

## NMA response to the ICO [consultation](#) on the second draft journalism code of practice

1. We write on behalf of the News Media Association (the “**NMA**”), the voice of UK national, regional and local newspapers in all their print and digital forms - a £4 billion sector read by more than 46 million adults every month in print and online. Our members publish over 900 news media titles - from The Times, The Guardian, The Daily Telegraph and the Daily Mirror to the Manchester Evening News, Kent Messenger, and the Monmouthshire Beacon.
2. We are grateful for this opportunity to comment on the revised draft Code published in September 2022 (the “**Second Draft Code**”). We recognise that significant improvements have been made in response to stakeholder concerns. However, we continue to hold serious concerns about the overall approach to the Code, and disagree with specific passages in the draft. The Information Commissioner has a potentially broad discretion in drawing up the statutory code on data protection and journalism. The Code is taken into consideration by the courts and tribunals in deciding media liability in civil and criminal cases. It is, therefore, imperative that the Code is fit for purpose and is a help rather than a hindrance to journalists seeking to apply the data protection regime correctly (we refer you to the DMG Media and Harmsworth Media submission that sets out the practical problems with the Code, which we have read and we endorse).
3. The NMA has worked together with the Media Lawyer’s Association (the “**MLA**”), of which it is a member, to provide the ICO with: (i) a comprehensive submission on the Second Draft Code; together with (ii) a mark-up of the Second Draft Code with suggested changes drafted by specialist counsel (together the “**MLA Submission**”). We share the MLA’s concerns about the approach taken, and we remain of the view that the changes required still go beyond what can be achieved by simply editing the existing text. In our view, a further substantial overhaul is still required. The NMA, therefore, writes in full support of the MLA Submission.
4. Further to the NMA’s submission to the ICO dated 10 January 2022 and the ICO workshops on the draft journalism code consultation in November 2021, in which the NMA and its members took an active role, the NMA would be pleased to meet with the ICO to discuss these proposals in further detail. To avoid duplication, we shall not reproduce the contents of the MLA Submission here. Instead, we summarise the key points for ease of reference and refer the ICO to the detail of the MLA Submission.
  - a. **Clarify and shorten the Second Draft Code** – The Second Draft Code remains unworkably long. It must be streamlined so that it is fit for use by journalists making decisions at pace and under pressure. We suggest, as a starting point, that passages that simply relay general requirements of data protection law rather

than the application of the journalism exemption be removed because: (i) it is produced elsewhere in ICO guidance which can be linked to; and (ii) in its presentation, it causes confusion as to when and how the Journalism Exemption is applied.

- b. **Structure of the Second Draft Code** - A more logical structure would be to outline the general requirements of data protection law (which could be done by linking to existing guidance) and then to address the Journalism Exemption before turning to specific areas of concern. We refer to the MLA Submission which sets out a more user-friendly outline.
- c. **References to privacy and privacy law** – At time the Second Draft Code wrongly conflates data protection and the law of misuse of private information. Not all personal data is information in respect of which the data subject has a reasonable expectation of privacy. It is imperative that this is clarified in the Code; otherwise, the Code will improperly rewrite material legal distinctions and undermine the [Editors' Code of Practice](#).
- d. **“Must”, “should” and “could”** - We welcome the attempt to distinguish between legal requirements and other recommendations and suggestions. However, for reasons of precision and clarity, “must” should be confined to legal obligations that are absolute under data protection law.
- e. **Legitimate interests** – Article 6(1)(f) UK GDPR ‘legitimate interests’ is important for journalists and must be reflected more accurately in both the content and structure of the Code. As currently drafted, the Second Draft Code fails to give adequate weight to this key legal concept.
- f. **Give greater recognition to the public interest in freedom of expression itself** – We repeat what we said in our submission of 10 January 2022. It is necessary to redress the misleading impression that the journalism exemption is only available in cases of serious investigative journalism. It must be made clear that a publication may be in the public interest simply because it involves the lawful exercise of the right to freedom of expression. The draft Code rightly recognises that there is an inherent “*general public interest in freedom of expression and information*”. However, this must be expressly recognised as a general public interest argument; otherwise, there is real risk of a chilling effect on journalism.
- g. **State the law correctly** – the MLA has rightly identified statements of law in the draft Code which are wrong. We refer the ICO the MLA Submission for further detail.
- h. **Accuracy** – Personal data contained in an article are not rendered “*inaccurate*” or out of date in breach of Article 5 UK GDPR by reason of later occurring events if it was accurate at the date of publication. Failure to clarify this places an undue burden on publishers to constantly review and update archives or revise articles as soon as interviewees change their minds, which is entirely impractical.

- i. **Give greater clarity about the relationship between the ICO and other media regulators** – the NMA welcomes the ICO’s statement that the Second Draft Code does not concern press conduct or standards in general. Nevertheless, we support the MLA Submission which identifies scope for further clarity in this area.
5. For the reasons outlined here, the NMA agrees with the MLA that the draft Code needs to be fundamentally rethought rather than simply being adjusted here or there. The NMA would, therefore, welcome the opportunity to provide further comments on any revised draft Code.
6. We note that the ICO intends to supplement the Code with further guidance (without statutory effect) in due course. The NMA would welcome the opportunity to comment on any such guidance prior to it being issued. Given potentially significant ramifications of the draft Code identified, we would be pleased to be consulted on any further revisions to the Code before it is published.

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