

SECOND CONSULTATION ON THE DRAFT DATA PROTECTION AND JOURNALISM CODE

SUBMISSION ON BEHALF OF ASSOCIATED NEWSPAPERS LIMITED, GUARDIAN NEWS AND MEDIA LIMITED, NEWS UK, AND TELEGRAPH MEDIA GROUP

1. This is a response to the second consultation on the ICO's draft data protection and journalism code (the 'Code') by Associated Newspapers Limited, News UK, and Telegraph Media Group, who are the publishers of titles including:
 - The Daily Mail, Mail on Sunday, MailOnline, Metro, the *i*, and New Scientist
 - The Times and Sunday Times, the Sun, Talk Sport, Times Radio and the TLS
 - The Daily Telegraph and The Sunday Telegraph
2. Guardian News and Media Limited (GNM), who are the publishers of The Guardian and the Observer, and theguardian.com, also support the contents of this response (GNM are also submitting a separate response). It is separate to the response by the Media Lawyers Association, although we have participated in the preparation of the MLA's response and fully endorse it. Indeed, we see little point in reiterating those submissions in different language. They are all adopted.
3. It is separate to the response by the Media Lawyers Association, although we have participated in the preparation of the MLA's response and fully endorse it. Indeed, we see little point in reiterating those submissions in different language. They are all adopted.
4. We welcome the opportunity to engage with the ICO on the draft Code. Data protection law has the potential, recognised by the Court of Appeal, to "*impose restrictions on the media which radically restrict the freedom of the press*", many of which are incompatible

with the functioning of a free and vibrant media.¹ The importance of the Guidance is self-evident.

5. In this submission we seek to build on the work of the MLA by emphasising additional revisions to the draft Code which we believe are necessary and achieve this aim. Like the MLA, we emphasise the importance of the Guidance being in touch with practical reality if it to have value for journalists and the media.

Journalism and legitimate interests

6. The MLA submission understandably focusses on the journalism exemption, which is clearly of central importance.
7. We invite the ICO to revisit the section dealing with legitimate interests and if – as the MLA suggest – it is simplified and dealt with primarily by way of cross-reference to existing guidance, to the nevertheless ensure that in the revised section it is made clear that:
 - a. In general, legitimate interests (both commercial and journalistic) will mean that most published journalistic output will be lawful unless either (i) there is a countervailing right sufficient to justify the derogation from the right in Article 10 or (ii) the processing includes processing of special category data such that the additional requirements of Article 9 UKGDPR – subject to the exemption – applies.
 - b. The relevant test is no higher than reasonable necessity.²
 - c. In many cases processing will be self-evidently lawful on this ground, so specific record keeping or impact assessments are not required.
8. The current draft states that legitimate interests will be applicable in cases involving “*minimal privacy impact*” such as “*day-to-day reporting on local events*”.³ While we would not dispute the first statement, we do not believe that Article 6.1(f) can be construed as only applying where the impact on privacy is ‘minimal’. As to the second point, we can see no basis for distinguishing between local and national reporting in this context.

¹ *Campbell v MGN Ltd* [2002] EWCA Civ 1373, per Lord Phillips MR at [124].

² See e.g. *Cooper v NCA* [2019] EWCA Civ 16, [89]-[93]

³ The Draft Code makes other references to “local events” reporting when seeking to give examples of unintrusive or readily justifiable journalistic activity, which are also apt to mislead.

9. The output of media organisations – whether news reporting, sport, business, features, celebrity news or entertainment – will inevitably be replete with personal data with no or minimal privacy impact but will (and should be) clearly lawful on grounds of legitimate interest. Even in more serious cases, the general public interest in freedom of expression and maintaining a free press may well be weightier, according to content and context.
10. In addition to those changes proposed by the MLA, we would encourage the ICO to adopt the following revisions:

Para	Proposed change	Comment
4.8	Replace “ <i>outweighed by any harm caused to a person</i> ” with “ <i>overridden by the interests or fundamental rights and freedoms of a person</i> ” and add a new final sentence: “ <i>In the context of journalism, this will need to be sufficiently serious to override the fundamental right to freedom of expression and the freedom of the press.</i> ”	The language used should be the statutory language, to avoid downplaying the significance of the interest being protected. Explicit recognition should be given to the fact that freedom of expression is itself a fundamental human right.
4.10	Add “ <i>and can include commercial interests</i> ” after “ <i>Legitimate interests can be your own or third party interests</i> ”	This is self-evident; however, it is important to acknowledge that news publishers have legitimate commercial interests in addition to their journalistic ones. These are inextricably linked: a free press can only exist if it is commercially viable.
4.12	Replace “ <i>outweighed</i> ” with the statutory word “ <i>overridden</i> ”. Add, after “ <i>to a person</i> ”, the following new sentence “ <i>Where your legitimate interest is journalism, any harm would need to be sufficiently serious to justify interfering with the fundamental right to freedom of expression and the public interest in maintaining the freedom of the press.</i> ”	See above.
4.13	Add, at the beginning of the paragraph, “ <i>In many cases it will be obvious or self-evident that processing for the purposes of normal journalistic activity will be</i>	It is important that the ICO and the Code recognise that in a great number of instances journalistic processing will, clearly, be unobjectionable. In such cases the ICO should be clear that the

	<i>lawful because of your legitimate interests”.</i>	law does not impose an additional regulatory burden.
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The special purposes exemption and proportionality

11. The Draft Code throughout refers to mandatory legal requirements without the essential qualification that they apply only where the exemption does not (see paragraph 10 of the MLA submission which we adopt). This could be done by adding the words “*and subject to the exemption*” after “at a glance” at the start of each relevant section.

12. It is to be noted that it was said that the 1988 Act “*in the absence of [the exemption] would impose restrictions on the media which would radically restrict the freedom of the press*”.⁴ It is for this reason that the exemption is designed to “*provide widespread exemption from the duty to comply ... subject only to the simple conditions*”⁵ it contains. We believe this is no less apposite to the UKGDPR.

13. We also endorse the submission by the MLA that the test is one of practicality (see MLA, paragraphs 14 to 17). We also endorse their submissions on proportionality (MLA, paragraph 16).

The public interest

14. The Draft Code’s conception of the public interest should be revisited. The general public interest in freedom of expression, recognised as freestanding in section 12 of the Human Rights Act 1988 is barely recognised.⁶ In attempting to define topics of public interest, the Draft Code takes an approach which is worryingly narrow, suggesting that the exemption is reserved for the most serious and obvious cases of wrongdoing or misconduct.⁷ It is concerning, by way of example, that the Draft Code presently suggests that “reporting on local events” is a category of journalism which generally would not be expected to be of public interest (see §1.31).

⁴ *Campbell v MGN*, per Lord Phillips MR at [124].

⁵ *Ibid* at [118]

⁶ This general public interest is one which arises “*irrespective of whether a particular publication is desirable in the public interest*” because of the to society of the freedom of the press. As a result any interference with it must be justified. . . .: *A v B* [2002] EWCA Civ 337, per Lord Woolf at [11]. The Draft Code is with respect wrong in equating this with a general public interest in protecting privacy and data protection rights (at §1.29) and in suggesting (at §1.30) that the general public interest is restricted to public interests of the sort there identified.

⁷ The lists of public interest topics at §1.30 and §1.32 are of course said not to be exhaustive but they have a common theme in that they relate to particularly weighty or serious public interest considerations.

The importance of accurately reflecting the statutory tests

15. The relevant statutory tests (the “simple conditions” which govern application of the exemption) are not always accurately stated.

16. These misstatements tend to materially narrow the circumstances in which the exemption applies.⁸ As elsewhere, the best course is surely to keep to the statutory language, whenever possible. Examples include:

- a. “*prevent or disproportionately restrict*” as a shorthand for “*incompatible with*” (§1.7).
- b. “*intend or hope to publish*” as a shorthand for “*with a view to publication*” (e.g. §1.13)
- c. The suggestion that the exemption applies only to data which the “*controller hopes or intends*” to publish (‘At a glance’ bullet point 6) is incorrect and makes little practical sense at the key investigative stage, especially early on. Indeed, there may be no intention to publish off the record material.
- d. Sweeping restatements of the incompatibility criterion as (i) meaning that compliance is not incompatible if “*there is a straight-forward way to do so whilst still achieving your journalistic objectives*” (§1.37) that “*you cannot carry out your journalistic activity and comply with data protection at the same time*” or that this requires a controller to show that “*complying with the specific part of data protection law disproportionately affects your journalistic activity*”, and (ii) requiring a proportionality assessment which strikes a “*fair balance between what you want to achieve and the interests of the individual*” (§1.39-40). If restatement of the statutory language is thought helpful, then its proper construction is found in authority: it means that it would be “*impracticable to comply with data protection law in conducting your journalism*”. We repeat in this context our endorsement of the MLA submissions at paragraph 12 above.

Eroding these “simple conditions” by reference to public law proportionality

17. These are supposed to be simple conditions and the ICO’s guidance should acknowledge that often it will be obvious that they are satisfied. Coverage which will ordinarily clearly

⁸ E.g. “prevent or disproportionately restrict”

engage the exemption (including because the data includes special category data) includes, by way of example only:

- a. Reports of sporting injuries, or of illness or injury which affects other public performances or events.
- b. Uncontroversial reporting of political opinions, including reporting of “vox pops” or opinions expressed on social media,⁹ or which identifies individuals in connection with industrial action.
- c. Reporting of matters arising at public meetings, meetings of public companies or international associations, or from the proceedings of courts, legislatures or scientific or academic conferences.¹⁰

18. Since the test is practicality, and the Code is intended to be a practical guide, we suggest practical examples of this kind should be born in mind. We also emphasise that the journalist is in fact only required to have a reasonable belief that publication would be in the public interest, making due allowance in appropriate cases for potential harm to an individual.

19. In this context we invite the ICO to consider the following revisions:

Para	Proposed change	Comment
“at a glance”,	Replace “ <i>with the intention or hope</i> ” with “ <i>with a view to</i> ”	The current wording appears to narrow the scope of the exemption. The statutory language requires no gloss.
“at a glance” and 1.5	“reasonably believe publication is would be in the public interest”	The statutory language should be used. Reframing the requirement as one which requires a reasonable belief that publication “is” in the public interest wrongly suggests the exemption is limited to processing by publication.
“at a glance”	Delete “judging how the public interest would best be served overall”	See [17] above

⁹ Where consent would not be practical journalistically, and where, on the current draft, it is not clear that the ICO would treat the data as having been manifestly made public by the data subject themselves.

¹⁰ I.e. areas where for reasons of public policy the law requires the free flow of information. These are all areas which benefit from reporting privilege under the Defamation Act 1996

1.9	Add a further bullet point: <i>“unpublished journalistic material and activity other than publication done for the purpose of journalism”</i>	The current list incorrectly limits the attempt to defines journalism by reference only to published output.
1.13	Replace <i>“also intend or hope to publish”</i> with <i>“be processing with a view to publication”</i> .	See above
1.14	Replace <i>“intend or hope to publish”</i> with <i>“act with a view to publication”</i>	See above
1.15	<i>“It does not matter whether you have a particular story in mind, or you actually publish the a story you had in mind using the personal data”</i>	The current wording inappropriately narrows the scope of the exemption: see above.
1.23	Add <i>“In some cases this will be obvious”</i> after <i>“You must be able to demonstrate that your belief was reasonable”</i> .	See [16] above
1.25	Replace <i>“consider”</i> with <i>“have regard to”</i>	The Code should use the statutory language
1.27	Delete entire paragraph	This wrongly suggests that journalists are expected to consider an array of different competing public interests, or the “public interest” as a monolithic concept in a way which is neither realistic not required by law. The assessment required is one of weighing the public interest in publication against the harm to any relevant person.
1.29	Delete <i>“and protecting people’s right to privacy and data protection”</i>	This addition is oversimplistic and has the effect of undermining the general public interest in freedom of expression and press freedom. Although there is no presumptive priority between Articles 8 and 10 the law is clear that special acknowledgement has to be given to the public interest in freedom of expression itself and the maintenance of a free press. ¹¹ This also draws a false equivalence between the right to privacy (i.e. the right protected by Article 8) and data protection which is not a free-standing fundamental right.

¹¹ See s.12 of the Human Rights Act 1998 and *A v B* (fn 9 above)

1.35	Delete “ <i>or other public interests</i> ”	See above.
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The ICO’s regulatory role and the relationship with the media regulators

20. The burden of additional regulation by the ICO, and the reliance on data protection law by complainants and litigants seeking to prevent or erase published journalism has markedly increased in recent years, taking up substantial editorial time, and other resources. The ICO has historically been clear that it does not intend to operate as a media regulator. We maintain that this reflects the correct position in law and practice. The cost and time consumed by multiple editorial and legal burdens are ever increasing and threaten to interfere with efficient working practices.
21. We appreciate that the ICO needs some flexibility. However, a clear statement of principle and approach would greatly assist in managing the expectations of complainants and would ensure that the regulatory burden is proportionate with the complaint resolved by the right regulator/relevant body i.e. the one with the relevant objects and purposes, and experience. Duplicative investigations of the same complaint, by separate regulators, are unlikely ever to be justified or proportionate.
22. The relevant section of the Draft Code leaves it unclear as to how the ICO will approach this issue, where Guidance is needed to enable journalists, lawyers and indeed complainants to focus on the right regulator.¹²
23. We therefore strongly urge the ICO to adopt the proposal made by the MLA at paragraph 23 that the Code should contain a clear statement that complaints arising from an alleged breach or threatened breach of an editorial code will be referred to the relevant media regulator in the first instance. We believe this should be uncontroversial and that IPSO, for example, would share this view.
24. For the same reason, we would urge the ICO to be clear that – where a matter has already been the subject of investigation or determination by a relevant media regulator – it is unlikely that the ICO will consider it appropriate to investigate further absent a discrete complaint relating to data protection.
25. We therefore invite the ICO to consider the following suggested revisions:

¹² In particular on page 10

Page/ Para	Proposed change	Comment
P9	In the first sentence of the third paragraph: <i>“Before complaining to the ICO, we expect people to raise their concerns with you, or a relevant industry regulator, where applicable, first”</i>	
P9	At the end of the fourth paragraph add <i>“We will give specific consideration to whether further investigation or action is necessary or proportionate in any case where the relevant industry regulator has already been involved. This is generally a factor which means it is less likely to be appropriate for us to intervene.”</i>	See [23] above
P9	In paragraph 9: <i>“We also carefully consider the potential impact on freedom of expression before deciding to investigate or take any further action”</i>	It should be clarified that consideration of the impact on freedom of expression will be given before any action, including investigation.

26. We would be happy to assist on any questions which might arise from the above or indeed generally.

23rd November 2022