on page 80 of the draft code, in the reference to Section 10 of the Contempt of Court Act 1981. To be an accurate statement of that statutory law, this part of the code needs the word to be added where marked in bold as follows:

*i.e. '.....unless a court considers it to be **ADD: necessary** in the interests of justice or....'*

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

As regards the '**Right of access**', tackled on page 80, we believe it would be appropriate for the code to acknowledge and expressly state that in some cases, providing full reasons for a refusal to grant access to or disclose certain personal data under a Subject Access Request may itself be "incompatible with" journalism - so data subjects will not always be entitled to fully explained, detailed reasons for refusal, on that basis.

As regards the '**Right to restriction**', mentioned on page 81, the code should acknowledge that having regard to the importance of freedom of expression and information it may well be "incompatible with" journalism to comply with an

otherwise-applicable obligation to take down (i.e. and restrict processing of) an online article while a complaint is being considered, given that a common practice has developed whereby a note can be appended to the online article in question (a so-called *Loutchansky* tag, named after the well-known defamation case in which such an online note featured to sign-post certain aspects of the continuing online publication in question) while the complaint is scrutinised and reviewed.

As to the '**Right to rectification**', also mentioned on page 81, we believe the code is wrong in saying that where a news organisation remains satisfied (despite a complaint) that data is accurate "it is helpful to put a note on the system recording that the requester challenges its accuracy and explain why". We agree that doing that is one *option* that a journalistic publisher has, in its discretion (and that it sometimes serves usefully to placate a complainant). However, the code should expressly acknowledge that if the publisher remains satisfied that data are in fact accurate, it is not obliged to add, or retain, a note stating that an individual disputes that. The complainant would have recourse to the ICO or a court on the issue of contested accuracy, but the journalistic publisher should not be required to note the disputed facts prior to such adjudication or determination.

As regards the '**Right to erasure**', on pages 83-84, we believe the draft guidance strays inaccurately from the provisions of UK GDPR Articles 17(2) and 19, and would need to be amended in the way marked in bold, below:

*'...If you **ADD: or your organisation are obliged to** ~~[[DELETE: do]]~~ erase personal data in response to an erasure request, you need to **ADD: take reasonable steps, taking into account available technology and the cost of implementation, to** tell other organisations or individuals ~~[[DELETE: about the]]~~ **ADD: that the data subject has (i.e. where applicable) requested erasure** **ADD: of any links to, or copy or replication of, such personal data, if:***

- it has been disclosed to others **ADD: by you or your organisation;** or*
- the personal data has been made public (for example on social networks, forums or websites) **ADD: by you or your organisation.***

Consider whether it is possible or proportionate to contact the recipients of the personal data. If asked, tell the individual making the request who you disclosed their personal data to.

*Where personal data **ADD: that you are obliged to erase** has been made public online **ADD: by you or your organisation**, take reasonable steps, **ADD: insofar as is possible and proportionate**, to inform other controllers, who are processing the personal data, **ADD: about the erasure** ~~[[DELETE: to erase any links, copies or replication of that data]]~~. ...'*

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).

The code should contain robust acknowledgement (in various places throughout the code) about the practical reality of journalistic practices, in the interests of freedom of expression and of information in a democratic society.

For example, the code should expressly acknowledge that in the context of fast-moving, 24-hour-cycle, news reporting (in which breaking stories and news reports sometimes arise within minutes or hours of events developing) it will not always be compatible with journalism to comply with the cumbersome and time-consuming obligations in e.g. Articles 5, 13 and 14 of UK GDPR.

There will not always be sufficient time or practical opportunity for journalists to be transparent with data subjects about data they are processing (this is relevant to any guidance relating to Article 5). We believe this should be acknowledged in the code. The code should also expressly acknowledge and sign-post that journalists may well be entitled to rely on the 'journalism exemption' in such scenarios, where they have a reasonable belief that having to comply would be incompatible with journalism.

Similarly, there will not always be sufficient time or practical opportunity for journalists to provide all the detailed information specified under Articles 13 and 14. Again, the code should acknowledge this in its guidance and expressly cite the potential applicability of the 'journalism exemption' in such circumstances.

Further, it does not seem right for the ICO to state (on page 91 of the draft code) that it will provide assistance in certain cases to (only) claimants. Will the ICO not also state that it will provide assistance to defendants, too, in certain circumstances? It is important to note that not all "journalists" or "journalism" organisations are wealthy persons or commercial entities, and, as is noted on page 23, the definition of "journalism" is rightly very broad, and includes many tiny news outlets and also individual citizen journalists and bloggers.

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).

n/a

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

- Yes
 No

Q9a If yes, please explain your answer to Q9.

If the code retains its current prescriptive content and style, it risks the ICO becoming an unintended media regulator.

In this regard, the code should acknowledge that some issues may be appropriately dealt with under press regulatory systems, including independent self-regulatory regimes under the Editors' Code.

The code should also acknowledge that where a journalist or journalism organisation undertakes some other form of privacy vs. publicity assessment under e.g. the law of privacy or confidence, or under the Editors' Code, it may well not be necessary for there to be a further or duplicated assessment or record-keeping exercise undertaken under data protection law or the ICO's journalism code before a data controller is in a position to demonstrate compliance with various data protection requirements.

Please also note our responses to other parts of this consultation questionnaire as regards unwarranted or unintended consequences.

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?

We take issue with the draft code's statements about user-generated content ('UGC') at the top of page 17.

We believe the code should recognise that when news publishers receive users' comments posted below articles, those posts and any personal data that they contain or entail are then processed (e.g. unwittingly hosted, and/or knowingly edited and published) by journalism organisations as data that is being processed for the purposes of journalism.

Such UGC relates to, and enriches, the professionally produced journalism in the relevant online articles, and then forms an integral part of the online journalistic archive of journalistic information. It is wrong for the code to seek to distinguish UGC as not being journalistic, or not comprising data that is then processed for the special purposes of journalism.

Likewise, we consider that UGC should be mentioned on page 72 of the code in the section titled 'Retaining news archives', by adding e.g. the words marked in bold, here:

"...There is a strong, general public interest in the presentation of news archives, **ADD: including user generated content below archived news reports,** which contribute significantly to the public's access to information about past events and contemporary history. This is generally a weighty factor in favour of not erasing personal data from news archives (see Right to erasure). ..."

Section 2 About you

Please see privacy information above.

Q12 What is your name?

Nigel Hanson

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

Senior Legal Counsel, The Financial Times Ltd

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.

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.

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