

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 overall we consider that the revised draft code reflects the feedback provided, and has been improved generally, there are still areas which could, and we suggest should, be improved by making some relatively minor amendments to the existing draft. For instance, in some areas, useful guidance has been removed, presumably in the interests of brevity. Whilst this improves the draft code in places, in others it seems to us that it makes the guidance less clear. We set out some examples below:

1. On page 30, at paragraph 4.29, you have removed reference to the factors that processors must bear in mind when considering whether it is fair to use data from social media posts (see page 47 of the previous draft code), including the nature of the information; whether it is available freely or only to a limited number of people on social media; how long ago was it put on social media; if there is evidence that it was put on social media by someone other than the individual concerned; and whether they were a minor when it was put on social media. We consider that these factors are useful guidance for journalists and that it would be useful for them to be reinstated.

2. On page 35, at paragraph 5.8, you have removed the list of circumstances in which information "*will not necessarily lose its private character*" from pages 54

and 55 of the previous draft code, namely that an individual has already disclosed personal data relating to the same or similar parts of their life; that the individual (or another person) has already disclosed certain facts relating to the personal data; that the individual intends to publish the personal data in the future; and that the individual (or another person) may or would be able to publish the personal data in another country according to different laws. We consider that these points remain useful guidance for journalists and should be reinstated.

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.

1. We query whether the new version of the draft code's distinction between acts which journalists and/or other processors "must", "should" or "could" carry out might be improved at times. By way of a few examples only of where "should" ought to say "must" in our view:

- On page 14, paragraph 1.28: "*you **should** consider whether the arguments in favour of publication are stronger than any harm to a person*";
- On page 26 and page 33, paragraph 4.52: "*you **should** consider all the circumstances to decide if a suspect has a reasonable expectation of privacy*" and "*you **should** make sure you can justify identifying a suspect, taking into account the public interest in publication and the harmful consequences for the person*";
- On page 35, paragraphs 5.3 and 5.9: "*you can use personal data even if it may cause harm but you **should** be able to justify it*" and that "*you **should** consider all the circumstances*" when assessing whether a public figure has a right of privacy in relation to certain matters; and
- On page 58, paragraph 12.24: "*... if it becomes clear than an opinion was based on inaccurate data, you **should** correct it*".

We appreciate that there might be a system whereby the ICO has delineated between these three types of obligations, but if that is the case, the system is not clear to us, and we consider that this might cause confusion on the part of readers as to the importance of their various obligations.

2. On pages 12 and 13 at paragraphs 1.13 to 1.15, we consider that the explanation on the meaning of the wording "with a view to publication" is unclear and/or inaccurate. It suggests that journalists can indefinitely retain all personal data that they have about an individual, (a) whether or not they intend to publish such data ("*it does not matter whether you actually publish the story you had in mind*"); and/or (b) if they even have a "hope" of using it in a

different story in the future, or updating an existing story. We would suggest that this is an inaccurate characterisation of the wording "*with a view to publication*" and reads as though journalists are entitled to retain personal data gathered for a story indefinitely, regardless of any real intention to publish it, which they are not.

3. On page 27 at paragraph 4.6, the draft code advises that processors "*should use the most relevant lawful reason and consider if more than one applies*", but does not refer to the obligation to demonstrate compliance by making a record of which lawful basis the processor is relying on per Articles 5(2) and 24 of the UK GDPR (as referred to on the "lawful basis for processing page" of the ICO's guide to the GDPR).

4. On page 28, no reference is made under the "Consent" heading to the crucial fact that data subjects can withdraw their consent at any time, whereupon the relevant controller cannot rely on this lawful basis. This is an important factor to make journalists aware of if they are seeking to rely on such lawful basis.

5. On page 29, paragraphs 4.23 and 4.24, whilst helpful, could be further clarified. For instance, the phrase "*deliberately inferring the data*" in the third bullet point under paragraph 4.23 is unclear in meaning, and perhaps should say "*deliberately attempting to reveal the data*", which mirrors the language used at paragraph 4.24 below. Further, the sentence "*however, if you can only infer or guess these details, you do not need to meet extra conditions to use the data*" is difficult to follow, as it appears to refer to "you" as both the publisher and the reader without drawing a distinction. It also appears to contradict the guidance at 4.23 above; if a reader can infer or guess the information of a special category from what has been published, it may still be special category data.

6. On page 35 at paragraph 5.5, the draft code advises that "*when considering a person's reasonable expectations, it is often important to decide whether a reasonable person would consider the information to be private*". We consider that wording to the effect of "*in all the circumstances*" ought to be added to the end of this sentence because information that might be considered private by a reasonable person generally would not necessarily be private in respect of someone who, for example, has a diminished reasonable expectation of privacy as a result of having put information about their private life into the public domain, or, conversely, an individual who has taken steps to safeguard areas of their private life might be entitled to an increased reasonable expectation of privacy. As a result, the circumstances matter when considering whether an individual has a reasonable expectation of privacy; it is not a 'one size fits all' approach.

7. On page 36 at paragraph 5.10, the draft code cites as an example of information that is usually, but not always, considered private "*personal data about someone's involvement in crime as a victim or a witness*". At paragraph 5.11, the draft code refers to criminal offence data attracting "*extra protection*". We are unclear as to the distinction you are drawing between personal data relating to victims and witnesses and criminal offence data more widely, given the former is included within the latter. The omission of those accused of crimes from the third bullet point of paragraph 5.10, and the absence of any reference to "*actual or alleged*" crimes, appear to create a distinction with criminal offence

data. We are not clear as to the basis of such distinction and it is not specified in the draft code.

8. On page 57, at paragraph 12.20, the draft code says that an individual requesting that their personal data be rectified "*should be able to prove, on the balance of probabilities, that the information is accurate*". This appears to be a disproportionately high burden, and not one that is supported by the legislation. There is clearly an obligation on the data controller to use accurate personal, per Article 5(1)(d) of the UK GDPR and section 7 of the draft code, and the requester has a "*right to obtain from the controller without undue delay the rectification of inaccurate personal data concerning him or her*", per Article 16 of the UK GDPR. The burden is not on the requester to prove that the information is inaccurate, but on the controller/processor to take "*every reasonable step ... to ensure that personal data that are inaccurate, having regard to the purposes for which they are processed, are erased or rectified without delay*" (Article 5(1)(d) UK GDPR). Therefore, "*what the requester tells you*" ought to be a sufficient factor to consider, together with the others listed, without requiring the requester to prove the matter on the balance of probabilities.

9. On page 58, at paragraph 12.28, the draft code suggests that people only have the right to object to the use of their personal data if the controller is "*relying on the legitimate interests lawful reason for using it*". In fact, they can object under other lawful bases, such as the public task basis (see the ICO guidance on "*The right to object to the use of your data*"), and of course they can withdraw their consent, if that lawful basis is relied upon, which is not referred to.

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

Nothing beyond that which is set out above.

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?

We would reiterate the comments above to the extent that the issues are repeated in the code 'at a glance' document. In our view, this document appears to be of limited use on its own without the analysis and explanation provided in the draft code, and we are unclear of its value as a standalone document where its substance is repeated in the draft code itself.

Section three: About you

Q10 What is your name?

Jon Oakley, Thomas Moore

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

Simkins LLP, Partner & Associate

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.

As above.

Thank you for taking the time to share your views and experience.