

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

Start date: 9 September 2022

End date: 23 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.

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.

Despite some improvements, the draft Code of Practice (the **Draft Code**) continues to be unduly and unnecessarily prescriptive, and is so at odds with the reality of modern newsgathering as to render it practically impossible to report breaking news, thus having a chilling effect on free speech.

An overemphasis on the need to demonstrate and document compliance with the Code risks journalists' being misled into forming a general impression that all elements of their work must be the subject of careful review and note-keeping, with every story subject to a risk assessment. This is true for all news organisations, but could be particularly difficult for smaller independent and local news organisations, where sophisticated legal advice is less common; such a burden in these organisations runs a real risk of being fatal to their business.

The prescriptive steps detailed in the Draft Code are not required under the law currently, and would very likely lead to one of two outcomes, neither of which is desirable. One is total paralysis: news outlets publishing breaking news are required to make decisions quickly on a risk-based model. Performing the risk assessments prescribed by the Draft Code when there is a low risk of harm to the data subject, and a countervailing public interest in publishing the information, is not just impractical, but would in fact cause a newsroom to grind to a halt.

An alternative outcome, in order to avoid such paralysis, would be to generate a process by which compliance with data protection obligations becomes little more than a box-ticking exercise. Compliance with data protection law then becomes routinised in its operation for the sake of commercial expediency, and therefore denuded of its importance.

One way to avoid these equally undesirable outcomes could be to encourage organisations to implement in the first instance DPIAs for certain known categories of stories, the likes of which they are in the business of routinely publishing. Thereafter, the day-to-day judgements on any particular story within a certain category will be left to editorial discretion, in line with such procedures.

This category-specific approach to risk assessments would include a process whereby certain high-risk stories (identified as such by reference to stipulated criteria) are elevated to a review by appropriate people within the organisation and subject to further scrutiny, including (if necessary) conducting an appropriate risk assessment for the individual story in question. This approach is in line with the compliance analysis already undertaken (particularly by major news organisations) when publishing high-risk stories.

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

There are a number of instances in the Draft Code where, in an apparent attempt to clarify the meaning of wording in the legislation itself, the Draft Code resorts to synonyms or introduces new concepts which necessarily deviate from

the statutory language itself, and risk having the (doubtlessly unintended) effect or narrowing the application of the Journalistic Exemption.

For example, in the section “what does “incompatible with journalism” mean?” the Draft Code states that “you must comply with data protection law **if there is a straightforward way to do so whilst achieving your journalistic objective**” [our emphasis]. Furthermore, later it is said that “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 journalist activity.

The concept of “incompatibility with journalism” is not sufficiently complicated that it requires the introduction of further concepts by way of attempted clarification. In fact, the introduction of such concepts, which are absent in the legislation, may well invite more questions than it does provide answers, while also potentially narrowing the scope of the application of the exemption.

This is true also in the discussion of what it means for a journalist to process data “with a view to publication”. The Draft Code talks of a journalist acting “**with the intention or hope** of publishing journalistic material”. Again, this is language not found in the statute.

It is suggested that the statutory language is clear enough on its face such that it does not need clarification in the Code, particularly if such attempted clarifications (1) achieve the exact opposite by complicating matters further and (2) potentially restrict the application of the exemption beyond the scope intended by Parliament.

Should the courts seek to clarify or offer guidance on the proper interpretation of the statutory language in that venue, it would be sensible to include such commentary. However, for reasons already offered by other parties in relation to a previous consultation, references to case law should arguably be limited to appellate rather than first instance decisions due to the former’s greater precedential value.

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?

Section three: About you

Q10 What is your name?

Wiggin LLP

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

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.