RESPONSE TO ICO CONSULTATION ON THE REVISED DRAFT JOURNALISM CODE OF PRACTICE

23 NOVEMBER 2022

About Handley Gill Limited

At Handley Gill, we combine cost-effective, pragmatic and robust advice with the in-depth technical knowledge and expertise necessary to provide quality data protection, privacy and wider legal advice, compliance and assurance services to our clients.

Our consultants have significant experience across the public and private sectors, working in-house as well as in professional services organisations, spanning a number of industries, including:

·Regulated industries, such as law firms and other legal professionals, financial institutions and other financial services providers including fintech, insurers and insurance intermediaries;
·Retail, branding, advertising and marketing;
·Technology start ups;
·Content providers, including publishers, broadcasters, social media platforms and, online and editorial content creators;
·Political parties and lobbying groups;
·Law enforcement entities;
·Charitable organisations;
·Employment agencies;
·The public sector;
·Sport and fitness; and,
·Health care.

Our services include:

·Establishing and implementing data protection compliance frameworks

·Providing outsourced data protection officer (DPO) services

·Conducting legitimate interests assessments

·Drafting privacy, data protection and cookie policies and notices

·Drafting, advising on and negotiating data processing agreements

·Advising on compliant marketing practices and campaigns

·Conducting international data transfer risk assessments

·Advising on and preparing responses to data subject rights requests, including data subject access requests (DSARs)

·Advising on data breach notification obligations

·Conducting data mapping exercises

·Advising on the lawful basis for personal data processing

·Conducting data protection impact assessments, advising on high risk processing and prior consultation obligations

·Drafting data handling and management policies and standards

·Drafting, advising on and negotiating data sharing agreements

·Advising on and conducting vendor and supply chain risk assessments

·Drafting, advising on and negotiating international data transfer agreements

·Preparing and rehearsing data breach and cyber incident response preparedness plans

·Designing and delivering standard and bespoke data protection training

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·Advising on the application of the Age Appropriate Design Code (Children's Code)

·Advising on the ethical design and implementation of machine learning and Artificial Intelligence (AI)

·Advising and representing in regulatory and enforcement action brought by the Information Commissioner (ICO) and other regulators

·Providing independent data stewardship representation to support consultation obligations

·Conducting data protection audits

·Advising and representing in appeals to the First-Tier Tribunal (Information Rights)

As well as holding Bachelors and Masters degrees in law, our consultants hold relevant professional qualifications, including the International Association of Privacy Professionals Certified Information Privacy Professional/Europe (CIPP/E) certification, the accredited OU Introduction to Cyber Security and the University of Michigan Data Science Ethics course, so you can be assured of our expertise advising on the GDPR, UK GDPR, Data Protection Act 2018, Privacy and Electronic Communications Regulations (PECR), and the impact of the Data Protection and Digital Information and Online Safety Bills. Our consultants are also OneTrust Certified Privacy Professionals, and we can work with your organisation using OneTrust, as well as other privacy management platforms, or work with you to develop your own framework to demonstrate compliance with ethical, social and governance (ESG) risk.

Our consultants have expertise in developing policy and legislation, particularly in the data protection, technology regulation, media, content and online safety spheres, and have developed position papers and lobbying documents, as well as engaging in lobbying activity, on behalf of clients and in the wider interests of industry. We work with think tanks, politicians and other organisations to develop thought leadership, position papers and legislative amendments in relation to data protection and content issues and associated regulatory matters.

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Executive Summary

We were pleased to note that the Information Commissioner has issued a revised draft Journalism Code of Practice in light of the manifest errors and mis-statements of the law in the original draft that we highlighted in our original consultation response, which is available online[1] and is annexed to this response for ease of reference.

We welcome the opportunity to comment on the revised draft Code.

We were also pleased to note that the revised draft Code has been shortened and re-written in an effort to increase its accessibility to those affected by it.

Regrettably, however, significant errors either remain or have been introduced in the revised draft the effect of which is to undermine or otherwise fail to accord appropriate protection to the fundamental right to freedom of expression and information, and (as was also noted by other respondents to the initial consultation) repeatedly unnecessarily and improperly conflates the requirements of data protection legislation with the tort of the misuse of private information and rights which may exist under article 8 of the European Convention on Human Rights, and the law of defamation, and inappropriately seeks to give statutory force in the context of the code to assertions made in reliance on those causes of actions.

We also consider that there remains a lack of clarity as to which provisions are not required to be complied with where there is a reasonable belief that to do so would be incompatible with the purpose of journalism and the other relevant conditions under Schedule 2 Part 5 para.26 Data Protection Act 2018 are met.

We were therefore disappointed to see that the ICO had taken extracts from the revised draft guidance, which contained inaccurate information, and published these in a social media post[2] in a manner where it was not clear that the content did not state the law and was the subject of ongoing consultation, and was therefore liable to mislead. We would welcome this being withdrawn.

Throughout the guidance, it is stated that controllers *"must"* comply with the requirements of the UK GDPR and Data Protection Act 2018, and at page 5 of the guidance it is stated that *"When we use the word must in the code, this refers to legal requirements"*, but it is not made clear that this refers to legal requirements unless the journalism exemption applies. We consider that this serves to cause unnecessary confusion and that it must be made clear throughout the guidance that while the starting point is that there must be compliance, this is unless the journalism exemption applies, except where that is not the case (in relation to the obligation to take appropriate technical and organisational measures to protection personal data, for example). This is particularly the case because, while shortened, given the length of the guidance in practice we anticipate that controllers will use the guide by referring to the specific

[1] https://www.handleygill.co.uk/response-to-ico-draft-journalism-code-of-practice

[2] https://www.linkedin.com/posts/information-commissioner%27s-office_journalism-code-applying-the-journalism-activity-6986928740798713856-Kjq8?utm_source=share&utm_medium=member_desktop

section. We have not identified every instance in which we consider that this should apply, given the impact it would have on the length of this submission.

Furthermore, the revised draft Code continues to fail to acknowledge that the exemption may be relied upon by journalistic sources and others contributing to the journalistic purpose. This is exacerbated by the mis-statements of the law as included in documents supporting the draft Code.

We remain of the view that it would be of assistance, particularly to those controllers who will not have the benefit of direct access to legal advice, to cross-reference the relevant provisions of the UK GDPR and Data Protection Act 2018 (acknowledging that this could require the Code to be revised and updated subject to the Government's reform of data protection legislation). We also consider that there would be a benefit in refencing the relevant jurisprudence from which statements of principle have been extracted. While we note that our position contrasts with that of certain respondents to the Information Commissioner's initial consultation, we consider that this would enable users of the code to conduct further research if required and would flag where a principle might be overridden as a consequence of jurisprudence being over-turned. We accept that doing so in a separate supporting document may make it easier to manage any amendments necessary as a consequence of developments in the law.

We note that the draft code fails to give consideration to emerging technologies used in the context of journalism, and consider this to be a missed opportunity. It would be inappropriate at this stage to seek to introduce such guidance in the absence of any consultation, but we consider that this could form the basis for future consideration. Facial recognition and artificial intelligence (AI) technologies can be utilised as tools to verify the accuracy of personal data and tackle potential disinformation, and AI is already being utilised to produce journalistic material.

While we acknowledge that the Information Commissioner's functions are established by s.115-116 Data Protection Act 2018, primarily to monitor, enforce and promote public awareness of the UK GDPR, this does not create an unfettered right or obligation to protect data protection rights at all costs and to the detriment of other fundamental rights. Section 2(2) Data Protection Act 2018 makes clear that in carrying out his functions, *"the Commissioner must have regard to the importance of securing an appropriate level of protection for personal data, taking account of the interests of data subjects, controllers and others and matters of general public interest"* (emphasis added). Indeed, as a public authority, the Information Commissioner is subject to a legal duty to act in accordance with other Convention rights and this requires the Commission to balance Article 8 rights, where they apply in respect of personal data processing, and the Article 10 right to freedom of expression and information which is inherent in the processing of personal data for the purpose of journalism. Regrettably, in light of the content of both the original and subsequent drafts of the proposed code of practice, and having regard to the Information Commissioner's conduct in relation to the investigation and enforcement of the processing of personal data for the purpose of journalism, we remain of the view that there appears to be a distinct misunderstanding of - or perhaps even disregard for - both the actual provisions of the data protection legislation and the

protections for journalism contained therein and the importance of protecting the fundamental right to freedom of expression and information. We remain hopeful that this can be ameliorated prior to the code being finalised.

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.

Please see the Executive Summary above and the specific commentary below.

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 the Executive Summary above and the specific commentary below.

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

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?

These documents contain inaccurate assertions regarding the law, and as such are not fit for purpose.

Section three: About you

Q10 What is your name?

Nicola Cain

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

CEO & Principal Consultant, Handley Gill Limited

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.

[redacted]

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.

[redacted]

SPECIFIC COMMENTS ON THE CONTENT OF THE REVISED DRAFT JOURNALISM CODE

	PAGE	PARA.	DRAFT CODE	COMMENT
1.	5		*"When we use the word must in the code, this refers to legal requirements."*	It should be made clear that the relevant legal requirements apply unless the relevant requirement is covered by Schedule 2 Part 5 para.26 Data Protection Act 2018 and the exemption applies.
2.	9		*"When the case concerns journalism, the person pursuing court action can ask the ICO to assist, if the case is of substantial public importance."*	This mis-states the law. Section 175(1) Data Protection Act 2018 states that *"An individual who is a party, or prospective party, to special purposes proceedings may apply to the Commissioner for assistance in those proceedings."* This is not limited to complainants.
3.	10		*"The exemption can cover all the personal data you use for journalism, as long as you have the intention or hope of publishing it."*	The journalism exemption does not merely apply to personal data which is intended or hoped to be published, but to any personal data processed with a view to the publication of journalistic material.
4.	10		*"The exemption applies if you reasonably believe that a specific part of data protection law must or should be set aside because complying with it disproportionately restricts your journalistic activity."*	This exposition of Schedule 2 Part 5 para.26(3) Data Protection Act 2018 is overly legalistic and we would prefer the maintenance of the explanation given in the existing guidance 'Data protection and journalism: a guide for the media' which states *"there must be a clear argument that the provision in question presents an obstacle to responsible journalism. You should be able to show it was impossible to both comply with a particular provision and to fulfil your journalistic purpose. Alternatively, you can show that it was unreasonable in the*

				circumstances to comply with a particular provision, by virtue of it being impractical or inappropriate. You must balance the detrimental effect compliance would have on journalism against the detrimental effect non-compliance would have on the rights of the data subject".
5.	12	*1.12*	*"For third party content or online "user-generated content", you could consider whether you have applied any editorial judgement to the third party content (eg to decide whether to include a reader's response). The more editorial control exerted, the more likely it is that you are using personal data for the purposes of journalism."*	This paragraph lacks clarity as to the circumstances in which it is intended to apply. In so far as, for example, reader comments on online articles are published without prior moderation, we do not consider that – nor is there any legal basis for suggesting – this would prevent any personal data being processed for the purposes of journalism.
6.	13	*1.22*	*"It is the belief of the controller that is relevant rather than an individual journalist. However, you can decide to delegate responsibility for decisions to individual journalists depending on the level of risk."*	The effect of this assertion is to introduce a new and unique obligation on individuals and entities processing personal data for the purposes of journalism. Nowhere else in the Information Commissioner's guidance has it been suggested that processing of certain types, e.g. high risk processing, can only be undertaken at the behest of senior executives. This is not, in practice, how most public or private sector organisations are run, with operational decisions being devolved to relevant staff. The implication of this paragraph is that the legitimate reliance by an individual journalist on the exemption when processing personal data for the purposes of journalism

				could be undermined if the processing had not been the subject of prior executive approval. Obligations under the data protection legislation are not in the nature of statutory obligations which may be delegated to officers and staff provided appropriate authority and mechanisms are in place to do so.
7.	15	*1.31*	*"What is ultimately "in the public interest" is determined by balancing factors in favour of publication against any harm to a person."*	This should refer to *"any unwarranted harm to the relevant data subject"*, not merely to *"any harm to a person"*.
8.	15	*1.35*	*"Certain factors can add weight to the arguments on either side of the public interest balance. Factors you could consider include:* *• how likely and severe any harm could be. If there would be a severe impact on people or other public interests, then this will carry significant weight in the public interest. This is relevant if, for example, there is any risk of physical or mental harm to an individual;..."*	A risk of physical or mental harm must be significant in order to outweigh the right to freedom of expression, as recognised the Supreme Court in, for example, Application by Guardian News and Media Ltd and others in Her Majesty's Treasury (Respondent) v Mohammed Jabar Ahmed and others (FC) (Appellants) [2010] UKSC 1.
9.	15	*1.35*	*"Certain factors can add weight to the arguments on either side of the public interest balance. Factors you could consider include:* *...* *• whether information is already in the public domain. There may be a public interest in presenting a full picture or to remove any*	The concept that the extent to which information is already in the public domain may be relevant to the public interest is one which has developed in the context of the consideration of the application of exemptions under the Freedom of Information Act 2000 (see, for example, Lownie v Information Commissioner and others (EA/2017/0087)) and is

			suspicion of manipulating the facts or spin. However, there may be a weaker public interest in publication if similar information is already available and the information you wish to publish would not significantly add to it.	reflected only in the Information Commissioner's guidance on 'Freedom of Information and Environmental Information Regulations'[3]. It is not accepted, and nor has any precedent been put forward to establish, that this concept is applicable in the context of the application of the journalism exemption and to suggest otherwise imposes an unacceptable fetter on editorial discretion and the right to freedom of expression and information. Indeed, s.12(4) Human Rights Act 1998 identifies that the fact that information is already or will shortly come into the public domain is a factor weighing in favour of publication, rather than prior restraint.
10.	16	*1.37*	*"However, a part of data protection law may be "incompatible" with journalism if you reasonably believe that it must or should be set aside to enable your journalistic activity. As explained in section 1.20 of this code, a reasonable belief is one that you can objectively justify in a reasonable way. "*	Again, we consider that the language in the existing guidance 'Data protection and journalism: a guide for the media' (*"there must be a clear argument that the provision in question presents an obstacle to responsible journalism"*) is preferable to this legalistic exposition of the law.
11.	28	*4.13*	*"You should take extra care when dealing with children's personal data or other vulnerable groups. You must consider a child's best interests in accordance with the United Nations*	This mis-states the law. While the UN Convention on the Rights of the Child was ratified by the UK in 1991, it does not form part of domestic law. It does not create directly enforceable rights and is only applicable to public bodies,

[3] https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/the-public-interest-test/

			Convention on the Rights of the Child."	not to media organisations and other individuals or entities processing personal data for the purposes of journalism. It may, however, be appropriate to reflect that public bodies, courts and tribunals may have regard to the Convention in the course of fulfilling their roles.
12.	30	*4.29*	*"You should be cautious when applying this condition to information obtained from social media posts or other user-generated content. You must always consider whether it is fair to use the data bearing in mind that people may make their personal data public without realising it."*	This assertion, which is not supported by jurisprudence or practice, contradicts and serves to undermine the explicit protection contained within Schedule 1 Part 3 para.32 Data Protection Act 2018 for the processing of even criminal conviction and offence data where this is manifestly made public by the data subject, and should be excised from the guidance. The mere fact that personal data processed for the purpose of journalism constitutes UGC material or is gleaned from a social media post should not in and of itself create a statutory expectation that it will be subject to additional scrutiny.
13.	30	*4.31*	*"There is a strong public interest in the rehabilitation of offenders recognised in the Rehabilitation of Offenders Act 1974 (ROA 1974). Although this is generally a strong factor in favour of not publishing or broadcasting data once a conviction is spent, whether or not it is fair depends on all the circumstances.*	This paragraph not only inaccurately reflects the judgment of Warby J (as he then was) in NT1 and NT2 v Google LLC [2018] EWHC 799 (QB), but it also inappropriately applies principles established in the context of determining the rights of online intermediaries such as search engine providers to originating publishers.
14.	32	*4.48*	*"In some cases, there may be a risk of prejudice*	This statement is reductive and may unnecessarily chill

			to the course of justice. You must only use criminal offence data if it would not breach any other law. For example, you may be in contempt of court if you publicly comment on a court case on social media or in a story."	freedom of expression. Merely publicly commenting on a court case in a publication or on social media doesn't pose a risk of breaching the strict liability rule under section 1 Contempt of Court Act 1981. Only the publication of any matter which creates a substantial risk of serious prejudice or impediment to the course of justice in legal proceedings and to which there is no defence, for example because the risk is merely incidental to the publication in good faith of public affairs or matters in the public interest.
15.	32	*4.49*	*"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. Although it depends on the specific facts of each case, the facts will often point to a conclusion that there is a reasonable expectation of privacy."*	The judgment of the Supreme Court in Bloomberg LP v ZXC [2022] UKSC 5 in the context of a misuse of private information claim made clear that it was merely a *"legitimate starting point"* that an individual under state investigation would have a reasonable expectation of privacy in that fact prior to charge, although this would be fact dependent and should *"avoid any suggestion of a legal presumption"*, and therefore this assertion goes further than existing law. This also goes beyond the application of data protection legislation and effectively seeks to develop the law of misuse of private information via the back door.
16.	33	*4.53*	*"You should act proportionately and consider whether you can sufficiently serve the public interest without identifying the suspect. For example, you may be*	The European Court of Human Rights has recognised, as have the domestic courts, that it is not their role to interfere in editorial decisions regarding the manner of reporting, including the identification of

			able to highlight weaknesses in an investigation by a public authority without identifying a suspect."	individuals, see for example News Verlags GmbH & Co KG v Austria (2000) 31 EHRR 246, 256, para 39. See also the unanimous decision of the Supreme Court in Application by Guardian News and Media Ltd and others in Her Majesty's Treasury (Respondent) v Mohammed Jabar Ahmed and others (FC) (Appellants) [2010] UKSC 1, which recognised *"This is not just a matter of deference to editorial independence. The judges are recognising that editors know best how to present material in a way that will interest the readers of their particular publication and so help them to absorb the information. A requirement to report it in some austere, abstract form, devoid of much of its human interest, could well mean that the report would not be read and the information would not be passed on. Ultimately, such an approach could threaten the viability of newspapers and magazines, which can only inform the public if they attract enough readers and make enough money to survive."* See also In re S [2005] 1 AC 593, 608, per Lord Steyn at para 34., and In re BBC [2009] UKHL 34.
17.	38	6	*"You should consider whether you need to do a DPIA if you collect personal data from a source other than the person it is about without providing them with privacy information."*	This assertion would serve to impose a new statutory expectation as to when a DPIA, and in particular DPIA screening, needs to be conducted in circumstances other than those that will necessarily pose a high risk as is required by the UK GDPR.

				This would create a substantial additional unnecessary burden on controllers processing personal data for the purpose of journalism.
18.	41	*7.4*	*"You should:* *• make sure that the source of the personal data and their status is clear where possible;* *• consider any challenges to the accuracy of information; and* *• consider whether you need to update the data."*	It is not a requirement of the UK GDPR or the Data Protection Act 2018, and nor is it appropriate for the Information Commissioner to introduce a new statutory expectation, that information regarding journalistic sources should be published.
19.	42	*7.16*	*"While deciding what editorial position to take when reporting the news, it is important to make sure you continue to present personal data accurately. You may need to clarify the nature or context of some content specifically to avoid compromising the accuracy of the personal data. For example, you should check that headlines are supported by the text. "*	It is a well-established principle, in both the law of defamation and in data protection (see NT1 v Google LLC [2018] EWHC 799 (QB) and Aven & others v Orbis Business Intelligence Limited [2020] EWHC 1812 (QB)), that when determining accuracy one must look to the entire context in which the relevant personal data appears, and personal data in headlines cannot be considered in isolation.
20.	57	*12.20*	*"If you receive a request for rectification, you should take reasonable steps to check that the data is accurate. Factors you should consider include:* *• what the requester tells you – they should be able to prove, on the balance of probabilities, that the information is inaccurate;* *• any steps you have already taken to verify the accuracy of the personal*	There is no obligation to consider the *"risk of harm to the person"* under the UK GDPR.

			data (see Use accurate personal data); and *• the risk of harm to the person."*	
21.	58	*12.24*	*"Opinions are subjective by their nature and not necessarily inaccurate simply because someone disagrees or it is later proven to be incorrect. However, if it becomes clear than an opinion was based on inaccurate data, you should correct it."*	This paragraph does not make clear whether it is intended to apply to the expression of an opinion by or on behalf of the controller themselves, or the reporting of an opinion by a third party. In any event, to suggest that it would be unlawful in every scenario not to remove and or revise journalistic material is not only not supported either by the UK GDPR, Data Protection Act 2018 or jurisprudence but impermissibly trespasses into editorial decision making. We would suggest that the words "*However, if it becomes clear than an opinion was based on inaccurate data, you should correct it*" ought to be excised. It would appear that this paragraph refers to the provisions of s.14(1) Data Protection Act 1998, which granted the court certain powers and is no longer in force, but only partially reflects its application by disregarding the provisions of s.14(2).
22.	58	*12.25*	*"This may take a variety of forms, for example, an advisory line at the top of an online article, or a printed correction in a newspaper. "*	While perhaps intended to be indicative, it is not appropriate for the guidance to dictate where or the manner in which a correction or clarification ought to be published.
23.	58	*12.26*	*"Unless it is impossible or involves disproportionate effort, you must tell each recipient that you have rectified the data. If the person concerned wants to know who these*	This statement of the law goes further than the actual requirements of the UK GDPR as set out at Article 19 and recital 66. The latter provides that the *"controller should take reasonable steps, taking into account available*

			recipients are, you must tell them."	*technology and the means available to the controller, including technical measures, to inform the controllers which are processing the personal data of the data subject's request."*
24.	59	*12.32*	*Right to erasure*	It may be helpful to identify that this is also sometimes known as the "Right to be forgotten".
25.	59	*12.32-40*		We consider that it would provide greater clarity to amalgamate these sections to make clear that there is a specific exemption from the right to erasure under Article 17(3)(a) UK GDPR where processing of personal data are necessary for the exercise of the right of freedom of expression and information.
26.	59	*12.36*	*"Crucially, the right to erasure does not apply if using the data is necessary to exercise the right to freedom of expression and information. In practice, this is likely to be similar to balancing public interest considerations proportionately (see Apply the journalism exemption)."*	This puts forward a position on the interpretation and application of the UK GDPR which is not supported by jurisprudence and, if that is the Information Commissioner's position, ought properly to be made in submissions as part of an intervention in a relevant case, and not in statutory guidance. This is particularly important since, by virtue of Schedule 2 Part 5 para.26(9)(b)(5), the journalism exemption also applies to the right to erasure despite the relevant provision of the GDPR itself incorporating an exclusion.
27.	59	*12.37*	*"To help you determine whether you need to use the data to exercise the right to freedom of expression, you should take into account the factors used by the European Court of*	It would be desirable to identify the specific case(s) and/or guidance being referenced, in this instance the judgments of the European Court of Human Rights in Axel Springer AG v Germany (App. No. 39954/08), 07 February

			Human Rights when balancing these rights."	2012 and, most recently, Hurbain v Belgium (App. No. 57292/16), 22 June 2021. While we note that the Hurbain judgment is referenced in the relevant section of the supporting reference notes, it would not be apparent that the relevant principles were drawn from this case. Again, however, Article 8 of the Convention is not applicable to all processing of personal data and it is therefore inappropriate to draw directly from the European Court's jurisprudence in this regard in a manner which establishes compliance expectations.
28.	60	*12.39*	*"An offender may reasonably expect privacy as a result of the passage of time. You should take into account the strong public interest in the rehabilitation of offenders (See Use personal data lawfully). "*	This paragraph is inappropriate and unbalanced in that it fails to reflect the right to freedom of expression and information in the administration of justice, and in the right of victims and other individuals who find themselves ensnared in criminal activity to share their own experiences. The High Court explicitly recognised, in NT1 & NT2 v Google LLC [2018] EWHC 799 (QB) para.111 per Warby J, that *"Publicity for what happens at a trial is the ordinary consequence of the open justice principle: "An important aspect of the public interest in the administration of criminal justice is that the identity of those convicted and sentenced for criminal offices should not be concealed.* *Uncomfortable though it may frequently be for the defendant that is a normal*

				consequence of his crime": Re Trinity Mirror plc [2008] EWCA Crim 50 [2008] QB 770 [32] (Sir Igor Judge P). The same must be true of the details of the offending, and other information disclosed in open court, including information about himself which a criminal reveals at a trial or in the course of an application."

SPECIFIC COMMENTS ON THE CONTENT OF THE 'DATA PROTECTION AND JOURNALISM CODE OF PRACTICE – AT A GLANCE'

	PAGE	SECTION	AT A GLANCE	COMMENT
1.	1	1	*"The exemption applies if you:* *» use personal data for journalism;* *» act with the intention or hope of publishing journalistic material;* *» reasonably believe publication is in the public interest; and* *» reasonably believe that complying with a specific part of data protection law is incompatible with journalism."*	This is inaccurate statement of the law. This is inaccurate statement of the law. Schedule 2 Part 5 paragraph 26(2)(a) Data Protection Act 2018 explicitly states that the exemption may be relied upon if personal data is being processed "with a view to the publication by a person". It is not a requirement of the law that the envisaged publication will be undertaken by the same individual or entity.
2.	1	1	*"The exemption can cover all the personal data you use for journalism as long as you have the intention or hope of publishing it."*	This is inaccurate statement of the law. The exemption can cover all of the personal data used for journalism if it is used with a view to the publication (by someone) of journalistic material, regardless of whether the personal data is actually used in the publication.
3.	2	4	*"Criminal offence data includes allegations of criminal behaviour. You should consider all the circumstances to decide if a suspect has a reasonable expectation of privacy. If a suspect is under investigation by the state, there is usually a reasonable expectation of privacy."*	The judgment of the Supreme Court in Bloomberg LP v ZXC [2022] UKSC 5 in the context of a misuse of private information claim made clear that it was merely a "legitimate starting point" that an individual under state investigation would have a reasonable expectation of privacy in that fact prior to charge, although this would be fact dependent and should *"avoid any suggestion of a legal presumption"*, and therefore this assertion goes further than existing law. This also goes beyond the application of data protection legislation and effectively

				seeks to develop the law of misuse of private information via the back door.
4.	3	5	*"You should consider the specific circumstances to decide what an individual reasonably expects. Various factors may be relevant including:* *» the extent to which the information is in the public domain;* *» a person's public profile; and* *» the risk of harm."*	This should refer only to *"unwarranted harm"* to the relevant data subject.
5.	3	5	*"You should make sure you can justify your decision to use any personal data in view of the risk of harm and publish data that is proportionate to the public interest. "*	This should refer only to *"unwarranted harm"* to the relevant data subject.
6.	4	7	*"You should:* *» make sure that the source of the personal data and their status is clear where possible;* *» consider any challenges to the accuracy of the data; and* *» consider whether you need to update it."*	It is not a requirement of the UK GDPR or the Data Protection Act 2018, and nor is it appropriate for the Information Commissioner to introduce a new statutory expectation, that information regarding journalistic sources should be published.
7.	4	7	*"As a general rule, the greater the risk of harm to people, the more thorough your accuracy checks need to be."*	This should refer only to *"unwarranted harm"* to the relevant data subject.
8.	4	7	*"When the criteria applies, the journalism exemption can remove the usual requirement to use accurate personal data. However, accuracy is generally a fundamental journalistic value so you are unlikely*	The commentary that the Information Commissioner considers that it is unlikely to be necessary to use the journalism exemption in connection with the accuracy principle is unnecessary, inappropriate and inaccurate. Public interest journalism may well involve the publication of

			to use it for this reason often. "	allegations which cannot be demonstrated to be accurate, but are nevertheless protected by law.
9.	5	9	*"You must use accurate personal data for journalism, which also involves considering how much data you need."*	The data minimisation principle under Article 5(c) UK GDPR is distinct from the accuracy principle under Article 5(d), and to conflate the two is unhelpful and unnecessary.
10.	5	9	*"When the criteria applies, the journalism exemption can remove the usual requirement to use no more personal data that you need. "*	This appears to include a typographical error and should read *"When the criteria applies, the journalism exemption can remove the usual requirement to use no more personal data than you need. "*

SPECIFIC COMMENTS ON THE CONTENT OF THE '10 DATA PROTECTION TIPS FOR DAY-TO-DAY JOURNALISM'

	PAGE	SECTION	TIP	COMMENT
1.	1	1	*"The exemption applies if:* *o your organisation intends to publish journalistic content;* *o you reasonably believe it is in the public interest; and* *o reasonably believe that complying with a specific part of data protection law is not possible or would unduly restrict journalism."*	This is inaccurate statement of the law. Schedule 2 Part 5 paragraph 26(2)(a) Data Protection Act 2018 explicitly states that the exemption may be relied upon if personal data is being processed "with a view to the publication by a person". It is not a requirement of the law that the envisaged publication will be undertaken by the same individual or entity.
2.	2	3	*"There is an exemption for journalism that can remove many, but not all, parts of data protection law. For example, you always need to show how you are complying and keeping personal data secure. The exemption applies if:* *o your organisation intends to publish journalistic content;* *o you reasonably believe it is in the public interest; and* *o reasonably believe that complying with a specific part of data protection law is not possible or would unduly restrict journalism. "*	It is unhelpful to use yet another formulation of when the special purposes exemption applies, and we would advocate both consistency and a return to the exposition included in the existing guidance 'Data protection and journalism: a guide for the media', i.e. that compliance is incompatible or inappropriate.
3.	3	4	*"'Legitimate interest' is often the most appropriate legal reason for you to use for journalism. It is a good place to start when considering which one applies. It allows you to*	This should refer to unwarranted harm to the data subject.

			collect personal data if there is a public interest in collecting the data which is stronger than the harm to a person."	
4.	3	4		This section fails to make clear that the journalism exemption can apply to the requirements set out in this section.
5.	3	5		This section fails to make clear that the journalism exemption can apply to the requirements set out in this section.
6.	3	5	*"Various factors may be relevant, including whether:* *o information is already publicly available;* *o the person concerned has a public profile – although you always need to consider all the circumstances;* *and* *o the risk of harm to the person.*	This should refer to unwarranted harm to the data subject.
7.	4	6		This section fails to make clear that the journalism exemption can apply to the requirements set out in this section.
8.	4	7		This section fails to make clear that the journalism exemption can apply to the requirements set out in this section.
9.	4	8	*"When time is limited, only use the right amount of personal data to write your story. This helps you to be more efficient and comply with data protection law."*	The data minimisation principle applies regardless of whether *"time is limited"*.
10.	4	8		This section fails to make clear that the journalism exemption can apply to the requirements set out in this section.
11.	5	9	*"When people are acting on behalf of your organisation, such as*	We consider that it may provide greater clarity to be clear that these

			freelancers or photographers, you must have a written contract in place guaranteeing that they will also protect the personal data."	entities/individuals will be data processors where they are acting in accordance with your instructions.

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