

ICO CONSULTATION - DRAFT JOURNALISM CODE OF PRACTICE

SUBMISSION ON BEHALF OF THE BBC

22 NOVEMBER 2022



1. Overview

- 1.1 The BBC welcomes the opportunity to respond to the new draft journalism code of practice ('the draft Code') produced by the Information Commissioner's Office ('the ICO').
- 1.2 This submission is made by the BBC Public Service and is supported by BBC Studios, a separate data controller.
- 1.3 Some of the submission below will reflect and repeat points which were included in the BBC's response to the initial consultation on the first draft Code in January 2022. For ease of reference we have repeated a number of points in this document rather than asking the ICO to refer back to our previous submission.
- 1.4 The BBC supports the aims of the draft Code, particularly to the extent it ensures consistency with the ICO's existing media guide, 'Data protection and journalism: a guide for the media' ('the current Guide') and the framing of the draft Code as principle-based rather than prescriptive.
- 1.5 As with the previous draft Code, the BBC is encouraged to see reference to the broad definition of 'journalism' from *Sugar (Deceased) v BBC* [2012] UKSC 4 (pg. 23), as well as the characterisation of the 'broad' special purposes exemption (pg.22) which is correctly explained throughout as disapplying most data protection obligations concerning the processing of personal data in the context of journalism. The BBC is further encouraged to see the value ascribed to freedom of expression and the importance of the retention of news archives in the draft Code.
- 1.6 We are pleased to see the introduction of the terms "must", "should" and "could" in the new draft, which are of assistance in determining where the guidance is reflecting mandatory legal requirements as opposed to suggestions of how compliance might be achieved.

- 1.7 Some sections of the draft Code still stray into the area of editorial decision making and unnecessarily overlap with the spheres of industry regulators. We believe it is possible to further reduce the length of the draft Code by removing the remaining sections of guidance that stray into editorial decision-making.
- 1.8 We still feel that the order of the draft Code does not lend itself to a natural journey through the operation of data protection law. It would be easier for users to understand if it started with at least a summary of the data protection principles that journalists are expected to follow before going on to an explanation of the special purposes exemption for journalism. The lawful bases for data processing, including legitimate interests should also be explained before moving onto the special purposes exemption, particularly as this basis is frequently relied on in the context of journalism. It would also make sense for the complaints section to be moved to near the end of the Code.
- 1.9 The creation of the new summary documents “Data protection and journalism code of practice – At a glance” and “10 data protection tips for day-to-day journalism” are also welcomed. However, it would be helpful if the ICO could provide further clarity as to the different purposes that these two documents are intended to serve. Our initial impression is that these two documents are very similar and that they could effectively be combined into a single summary document as they duplicate many of the same points.
- 1.10 The removal of the case law into a standalone supplemental document is also helpful, however we would ask the ICO to provide further details regarding how the supporting reference materials document will be updated to ensure that it keeps in step with developments in case law in this area.
- 1.11 The BBC also endorses the general submissions from the Media Lawyer’s Association of which we are a member.
- 1.12 The BBC would appreciate the opportunity to review any further revisions of the draft Code (and any complementary resources) the ICO produces before it is finalised.

2 References to other causes of action

- 2.1 The draft Code includes summaries of legal developments in the area of misuse of private information that should be more clearly framed as distinct from data protection law or removed altogether.
- 2.2 This is particularly problematic in the section on processing criminal convictions data on pages 32-33. The current framing of developments in privacy law set out in the draft Code could contribute to the conflation of the separate causes of action (of misuse of private information, data protection and contempt) and we would ask that it is made clearer where decisions or principles from other areas of law are being reflected.
- 2.3 While data protection law often overlaps with these other causes of action, they remain separate actions that protect the rights of individuals in different ways and could confuse readers of the Code who are not legally trained. Our position is that such analysis should be outside the scope of the Code or should be clearly signposted where it arises.
- 2.4 A specific issue also arises in 4.49 where the current draft states “*A suspect under state investigation usually has a reasonable expectation of privacy up to the point of charge, including about the fact that there is an investigation.*” We do not agree that this is an accurate reflection of the case law in this area. The circumstances which give rise to a reasonable expectation of privacy are clearly of significant importance to the media and it is therefore critical the current law is accurately reflected. If the ICO believes that the Code must include an assessment of the current state of the common law in this area, we would ask the ICO to carefully consider the judgment of the Supreme Court in *ZXC v Bloomberg* at *para 146*¹ which is clear about the extent of the reasonable expectation of privacy in these cases. We would therefore suggest that 4.49 is redrafted to read:
“*Under the law of the misuse of private information, a suspect under state investigation usually has a reasonable expectation of privacy in respect of information relating to that investigation, up until the point of charge. Although it depends on the specific facts of each case.*”

¹ *Bloomberg LP (Appellant) v ZXC (Respondent)* [2002] UKSC 5 <https://www.supremecourt.uk/cases/docs/uksc-2020-0122-judgment.pdf>

3 The Accountability Principle

- 3.1 The BBC raised a number of concerns in its response to the last consultation regarding the prescriptive way in which this section was drafted and the absence of sufficient reference to existing industry codes and procedures.
- 3.2 We are pleased to see that these concerns have been taken into account and that the new draft Code makes it clear that there is no one-size-fits-all approach (p.17) and that compliance with industry codes is likely to help demonstrate compliance with data protection requirements (p.19).
- 3.3 It is currently unclear whether section 2.33 is intended to refer to the general obligation to consult the DPO in matters which relate to the protection of personal data (as per the provisions of Article 38) or whether it is meant to provide guidance as to when this obligation arises specifically in relation to DPIAs. If this section is intended to refer to DPIAs specifically, we believe that the last sentence of section 2.33 mis-states the legal position: the obligation to consult the DPO regarding DPIAs is more nuanced than section 2.33 suggests. The controller must be engaged in a processing activity that is (i) *likely* to result (not *may* result) in high risk; or (ii) on the ICO's list of high risk processing activities promulgated under Article 35(4).

4 The special purposes exemption

- 4.1 The BBC welcomes the adoption of existing ICO guidance to explain the special purposes exemption and the frequent caveat that the exemption, when engaged, will often 'disapply all requirements of data protection law'.
- 4.2 We are also pleased to see the revised wording in the bullet points on p.10 which says that the exemption applies where a journalist reasonably believes that compliance "disproportionately restricts your journalistic activity" although we agree with the MLA's response where they suggest it would be preferable to follow the wording in *Campbell v MGN Ltd* [2003] QB 633 and to use the term "impractical." (This wording should also be used consistently throughout the document.)
- 4.3 We also agree with the MLA's submission that the draft Code is incorrect to state that a journalist should conduct a separate proportionality balancing exercise to determine whether it is practical to comply with data protection

law as the proportionality exercise is conducted by applying the four conditions of the exemption.

- 4.4 We still believe that the order of the draft Code – placing the exemption at the start of the document - does not reflect the operation of UK data protection legislation or decision-making processes. Without diminishing the important protection the exemption affords freedom of expression, it should appear after at least a summary of the data protection principles (as per the format of the “10 Data Protection Tips” document) for consistency and to promote a clearer more intuitive user journey through the document.
- 4.5 As other organisations have noted, the draft Code downplays the importance of legitimate interests as a lawful basis for processing personal data in the context of journalism and therefore overstates the need to rely on the special purposes exemption. The section on processing data lawfully should therefore appear before the section on the special purposes exemption. (Further comments regarding legitimate interests are set out below.)
- 4.6 Digital publication is now a primary platform for professional journalists and news organisations and this should therefore be reflected specifically in the first bullet point under paragraph 1.9 to include digital platforms such as websites, social media platforms and mobile apps (along with newspapers, magazines, radio and television).
- 4.7 We also think the wording of 1.31 on page 15 is unclear. There is no reason why reporting “local events” might not include the various matters of public interest in the bullet points that precede this section and in many cases local reporting includes matters of significant public interest. We would suggest rephrasing 1.31 as follows: *“This does not mean that there cannot be a public interest in reporting day to day events. . . .”*
- 4.8 In the bullet points listed under para 1.35 (p.15) we would also suggest a slight change for the sake of clarity as follows: “how likely and severe any harm caused as a result of not publishing could be. If there would be a severe impact on people or other public interests. . .”

5 Complaints, Enforcement and Investigations

- 5.1 In relation to the structure of the Code, we are also unclear as to why the section on Complaints, Enforcement and Investigations comes before the

explanation of the other GDPR requirements. We believe this section would more naturally fit at the end of the Code.

6 Using Personal Data Lawfully

- 6.1 As noted above, the draft Code downplays the important role of legitimate interests as a lawful basis for data processing. The work of journalists will frequently be lawful on this basis without the need to rely on the special purposes exemption.
- 6.2 In paras 4.8 to 4.13 legitimate interests is drafted far too narrowly with no acknowledgment that it can include commercial as well as journalistic interests and that it may apply to a wide range of output including not only news, but also other genres including sport, documentaries, drama and entertainment. (The reference to “day to day reporting on local events” at 4.9 is therefore unhelpful and misleading.) The public interest in such output may well engage the special purposes exemption, however it needs to be properly explained that reliance on the exemption will often not be necessary where the legitimate interests basis applies.
- 6.3 The draft Code also says at 4.8 that the legitimate interests basis can be used when “it is necessary” to use personal data to pursue legitimate interests, when in fact the test is “reasonably necessary”.

7. The Accuracy Principle

- 7.1 The BBC remains of the view that section 7 of the draft Code still unnecessarily strays into editorial decision-making. The draft Code includes detailed sections on, for instance, the distinction between fact and opinion, as well as how to verify the accuracy of personal data used for newsgathering and content creation. Paragraph 7.7 on p.41 includes a suggestion of what explicit details journalists should publish about the veracity of their information. Para 7.12 ventures into what information should be provided about journalistic sources. We do not believe that it is the role of the ICO to take a view on such matters and these areas are already covered in detail by various industry codes.
- 7.2 Paragraph 7.15 summarises the test from defamation law regarding meaning. This section is unnecessary and unhelpful. As noted above we

believe the conflation of various causes of action is unhelpful and, if the ICO believes it is essential to include, it should be clearly signposted.

- 7.3 The draft Code should specifically refer to existing industry codes that require high standards of editorial compliance to achieve 'due accuracy' (see, for instance, Part 3 of the BBC's Editorial Guidelines).
- 7.4 Greater prominence should be given to the concepts of editorial discretion and express reference should be made to clarify that the ICO's role is not to step into the shoes of an editor or journalist. The draft Code should explain that the ICO will normally not intervene if other regulators such as Ofcom are better-placed to deal with a matter involving privacy concerns.

8. Using Personal Data Fairly

- 8.1 The section on covert surveillance, subterfuge and similar intrusive methods on p.37 is helpful guidance, however we would encourage the ICO to specifically reflect the fact that existing industry codes and organisational policies will often include an assessment of the considerations at 5.24.

9. Individual rights

- 9.1 Part 12 of the draft Code on individual data subject rights requires revision to explain the limits of these rights when engaged by data subjects who are identified in journalistic data processing. The journalism exemption is not currently given enough prominence in this regard. This will also assist to manage the expectations of data subjects.
- 9.2 The guidance on other data subject rights is also problematic as it strays into editorial decision-making. Of most concern to the BBC is the characterisation of the right to rectification on page 57 which provides considerable detail about the temporary removal of online journalism where a data subject 'contests the accuracy of their personal data and you are verifying it'. As explained previously in this submission, the draft Code should reference existing and complementary legal and editorial processes implemented by media organisations to deal with accuracy complaints such as the provisions of section 5 of the Defamation Act 2013 which deal with defamation complaints about third party content. Clearly where media organisations receive accuracy or defamation complaints that immediately

trigger editorial and legal risks, these may be quickly removed, restricted or amended.

10. The supplementary materials

- 10.1 We support the production of quick reference guides as they will assist in making the Code accessible to journalists in the day to day course of their work.
- 10.2 However we note that there is significant duplication between the “10 data protection tips” and “At a glance” documents and it is unclear what separate purposes they serve.
- 10.3 In terms of the structure and clarity of content, it seems to us that the “At a glance” document provides a more user friendly guide to the application of data protection law, particularly as it clearly sets out which of the data protection principles can be disapplied in circumstances where the requirements of the journalism exemption are fulfilled. In the case of the “10 data protection tips” document, this is not clear and we believe that a journalist considering that document will not gain a clear understanding as to when the journalism exemption might be relevant as opposed to the requirements of data protection law to which it cannot be applied. If both separate documents are to be retained we would encourage the ICO to adopt the clarity shown in the “At a glance” document in both these guides.
- 10.4 In relation to the specific wording of the “10 Data protection tips” document the first bullet point in section 8 is a little vague, is print media specific and strays into editorial decision making. We would suggest it is redrafted to say: *“When time is limited, use only a proportionate amount of personal data to tell your story. This will help you to comply with data protection law”*.
- 10.5 Section 9 of the “10 Data protection tips” document deals with the agreements that need to be in place when sharing data. The first bullet point states that “When people are acting on behalf of your organisation, such as freelancers or photographers, you **must** have a written contract in place guaranteeing that they will also project the personal data.” This is not a correct reflection of the law or of the provisions of the draft Code which state at 11.9 (p.52) that you “could have a data sharing agreement

with other parties”. The ICO’s own Data Sharing Code also describes this as good practice on p.26 of that code which states “It is good practice to have a data sharing agreement. Having a data sharing agreement in place helps you demonstrate you are meeting your accountability obligations under the UK GDPR. A data sharing agreement between the parties sending and receiving data can form a major part of your compliance with the accountability principle, although it is not mandatory.”

- 10.6 We agree with the MLA that a change is also required to the fourth bullet point in section 3 of the 10 Data Protection Tips document to accurately reflect the third stage of applying the special purposes exemption. It should reflect that the exemption can be applied where compliance is “impractical” rather than the present wording that states that it requires a reasonable belief that compliance is “not possible or would unduly restrict journalism.”

Second consultation on the ICO's draft Data protection and journalism code of practice

Start date: 9 September 2022

End date: 4 November 2022

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Information Commissioner's Office

Introduction

We are seeking feedback on a revised version of our draft Data protection and journalism code of practice. This follows your feedback to a written public consultation that ran for 12 weeks from September 2021 and workshops.

You can read our summary of the feedback and individual responses on the ICO website – redacted in line with our privacy statement.

This is a draft of a statutory code of practice under section 124 of the Data Protection Act 2018 (DPA 2018). It will help those using personal data for journalism understand their legal obligations and comply with good practice.

The revised draft code is now out for further public consultation. Although the focus of this public consultation is the draft code, we would also welcome your views on the associated documents below. Please note that these documents do not form part of the statutory code.

- supporting reference notes for the code
- the code 'at a glance'
- 10 data protection tips for day-to-day journalism
- updated impact assessment

The public consultation will remain open until 4 November 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 respondents are acting in a private capacity (eg a member of the public). We will remove email addresses and telephone numbers from all responses.

For more information about what we do with personal data please see our [privacy notice](#).

Questions

When commenting, please bear in mind that the code does not aim to cover all of the legislation. Supporting reference notes contain key legal provisions, case law examples, and further reading.

Please also bear in mind that in line with your feedback, we plan to develop additional supporting resources, including guidance for smaller organisations and individuals.

Please let us know if you have any other comments about the code or associated documents in the general comment box at the end.

Section one: The statutory code

Q1 Overall, to what extent do you agree that the revised code sufficiently reflects the feedback provided to the ICO?

To inform your answer please ensure you have read the consultation summary report. This sets out the changes we made in response to your feedback.

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree

Q2 If you consider that the code does not sufficiently deal with the feedback, please specifically explain why and what you think we should change.

While we recognise that many positive changes have been made in the second draft, we still have a number of general and specific concerns. These are set out in detail in the BBC's response which accompanies this document.

Q3 To what extent do you agree that the code provides useful guidance on the use of personal data for journalism?

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree

Q4 If you do not think it is useful, please explain why specifically and what you think we should change.

Please see our detailed feedback contained in the accompanying document.

Q5 Is there anything else you would like to tell us about the code?

Please see our detailed feedback contained in the accompanying document.

Section two: Supporting documents

Q6 To what extent do you agree that the supporting reference notes are helpful?

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree

Q7 To what extent do you agree that the code 'at a glance' is helpful?

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree

Q8 To what extent do you agree that the quick guide to support day-to-day journalism is helpful?

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree

Q9 Is there anything else you would like to tell us about the supporting reference notes, the code 'at a glance', quick guide for day-to-day journalism or impact assessment?

Please see the detailed feedback contained in the accompanying document.

Section three: About you

Q10 What is your name?

Sarah McColl

Q11 If applicable, what is the name of your organisation and role?

Senior Counsel, BBC

Q12 Are you acting: (Please select)

- 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.

Q13 Are you a: (Please select most appropriate)

- member of the public
- citizen journalist
- public figure (eg people 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)
- representative of a newspaper or magazine
- representative of a broadcaster
- representative of an online service other than those above
- representative of the views and interests of data subjects
- representative of a trade association
- representative of a regulator
- representative of a third sector/civil society body (eg charity, voluntary and community organisation, social enterprise or think tank)
- freelance journalist
- private investigator
- photographer
- academic
- lawyer
- other

If other, please specify.

Further consultation

Q14 Would you be happy for us to contact you about our work relating to the Data protection and journalism code of practice?

- Yes
- No

If so, please provide the best contact details.

Q15 Would you be happy for us to contact you about the review of processing for journalism 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.