

## Elizabeth Archer

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**From:** [REDACTED]  
**Sent:** 10 January 2022 18:29  
**To:** journalismcode  
**Subject:** RE: Journalism code - ICO consultation closes 10 Jan  
**Attachments:** ICO Draft Journalism Code Submission.pdf

External: This email originated outside the ICO.

Dear Elizabeth

Please find attached IMPRESS submission to the ICO's public consultation on the draft journalism Code. If there is any aspect of this submission that requires further clarification, please let me know. It may be helpful for us to meet and discuss parts of our submission; if you think that is the case, I am happy to arrange a time to meet and discuss further with you.

I am also aware that John Edwards will soon be taking up post as the new Commissioner. I would be most grateful if you could pass on our welcome to him, and we would be pleased to meet him over Zoom or in London, at his convenience, to discuss our work and relationship with the ICO as part of his induction to the role and regulatory landscape.

Many thanks for the opportunity to contribute to your consultation and we hope we can continue to work with you, once the Code is finalised and implementation commences.

Kind Regards

**Lexie Kirkconnell-Kawana (she/her)**  
Head of Regulation | IMPRESS

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**From:** journalismcode <journalismcode@ico.org.uk>  
**Sent:** 05 January 2022 15:08

[REDACTED]  
**Subject:** Journalism code - ICO consultation closes 10 Jan

Dear Lexie,

I hope you had a good Christmas break and happy new year.

We are sending out a reminder that our public consultation on the draft ICO statutory code of practice for data protection and journalism closes on **10 January 2022**. We'd be very grateful if you could let your members know. The code has already been shaped by industry feedback, and as we move towards completing a draft to submit to Parliament and other supporting resources, this continues to be crucial.

We look forward to hearing from you.

Best wishes,

Elizabeth Archer

Principal Policy Adviser  
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## **Submission to the Information Commissioner**

### **Draft Journalism Code 2021**

#### **Introduction**

1. IMPRESS is an independent self-regulatory body for news publishers in the United Kingdom. As of 10 January 2022, IMPRESS regulates 109 news publishers, which are collectively responsible for 191 publications and reaching over 17 million monthly readers. These include local and hyperlocal news publications, specialist publications and investigative journalism sites, all of which have voluntarily subscribed to the most rigorous and accountable ethical standards of public interest journalism. All UK news publishers are welcome to join IMPRESS on a fair and non-discriminatory basis and, by doing so, subscribe to a system of approved regulatory oversight.
2. When a publisher joins IMPRESS, they contract to become a participant in the IMPRESS Regulatory Scheme Agreement (the scheme). The scheme sets out that publishers are bound by the standards of press ethics set out in the IMPRESS Standards Code (the IMPRESS Code). The Code was developed with and for the UK public. It was written by the IMPRESS Code Committee after a rigorous and transparent consultation process. The IMPRESS Code is also only one of a handful of press codes from around the world to address issues relating to digital journalism. The IMPRESS Code is designed to exceed the law, that is, the IMPRESS Code meets minimum legal standards for news publishers in the UK, but also includes requirements that go further than the law to ensure news publishers are operating in the public interest. Thereby, some issues covered in the IMPRESS Code are also subject to civil and criminal law.
3. Finally, the scheme requires that news publishers put systems of internal governance in place to ensure they are transparent, professional and accountable; this includes nominating a legal and compliance officer, managing conflicts of interest, and displaying a complaints policy, which stipulates speedy in-house procedures for addressing complaints about the IMPRESS Code.

Members of the public benefit from IMPRESS awarding a 'Trust in Journalism' mark to publishers that meet our standards for membership. This mark signals to the public that the publisher adheres to the Code and is a trustworthy and accountable source of news.

4. This submission sets out the relationship between the ICO Journalism Code and existing industry codes, the areas where the ICO Journalism Code and the IMPRESS Standards Code align and diverge, and finally sets out some recommendations for areas the ICO Journalism Code could be improved and clarified.

## **The ICO journalism Code and existing press standards**

5. To meet the requirements of the Royal Charter for self-regulation of the press, an approved regulator must develop a Code that includes standards of accuracy and non-discrimination, affirms the right to freedom of expression and the rights of individuals and, it must define the public interest. The IMPRESS Code, which has been approved in accordance with the Royal Charter, is made up of 10 clauses: Accuracy, Attribution and Plagiarism, Children, Discrimination, Justice, Harassment, Privacy, Suicide, Sources and Transparency. It also includes a preamble, a section on public interest, and Guidance that accompanies the IMPRESS Code.
6. Other press codes are used in the UK. The Editor's Code of Practice, is an industry-based code, which is used by complaints handling body IPSO; the National Union of Journalists has a Code of Conduct and broadcasters, regulated by Ofcom, follow the Ofcom Broadcasting Code. The ICO have a statutory obligation to issue a journalism code under section 124 of the Data Protection Act 2018; the prescribed rule set and application of the rules will be subject to interpretation and discretion, which is why it is important that the ICO engage widely and conduct the necessary analysis to understand how the ICO Code may differ from existing press codes. For the journalism sector to be compliant with data protection law, it is important that the new journalism Code issued by the ICO (the ICO Code) is aligned with existing press codes, or rather that where there are gaps in the existing press codes, those standards therein are raised to meet the minimum legal requirements. The next part of this submission compares the ICO Code and the IMPRESS Standards Code.

## **Alignment between the ICO Code and the IMPRESS Standards Code**

7. There are several areas of alignment between the ICO Code and the IMPRESS Code; this indicates that there is a low risk of regulatory divergence (which could confuse regulatory subjects as to which guidance to follow) nor should there be regulatory gaps where the public could be subject to harmful practices and have little to no legal recourse. These areas of alignment are listed below for information.

### **Accuracy**

8. The ICO Code states that you are required to take reasonable steps to check the personal data a journalist is processing is accurate. It suggests referring to the BBC's Editorial guidelines as a useful resource (which suggests gathering first-hand sources, corroborating claims and allegations etc.). There is also acknowledgement that accidental inaccuracies are inevitable given the pace and quantity of journalistic output. The ICO Code further outlines that compliance with the accuracy principle involves clearly distinguishing between fact and opinion when reporting information about individuals.
9. The IMPRESS Code contains similar provisions on accuracy. The IMPRESS Code (1.1 Guidance on Accuracy) also says that there is not an absolute duty to publish only incontrovertibly true facts. Consideration must be given to the significance and likely consequences of inaccuracies, and the attempts made to corroborate a story, for example. The IMPRESS Code also requires that publishers must always distinguish clearly between statements of fact, conjecture and opinion (1.2 Accuracy).

### **Children's Consent**

10. The ICO Code and the IMPRESS Code set out specifications for obtaining children's consent. The IMPRESS Code states that journalists have a responsibility to carefully consider the age and capacity of the child to consent. The IMPRESS Code also features a detailed note to assist publishers with gaining the consent of a child.

### **Court Surveillance, subterfuge and intrusion**

11. The ICO Code states that, in accordance with data protection law, it is likely to be unfair to mislead people about a journalist's identity or intentions. However, the special purposes exemption could be relied upon when carrying out investigative journalism using undercover or intrusive covert methods to obtain the story. The public interest element would have to be satisfied. It would also be appropriate to keep a record of decision-making.
12. IMPRESS similarly addresses subterfuge under the Public Interest clause, and Harassment and Privacy clauses of the IMPRESS Code. It is emphasised that the use of clandestine devices and subterfuge should only be used as a last resort, and when there is a public interest exemption. The publisher would have

to satisfy that the material could not have been obtained by other, less intrusive means for example, and that the means used were proportionate to the significance of the information to be obtain. Similarly, to the ICO Code, The IMPRESS Code requires journalists to keep a contemporaneous record of decision-making that explains the public interest rationale for undertaking an action that may otherwise breach the Code.

### **Privacy: General**

13. More generally, the ICO Code and the IMPRESS Code are aligned on matters of privacy, there are some subtle differences in the nuance and emphasis noted below, but generally the codes should work in a complementary fashion. The ICO Code sets out factors which may help to clarify whether people have a reasonable expectation of privacy: the individual concerned (e.g., are they an adult or a child? Are they a public figure or do they perform a public role?); the nature of the activity in which the individual is engaged; and the place where the activity is happening.
14. The Privacy Clause of the IMPRESS Code has a more detailed list of factors which may give rise to a reasonable expectation of privacy (at IMPRESS Code 7.1): The nature of the information concerned, such as whether it relates to intimate, family, health or medical matters or personal finances; The nature of the place concerned, such as a home, school or hospital; How the information concerned was held or communicated, such as in private correspondence or a personal diary; The relevant attributes of the person, such as their age, occupation or public profile; and whether the person had voluntarily courted publicity on a relevant aspect of their private life. As above, these factors should complement the factors included in the ICO Code.

### **Privacy: Public figures**

15. The ICO Code sets out that individuals with a public profile may still have a reasonable expectation of privacy in specific circumstances. A public figure may attract or seek publicity about certain aspects of their life without losing the right to privacy regarding other matters. The IMPRESS Code (7.19 Guidance on Privacy) mirrors this – ‘if a public figure has published information about their health – for instance, in order to raise public awareness of the importance of screening for cancer – it does not mean that they have waived their right to keep all of their health and medical data private.’

### **Privacy: Information in the public domain**

16. The ICO Code states that if information about an individual is already in the public domain, the impact on any reasonable expectation of privacy is a matter of fact and degree. The ICO proceeds to mention certain instances where information will not necessarily lose its private character, such as where an individual intends to publish the personal data in the future or has already

disclosed personal data relating to the same or similar parts of their life. The IMPRESS Code (7.14 Guidance on Privacy) states 'Information that is already in the public domain will not generally give rise to a reasonable expectation of privacy'. That being said, all cases will be assessed in context and the IMPRESS Code Guidance specifically mentions that private photographs or videos that capture intimate moments may still attract a reasonable expectation of privacy even though they have been previously publicised, for example.

### **Privacy: Public photography**

17. Similarly, to 7.14 Guidance on Privacy (above), the ICO recognises that photographs or film of an individual may be intrusive, however they should also reasonably expect that they may sometimes be photographed or caught on film in public in an incidental way.
18. IMPRESS elaborates in its Guidance that there may be no reasonable expectation of privacy in some contexts, such as when appearing at an event for publicity purposes or when not doing anything related to family or private life.

### **Sources**

19. The ICO Code addresses the need to protect an anonymous source while also complying with the accuracy principle (journalists must be clear about the source); the guidance suggests journalists provide what information you can about the source, if appropriate. The ICO Code recommends that journalists keep records about sources and other research that is used to report an individual's personal data.
20. The IMPRESS Code (clause 8.1 – Sources) requires publishers to take every step to preserve the identity of sources who wish to remain anonymous. The Code states publishers must have a system, such as a secure database, to ensure that the identity of confidential sources is protected.

### **Complaints**

21. The ICO expects complaints about the handling of personal data to be made to the organisation concerned in the first instance. The ICO also encourages the organisation to consider carefully whether they can resolve the issue at this stage to help save the time and resources of all parties.
22. IMPRESS also expects that complainants contact the publisher in the first instance, with the expectation that the publisher will be able to resolve the complaint within 21 days of receipt (Section 3.2 – Regulatory Scheme). IMPRESS would defer all complaints regarding specific matters of data protection to ICO as the relevant regulator, where those matters do not otherwise engage the IMPRESS Code. IMPRESS also offers arbitration as an option for redress for breaches of data protection law as an alternative to costly litigation.

### **Corrections**

23. The ICO Code advises that you may need to add a note to make clear that you made a mistake or a correction, in the form of an advisory line at the top of an online article, or a printed correction area in a newspaper. Further, under the 'Right to rectification' section of the ICO Code, it lists accountability measures, including the requirement to have a policy setting out the process to follow when an inaccuracy is reported, and an online form to report inaccuracies.
24. The Standards Code (clause 1.2) states that publishers must correct any significant inaccuracy with due prominence (usually equal prominence) at the earliest opportunity. The IMPRESS Code goes into greater depth than the ICO Code by detailing examples of making corrections with 'equal prominence' and highlighting the importance of prompt correction. Further, the IMPRESS Regulatory Scheme (section 3.1) outlines how inaccuracies and any other potential Code breaches should be reported to the publisher, through an adequate and speedy in-house complaints system.

## **Areas of difference between the ICO Code and the IMPRESS Standards Code**

25. There are further areas where the ICO Code exceeds the IMPRESS Code, that is, where the ICO sets standards beyond what is required by the IMPRESS Code; in this way the standards used by IMPRESS would need to be raised to match the requirements set out in the ICO Code. These are described further below:

### **Social Media**

26. The ICO Code notes that there may be a higher risk when using internet sources, social media or other user-generated content. For example, inaccuracy on social media may be very damaging to an individual. The updated IMPRESS Code will address the risk of using internet sources, social media and user-generated content under the Preamble and Accuracy clauses; and therefore, this change will address any remit gap between the ICO Code and the IMPRESS Code.

### **Data Security**

27. The ICO Code provides substantial information regarding the secure protection of personal data and working practices. While the IMPRESS Code mentions the importance of having a secure database to ensure the protection of confidential sources (8.11 Guidance on Sources), it does not cover how to report a data breach for instance, or the importance of reviewing the effectiveness of security measures. IMPRESS has offered training by third party providers on data



security. In future, IMPRESS will refer publishers to the ICO's guidance on data security as a regulatory scheme requirement and as a legal standard to ensure IMPRESS publishers comply with the minimum legal requirements.

### **Right to erasure**

28. The ICO Code provides individuals with the general right to have their data erased in certain circumstances and says that publishers will need to give particular weight to any request for erasure if they are processing data based upon consent given by a child, especially any processing that is taking place on the internet.
29. The IMPRESS Code also requires that publishers 'reasonably consider' requests to anonymise content from people who were under 16 when the content was first published (Clause 3.3). One consideration to take into account is that the story or reported incident is part of a historic event, the importance of which may outweigh the detrimental effect to the applicant (this is similar to the ICO requirement that the existence of an overriding legitimate interest could allow for the processing of personal data). However, this requirement is not extended to those over 16s. A new equivalent right to be forgotten provision will be added to the Privacy clause as part of the updated IMPRESS Code in 2022 to address this gap.
30. Finally, there are areas of the ICO Code which set lower standards than the IMPRESS Code. As the ICO Code is based in statutory obligations and not an industry-based code, the lower standards adopted may be regarded as the minimum and proportionate steps necessary for publishers to meet their legal obligations. However, IMPRESS would recommend that the ICO carefully consider the implications of setting lower standards than the accepted and approved industry standards for journalism, to avoid the perverse consequences of incoherent or inconsistent regulation, for both regulatory subjects and the public which the law seeks to protect from harm.

### **Public Interest**

31. The ICO Code has created a 'special purposes exemption' which allows for the disapplication of many usual data protection law requirements if a data controller reasonably believes publication is in the public interest. In deciding whether there is a public interest, the ICO Code states that there must have a 'reasonable belief' that publication is in the public interest. To guide journalists, the ICO Code details what publishers should account for, such as whether there are general and/or specific public interest arguments, the likelihood and severity of harm, and whether the information is already in the public domain. The ICO Code does not have strict parameters as to when a public interest justification will *not* apply, instead advising that journalists should refer to the relevant Industry Codes and Guidelines, to also demonstrate that they reasonably believed publication was in

the public interest and to demonstrate that compliance with a data protection provision was incompatible with journalism.

32. The IMPRESS Code has a clear and detailed definition of what amounts to the public interest: public interest means that the public has a legitimate stake in a story because of the contribution it makes to a matter of importance to society. The IMPRESS Code also recommends that before undertaking any action which is justified by the public interest, which would otherwise breach the Code, that the publisher should, where practicable, make a contemporaneous note to document that decision making. The Guidance to the Code gives further detailed advice and information on specific scenarios and cases where the public interest would apply. One important distinction is that the IMPRESS Code sets out the circumstances under which a public interest exception can be made to derogate from the standards, for example, while there is a public interest exception to invasion of privacy. There is no public interest justification or exception to a breach of the accuracy or discrimination clauses of the Code. Similarly to the ICO Code, the IMPRESS Code suggests that if the publisher believes there is a public interest justification, they should make a contemporaneous note which explains why: the action is in the public interest; they could not have achieved the same result using measures that are compliant with the Code; the action is likely to achieve the desired outcome; and why any likely harm caused by the action does not outweigh the public interest in the action.
33. The NUJ Code does not specify what the public interest is, and the Editors Code of Practice is much more permissive and less prescriptive than the IMPRESS Code in its description of the public interest. These Codes are also not underpinned by any legal or publicly accountable mechanism, and they are developed by and for the industry, so they are not accountable to the public. One author has suggested, 'given that the public interest clause in the Editors Code recognises that freedom of expression is a public interest itself, the provisions can be read collectively to conclude that entertainment can be used to trump 'individual rights.'<sup>1</sup>
34. The ICO could find itself in a difficult regulatory position, if it were to find that a journalist had failed to demonstrate that a breach of data protection requirements was in the public interest, when the ICO Code directs journalists to other industry codes which set such low thresholds for what amounts to the public interest. ***We would recommend that the ICO consider carefully whether it should direct journalists to 'industry codes' as a broad categorisation when defining public interest, and that, the ICO should be more specific and consider adopting public interest tests recognised in law, such as the public interest***

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<sup>1</sup> Carney, Damian 2017. Up to standard? A critique of IPSO's Editors' Code of Practice and IMPRESS' Standards Code (Part 1). *Tottels Communications Law* 22 (3), pp. 77-88, at page 14.

***standard developed by IMPRESS and approved by the Press Recognition Panel.***

#### **Discrimination: Special category data**

35. The ICO Code refers to the 10 conditions under UK GDPR which allow for journalists to process special category data (e.g., racial or ethnic origin; political opinions; religious or philosophical beliefs), for instance explicit consent, or reasons of substantial public interest. Based on the legal definitions, processing can include publishing or publication. There is a risk that this could in effect legalise or codify discriminatory processing and reporting against individuals or groups, by in effect, suggesting there could be a substantial public interest in such practices.
36. The IMPRESS Code on the other hand says that there is no public interest qualification for referencing a person's protected characteristic (equivalent to special category data) unless it is strictly relevant to the story. This is because the publishing of protected characteristics irrelevant to a story is a common vehicle for discrimination. It is difficult to reconcile the risk of codifying discriminatory processing and reporting created by the ICO Code with other legal or industry standards. ***The ICO should carefully consider whether it should limit its substantial public interest exemption on types of processing, so that it does not include publishing special category data in such a way that could amount to discrimination.***

#### **Justice: identifying criminal suspects**

37. The ICO Code provides a 'general starting point' regarding criminal allegations that a suspect has a reasonable expectation of privacy regarding investigations. The principle underpinning this is the risk of prejudice to the course of justice. The ICO Code provides instances where a reasonable expectation of privacy is not reasonable in the circumstances, such as if the alleged activity had taken place in a public place. There may also be some limited circumstances where the public interest may justify identifying a suspect. The IMPRESS Code currently states that you must not directly or indirectly identify persons under the age of 18 who are or have been involved in criminal or family law proceedings, and also preserves the legal anonymity of victims of sexual offences. As part of our Code Review, IMPRESS is considering the inclusion of a new provision in the Code that suspects should not be identified prior to the commencement of legal proceedings.
38. The IMPRESS Code further highlights, under the guidance on clause 6.1, that there is strict liability in criminal law for publishing material that causes a substantial risk of serious prejudice to active criminal cases. The Justice clause of the IMPRESS Code does not allow for public interest qualification. It is worth noting there are several ongoing court cases which could unseat the public

interest justification as it appears in the existing draft for the ICO Code, with respect to revealing the identities of suspects. ***The ICO should closely monitor the legal developments in this space and if the legal position on publishing details of suspects prior to the commencement of legal proceedings changes, the ICO Code should be updated accordingly.***

## **Part Two: Areas of further clarification**

39. There are several areas in the ICO Code, where we consider further clarification should be provided to ensure that publishers and journalists understand their obligations under the ICO Code and are duly compliant. These are included below:

### **Personal Data**

40. The ICO Code should be relevant and meaningful for those subject to it. There may be some confusion as to what the definition of 'personal data' is, which is not explicitly provided in the ICO Code. It is noted that the Data Protection Act (DPA) 2018 can be referred to for clarification. However, a definition of personal data with examples related to journalism will better focus the subjects of this guidance on what types of data processing will be impacted. ***The ICO should consider including examples of personal data related to journalism in the Code.***

### **Children's consent**

41. The ICO Code outlines that if you are processing children's personal data, a data controller must consider the child's competence and ability to understand consent. There is reference to the United Nations Convention on the Rights of the Child as a means of ensuring that the best interests of the child have been considered, but no further detail on how a journalist or data processor should obtain consent, how a journalist can ensure a child has understood consent, and then otherwise how to deal with children's personal data. ***The ICO should provide further examples on how journalists should secure meaningful consent of children in the Code.***

### **Right to erasure**

42. Journalism plays an important role in society, by not just publishing current events and information, but by providing a historical record through accessible public archives. The right to erasure and journalism's archival function are therefore inherently at odds, and that tension is usually resolved with deference to the right to freedom of expression and the public interest. The ICO Code, too, states that the public interest is 'generally a weighty factor in favour of not erasing personal data from news archives', which implies to members of the public that a strong case would have to be made to successfully argue for erasure against a news publisher. ***The ICO Code could and should provide better guidance to***

***journalists and the public on the competing interests under right of erasure in the Code; a) the competing interests should be described, b) there should be a list of factors a data controller should consider when requests for erasure are made, c) there should be more clarity on what procedural steps a member of the public and a data controller should take, and d) the likely outcomes of such requests should be clarified to better manage the expectations of the public and data controllers.***

### **Defining journalism**

43. The ICO Code addresses how 'journalism' should be interpreted and the scope of activities that would be considered as engaging in journalism. The IMPRESS Code is not so prescriptive and rather suggests that the Code covers any conduct or activities undertaken by news publishers in the pursuit of journalism. This is because the sheer scale of activities makes it difficult to list all activities exclusively and because the techniques and practices are constantly evolving alongside technological development and the changing medium of news distribution. ***In defining journalism, the ICO should carefully consider whether it is more appropriate to describe the functions of journalism rather than setting out a prescriptive definition that lists journalistic activities.***

## **Conclusion**

44. IMPRESS welcomes the ICO's draft journalism Code as necessary and useful guidance for journalists and publishers on their legal obligations with respect to data protection law.
45. While there are a number of areas of existing alignment, IMPRESS will work to ensure its Standards Code meets and or exceeds the requirements of the ICO Code and has designed a schedule of activities in 2022 to bring that into effect where already identified.
46. IMPRESS has made a series of recommendations as to where the Code could be improved or clarified for it to be more relevant and useful to news publishers.