

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.

See attached additional comment

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.

See attached

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

See attached

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?

See attached

Section three: About you

Q10 What is your name?

The National Union of Journalists

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

The National Union of Journalists

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.

NUJ response to ICO second consultation: draft Data protection and journalism code of practice

November 2022

1. The National Union of Journalists (NUJ) is the voice for journalism and journalists in the UK and Ireland. It was founded in 1907 and has more than 28,000 members working in broadcasting, newspapers, news agencies, magazines, book publishing, public relations, photography, videography, and digital media.
2. We welcome the revised guidance from the Information Commissioner following the responses to the first consultation. However, the NUJ is concerned that although claiming to be a code for journalists, it appears much of the advice is the standard advice offered to company Data Protection Officers promptly over-ridden by the journalism exemption. This makes the code very confusing for journalists who are processing data regularly but not in the way most companies use it.
3. Journalists collect data strictly to publish it, but without knowing until that collection process is complete, precisely which information is pertinent. Since this is a journalism code and will be, or should be read by journalists, it can be assumed that that is how they will operate. Whilst standard guidance can be offered, the journalistic exemption caveats should be made clear at the start of each section and not the end, so that guides are read with caveats in mind.

'At a glance' section

4. The 'at a glance' section places much stress on the importance of informing people about their right to complain when providing privacy information. However, it is not always possible to notify people of this right. This is particularly true for photographers.

Journalists are rarely able to approach people who've been mentioned in sports reports, prize winners, politicians etc and check they understand they have a right to complain.

General

5. In most sections there is a list of guidance that is clearly aimed at all users then followed by a caveat such as that in S6:
 - When the criteria applies, the journalism exemption can remove the usual requirements to:
 - use personal data transparently; and
 - provide privacy information to the person the personal data is about when you collect it
6. Whilst it might seem to be appropriate to ensure a journalist reads all the advice before then discounting it when carrying out journalism, it would be much better and more likely to ensure compliance if the sections that are exempt for journalism are listed under the caveat above and only the sections that still would apply (if any) are listed after a note that journalism exemptions do not apply to the following advice.

Data protection impact assessments

7. The advice to provide a data protection impact assessment is unclear. Should this be produced ahead of a project starting? Is it reasonable to assume (as it is not clear from the code) that this would be a standard impact assessment agreed at a newspaper or website's launch, and updated as necessary rather than something that would need to be done on each assignment by a freelance or staff reporter or photographer who is simply going to interview a primary source who is perfectly able to refuse the interview if they wish?
8. Clause 2.32 says: "You do not need to carry out a DPIA for individual stories. You could do a more general DPIA that covers the ways you may use personal data in high-risk ways (e.g., using personal data for investigative journalism). But are freelance photographers and videographers expected to do a general DPIA as individuals? How

high is the risk from general visual imaging unless imaging people when you are obscuring their identities as in certain interviews?

Consideration could be given to a separate section which focuses on images.

Special category data

9. There are significant issues here, but the code gives little real guidance for journalists. In the consultation responses document on page 12 it says "We have included more detail about special category data to help people to understand how to consider photographs that may reveal ethnicity, for example. We also refer to the potential link between sensitive types of personal data and the risk of harm, such as discrimination."

10. In the revised draft code, it says in 4.23:

There may be times when you are not sure whether the information is special category data. For example, you may be able to infer an individual's religion or ethnicity from names, photographs or film. Where there is doubt, you should consider:

- whether it is possible to infer or guess special category data from the information you want to use;
- how certain that inference is; and
- whether you are deliberately inferring the data.

11. In 4.24, If you use the personal data specifically because it reveals one of the details above, you are using special category data. However, if you can only infer or guess these details, you do not need to meet extra conditions to use the data. Although you must still consider whether it is fair to use the information in context (see Use personal data fairly).

12. In 4.25, Before you use special category data, you should consider why you want to use it. This will help you choose a lawful reason and condition, and where relevant, a further condition and safeguard.”
13. It then refers to ten conditions under the UK GDPR that provide extra protection for special category data and can give you a valid reason for using it, but without further reference to photos or film in this section 4, and without the caveat of the exemption for journalism at the end of that section.
14. Section 5.19 says: "People should reasonably expect that they may sometimes be photographed or caught on film in public in an incidental way. However, if a person’s image is captured in public and they are the subject of the photograph or film, you must consider whether using their personal data is fair in the circumstances, even if the activity is happening in a public place.”
15. It is not clear if anyone in an image in public in an incidental way is or is not protected under the special data category. There are also practical issues. Photographers covering events may photograph a lot of people, some in crowds where it is obviously impossible to speak with everyone individually. More guidance and examples could be provided as to the basis on which data could be used which is fair in circumstances where special category data might apply.

Strategic lawsuits against public participation (SLAPPs)

16. The NUJ has condemned the abuse of legislation by those in powerful positions who target journalists and attempt to deter or stymie their reporting through lawsuits. SLAPPs against journalists are often brought under defamation laws but alarmingly also through data protection and privacy laws too. The union is concerned by the abuse of GDPR in this manner, posing a significant threat to freedom of expression and public

interest journalism. It is essential that sufficient protections are afforded journalists to minimise abusive practices.

17. The NUJ is a member of the UK Anti-SLAPP coalition, actively campaigning for an end to the use of SLAPPs, and for stronger legislation to ensure protections for those targeted in efforts to shut down public participation.

18. Further reference and addressing this aspect would be helpful to journalists.