

Elizabeth Archer

From: [Redacted]
Sent: 10 January 2022 15:15
To: journalismcode
Cc: Fiona McAllister
Subject: Response to ICO consultation on draft journalism code of practice: Channel 4
Attachments: Channel 4 Response on the draft Journalism Code of Practice 10.01.2022.pdf

External: This email originated outside the ICO.

Dear Ms Archer

Please find attached Channel 4's response to the consultation on the draft ICO statutory code of practice for data protection and journalism.

Should there be any further correspondence relating to this consultation we would be grateful if you could contact myself and my colleague, Fiona McAllister (copied).

Kind regards

Oli Murphy

Lawyer, Legal & Compliance

Channel 4

4th Floor West Gate

6 Grace Street

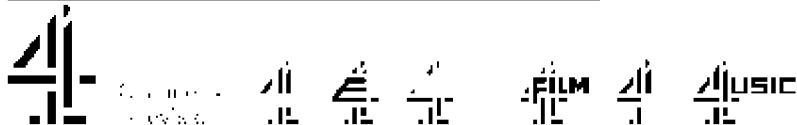
Leeds

LS1 2RP



The Channel 4 Producers Handbook is available here

<http://www.channel4.com/producers-handbook/>



Note:

Any views or opinions are solely those of the author and do not necessarily represent those of Channel Four Television Corporation unless specifically stated. This email and any files transmitted are confidential and intended solely for the use of the individual or entity to which they are addressed.

Thank You.

Channel Four Television Corporation, created by statute under English law, is at 124 Horseferry Road, London, SW1P 2TX .

4 Ventures Limited (Company No. 04106849), incorporated in England and Wales has its registered office at 124 Horseferry Road, London SW1P 2TX.

VAT no: GB 626475817

#####

ICO Consultation on the draft Journalism Code of Practice

Response of Channel 4 Television Corporation

1. Introduction

Channel 4 supports the ICO's intention to "*support organisations and individuals processing personal data for the purposes of journalism*". As a Public Service Broadcaster Channel 4 welcomes the ICO's acknowledgement that "*journalism plays a vital role in the free flow of communications in a democracy*".

At the heart of Channel 4's purpose lies the fundamental human right to freedom of expression and the right of everyone to impart and receive information, ideas and opinions. Channel 4 has a unique statutory remit to innovate, present alternative views, inspire change and reflect diversity of British society. This means that Channel 4's response to the consultation is based on its position as a broadcaster engaged in "*the disclosure to the public of information, opinions or ideas*" (*Satamedia*), through traditional news and current affairs formats, but also through scripted drama and comedy, non-scripted documentary and factual entertainment. Channel 4's output covers a very wide range of methods of communicating information, opinions and ideas to the public.

This response is structured in the same way as the draft code and can be read in parallel to each of the ten sections (there are some sections on which there are no comments).

Channel 4 is a member of the Media Lawyers Association and endorses their submission in addition to this response.

Like the MLA, Channel 4 would welcome the opportunity to further review and consult on the revised draft Code, the intended guidance document for journalists and any other complementary resources before they are finalised.

2. Matters of general application

2.1 Structure and Length

Navigation of the draft code is generally straight forward. Structurally the code would benefit from being ordered to reflect the way that data protection decisions involving the journalism exemption are made. To this end the section dealing with the exemption itself should be positioned towards the end of the code.

To be even more user-friendly Channel 4 suggests that the draft code could be condensed. Currently the draft code runs to 93 pages. In the body of the draft code there is a degree of repetition that Channel 4 suggests could be stripped out. Examples of this appear in the Summary section which is largely repeated in the "At a Glance" paragraphs that preface each specific section.

Channel 4 suggests that the Contents page and the "Navigating the Code" section could be usefully combined to further aid navigation of the draft code whilst also making it more succinct.

Channel 4 is concerned that the length of the draft code could be to the detriment of how user friendly it is. Channel 4's suggested solution is that the draft code adopts a principle-based approach. Channel 4 recognises the ICO's obligations in relation to the draft code as set out in section 124 of the DPA

2018, especially that it must contain “*practical guidance*”. Given the code will have statutory effect, Channel 4 would urge the ICO to carefully consider the way in which “*practical guidance*” is framed in the code. Given the way the Code is to be used (as per page 19), there is a risk that guidance which extends beyond a principle based approach into more prescriptive prose will set untested precedents and impose inflexible processes on organisations. It appears the ICO is alive to this issue as it has recognised the “*wide ranging practices*” that the term journalism can cover. In order to mitigate against this issue, Channel 4 suggests that the ICO adopts a similar approach to Ofcom in relation to the Ofcom Broadcasting Code whereby the code contains the core principles and the detailed guidance is set out separately, outside the scope of the code.

2.2 Case law and tribunal decisions

Under the Data Protection Act 2018, courts and tribunals will take the new code into account when considering data protection cases. It has statutory effect.

The draft code uses several case law and Tribunal decisions as examples and / or for the purposes of guidance. In many cases these examples are first instance decisions, relate to areas of law that are developing or are decisions that are non-binding. Aside from the inevitable debate that could be had about the way the cases are summarised, including these decisions in the draft code could have the consequence of elevating these decisions above the status that they currently have. In addition, reference to such decisions will mean that the lifespan of the draft code in its current format would be limited and that it would need to be constantly updated in line with developing jurisprudence. Channel 4 would therefore suggest that case law and Tribunal decisions are removed from the draft code altogether. In the event that the ICO decides to include case examples, they should feature outside of the scope of the code and within separate guidance in order to distinguish between principles that a court or the Commissioner **has** to take into account and examples which they **may** consider.

The one area in which Channel 4 would advocate the use of case law would be in the section dealing with the protection of sources (page 80). This area of case law is well established and the binding precedent in case law dealing with journalistic source protection would benefit this section.

2.3 Editorial discretion

Whilst the draft code recognises the importance in the freedom of expression it does not go far enough in recognising the expertise of journalists or the deference that should be exercised when considering editorial decision making. The law on this point has recently been set out in *Ali v Channel 5 Broadcasting Limited*, where the Court said:

“Editorial discretion cannot render lawful an interference with privacy which cannot logically or rationally be justified by reference to the public interest served by publication. But that there is a rational view by which public interest can justify publication, particularly giving full weight to editorial knowledge and discretion the court should be slow to interfere.”

The draft code would benefit from explicitly recognising the way in which the law protects editorial discretion in both the introduction and the sections dealing with the reasonable belief elements of the journalism exemption.

3. Balancing journalism and privacy

3.1 Definition of journalism

As a broadcaster that distributes information via a range of platforms and genres Channel 4 welcomes what appears to be a wide definition of journalism. It would be helpful if the guidance under the heading “what is journalism” (page 23) could be more definitive. At present phrases such as “*you may interpret ‘journalism’ to mean*” and “*it is likely that special purposes as a whole cover*”, leave ambiguity.

3.2 Journalism, academia, art and literature

Whilst Channel 4 recognises that the draft code is primarily focused on journalism, it would be helpful if the draft code did more to recognise the special purposes of academia, art and literature in accordance of Article 85(2) GDPR. There is often overlap between these four purposes and the way information is conveyed might not fit into one of the boxes neatly. This should be explicitly recognised – the important thing is that information, opinions or ideas are being conveyed to the public. The draft code does go some way in identifying the importance of art and literature (page 23), but for a broadcaster that purveys information by a variety of means, it is important that it is made explicit that there may sometimes be blurred lines between purposes. It is also important that the special purposes exemption (referred to in more detail below) applies equally to artists and writers as well as journalists. Accordingly, any proposed requirements, including but not limited to record keeping, should be practicable for the wide range of people and organisations engaged in freedom of expression.

3.3 What do we need to do to rely on the special purposes exemption?

The three-stage test is succinctly articulated on page 26 of the draft code. It would be helpful if (in line with the ICO’s other literature on this test) the phrase “*taking into account the special importance of the general public interest in freedom of expression*” was included in the three-stage test. There is some discussion of this principle but this is in the context of why the journalism exemption is less restrictive than other exemptions, not that the inherent interest in freedom of expression must be considered as part of the three stage test.

3.4 What does reasonable belief mean?

Channel 4 agrees with the articulation of the subjective and objective tests for holding a reasonable belief that publication is in the public interest. Channel 4’s position is that this is where the explanation should end. The prescriptive addition of ways in which it might be possible to demonstrate that a subjective belief was held (both in terms of records and policies) is not suitable to the many and varied ways in which consideration of the public interest can arise. The important point is that there is a belief that publication is in the public interest and that belief is objectively reasonable.

3.5 What does “in the public interest” mean?

In line with the above, Channel 4 does not believe that it is helpful to set out in a statutory code, applicable to a whole range of individuals and organisations, large and small, that “*draw[ing] up a list showing the arguments on both sides*” is an effective way to assess the relative weight of competing rights. Such considerations are often complicated, require much discussion and the exercise of fine editorial judgment. The draft code explicitly recognises and respects the independent judgment and expertise of editorial data controllers when it comes to consideration of the public interest. Channel 4 suggests that expertise should clearly not be disregarded simply because the consideration had occurred in a different format or by a different method to that prescribed by the code.

3.6 What does “incompatible with journalism” mean?

It would be beneficial if there was greater clarity around the language used when explaining when it will be held that there is a reasonable belief that a particular provision is incompatible with the purposes of journalism.

When dealing with the reasonable belief that complying with a particular provision is incompatible with the purposes of journalism (page 32), the word 'necessary' is used to explain when a disapplication of data protection law will be permitted. This is a binary test that conflicts with the subsequent points about proportionality and practicality. It is through the principles of practicality and proportionality, rather than necessity, that this principle should be explained.

For greater clarity the provisions on 'reasonable belief' in the incompatibility with journalism would benefit greatly from cross referring to the section *What does "reasonable belief" mean*. In particular, it would be helpful if the following paragraphs of the draft code on when a reasonable belief will be held could either be repeated or explicitly referred to:

"It does not need to be the only reasonable view or the most reasonable view. The ICO, a court or a tribunal may not agree with your assessment but that does not mean that your belief is not reasonable."

"In considering whether your belief is reasonable, the Commissioners role is not to substitute their own belief about what is reasonable in place of yours. It is only to consider the reasonableness of your belief on an objective basis."

By way of reminder, the leading case on the journalism exemption is *Campbell v MGN Ltd* [2003] QB 633 (CA). In that case the Court of Appeal considered the need for the journalism exemption arose as the nature of news reporting made it "impractical" for journalists to comply with many aspects of data protection law:

As to s.32(1)(c) Mr White submitted that there had been no necessity to publish the details of Miss Campbell's attendance at Narcotics Anonymous, or the photographs of her leaving the meeting, in order to put the record straight. It followed that Mr Morgan could not reasonably have believed it was incompatible with the purpose of journalism to refrain from publishing these details.

We have held earlier in this judgment that the details of Miss Campbell's attendance at Narcotics Anonymous was part of a journalistic package that it was reasonable to publish in the public interest. We do not consider that it would have been reasonably practicable to comply with the provisions of the data protection principles while at the same time making the publications in question. It follows that the Appellants have made good their contention that the three conditions of the exemption under s.32 were satisfied.

Accordingly, the Court rejected the proposition that compliance with data protection law was "incompatible" if it was necessary to breach its provisions in order to publish. What the data controller must decide is whether full compliance would be "impractical" and it is this belief that the court or regulator must then test against the standard of reasonableness. This interpretation gives proper effect to the principle of editorial discretion. An interpretation that permitted reliance on the exemption only where an editor believes that covering a story would necessarily involve a breach of data protection law would not give sufficient protection to editorial discretion.

To reflect the current law, the following wording should be included on page 32 of the draft code:

"In other words, it is necessary to not comply with data protection law in order to achieve your journalistic purpose"

should be replaced with:

“In other words, it is impractical to comply with data protection law while still achieving your journalistic purpose”.

3.7 Demonstrating your decision

A wide variety of content is broadcast by Channel 4 across its different channels and platforms. There are different risks associated with different types of content. Whilst this section does recognise those differing risks when considering appropriate record keeping (see page 34) it would be helpful if this section was framed entirely from a risk / proportionality perspective. There is a danger that being too prescriptive about the records and paperwork that needs to be produced for each piece of content will create an unworkable administrative burden on many of the small production companies with which Channel 4 work.

4. Be able to demonstrate compliance

In accordance with the points made above it would be beneficial if the risk-based, proportionate approach to accountability and record keeping could be made more explicit in this section. Journalism is by its very nature constantly evolving and very often decisions must be taken swiftly (whilst filming or otherwise) in order to take further action and/or release information to the public. Channel 4 is concerned that the potential administrative and financial burden placed on the independent production sector via myriad policies, procedures and DPIAs (referred to) could have a chilling effect on the distribution of information ideas and opinions.

The GDPR in the main does not expressly require the various records and policies set out in the draft code. The important thing is that the data controller should “be able to demonstrate compliance” with the data protection principles.

There is recognition in the draft code that “*proportionate and risk-based data protection measures*” are sufficient to satisfy the accountability principle. It would be beneficial if this theme could be given more emphasis under the headings “Why is it important that we are able to demonstrate compliance” and “How can we make sure that we are able to demonstrate compliance”. Channel 4 is concerned as to the repeated reference to Data Protection Impact Assessments and various other policies and procedures in this section. Whilst DPIAs are mandatory under Article 35(1) GDPR where the conditions outlined in that clause are satisfied and where there is a high risk to the rights and freedoms of data subjects, they are not a one size fits all solution. Channel 4 produces a broad range of content, not all of which involves data processing that would create a high risk of harm. In lower risk data processing scenarios controllers, particularly in the journalistic sphere, should be given flexibility to adopt proportionate and risk based accountability mechanisms. This would be in line with the requirement under Article 5(2) of the GDPR to “*demonstrate compliance*” and satisfies Channel 4’s regulator, Ofcom. It would be more efficient if the Channel was able to rely on what it provides to Ofcom in response to any ICO requests rather than having separate regimes.

Established compliance procedures already exist under many organisations’ existing regulatory obligations as well as within the Ofcom Broadcasting Code, which Channel 4 complies with. Where these procedures cover the key themes and principles that exist in data protection law it would be useful for the code to confirm that additional policies, that would largely be duplicates, do not become necessary as a result of this code.

5. Justify your use of personal data

5.1 Manifestly made public by the data subject

The provisions around when data is made manifestly public would benefit from greater clarity. The draft code states that “*data must realistically be accessible to a member of the general public*” but that if that member of the public is part of a limited audience, that data may not be sufficiently public. To aid understanding an explanation that the term “manifestly” adds a requirement over and above data simply being publicly accessible would be useful.

It is also unclear why the date on which data was published has any bearing if it is manifestly publicly accessible. The publicly accessible nature of data and the privacy rights that might attach to that data as a result of it having been published a long time ago are two separate issues.

This is an area which is incredibly fact sensitive. As a result, this would be an area that would benefit from the principled approach suggested at the head of this response, reducing the level of prescriptive detail where fine changes in circumstances are likely to dictate whether data has been made sufficiently public.

5.2 Covert surveillance, subterfuge, and similar intrusive methods

This is an area in which Channel 4 has existing regulatory obligations under the Ofcom Broadcasting Code. Whilst the proposals on this area in the draft code are largely analogous with the position under the Ofcom Broadcasting Code, it would be useful if this section could clarify that nothing in this section is meant to contradict the requirements under the Ofcom Broadcasting Code. In particular, in certain circumstances, the Ofcom Broadcasting Code permits covert filming and subterfuge for the purposes of entertainment (see Ofcom Broadcasting Code section 8.15). Without clarity that nothing in the draft code is meant to conflict with the rules and guidance of the Ofcom Broadcasting Code, there could be confusion as to whether covert filming or subterfuge is permitted for entertainment purposes under the draft code.

6. Take reasonable steps to ensure personal data is accurate

Channel 4, along with many other organisations in the journalism sphere, already has stringent accuracy obligations under existing industry regulations. The draft code sets out that it does not “*concern press conduct or standards in general*” and we assume that the same is true of broadcast standards. It would be therefore useful if at the very head of the section on accuracy it was made explicit that where applicable, deference will be given to industry regulators by the ICO. Channel 4 is keen to avoid a situation where organisations in effect have two regulators on the same area, with the duplication of resources and potential for diverging standards which that could entail.

Again, this is an area which is incredibly fact sensitive. Given the plethora of existing industry guidance in this area and the need for careful fact sensitive decisions to be made, this would be another area that would benefit from a more principled approach and a reduction in prescriptive detail. Such an approach would avoid any contradictions or divergences in approach with the guidance offered by other regulators.

The draft code, which would become a statutory code of practice refers to practices for ensuring accuracy under the BBC’s Editorial guidelines and IPSO’s guidance on reporting major incidents, neither of which apply to Channel 4. It does not appear that it is the intention to give that guidance statutory effect (given what is said on page 20) however referring to its content as more than supplementary reading could have that effect. Separately, reference is made to the Ofcom Broadcasting Code in the draft code, which does apply to Channel 4 and other broadcasters but does

not apply to other individuals and organisations which the draft code will apply to. Channel 4 will continue to comply with its obligations under the Ofcom Broadcasting Code whether or not is referred to in the draft code.

7. Decide how long to keep personal data

In the section dealing with data retention it is important that the specific role of broadcasters and the press in maintaining archives is more explicitly recognised. Under the heading “retaining news archives” the “strong, general public interest in the preservation of news archives” is set out, however in a code dealing with journalistic practices this section should be given much more prominence and be placed near the head of the guidance.

8. Helping people to exercise their rights

Channel 4 agrees that individuals should be aided in exercising their rights. However, this area of data protection law can unfortunately be open to abuse, either in litigation (often as a means of circumventing litigation timelines) or as an impermissible tool of prior restraint in attempts to prevent legitimate journalistic activities and publication of matters of public interest. It would therefore be useful if the guidance which accompanies the code on this section (assuming Channel 4’s suggestion at 2.1 above is implemented and the code is confined to core principles and there is separate guidance) could include an explanation of what an individual’s exercise of their rights cannot achieve, particularly with reference to the above potential abuses.

8.1 Refusals

Channel 4 accepts that it may be appropriate to explain why a data subject’s request is being rejected, including by reference to the fact that the journalism exemption is being relied upon, however there will be cases where even giving that information will undermine the invoking of the exemption and cannot be required. In certain circumstances, confirming the existence of an investigation may be one example of this. This should be made clear on pages 80 and 83.

In addition, the explanation under the refusals heading states that “*Generally you are required to comply with a request without undue delay within one month*”. Specific reference should be made to the fact that controllers can extend the time to respond by a further two months if the request is complex or several requests have been received from the same individual.

8.2 Right of access

In the discussion of sources on page 80, the word ‘*necessary*’ needs to be added so that section 10 of the Contempt of Court Act is correctly summarised.

8.3 Right to restriction

Further clarity would be useful on page 81 and 82 where the draft code states that processing should be restricted whilst accuracy is checked. It would be unfortunate if this section were to be interpreted as compelling broadcasters and publishers to remove stories from their distribution channels if the accuracy of a story was challenged. Such an eventuality would clearly allow those seeking to delay publication of a story on illegitimate grounds an easy means of doing so and therefore an unwarranted restriction on freedom of expression. There is an existing process for dealing with rectification requests which appropriately balances data controller and data subject rights, under the *Loutchansky* notice procedure.

If you would like to contact us in relation to any of the points raised please contact Oliver Murphy and Fiona McAllister on [REDACTED]

Submitted on 10 January 2022

Oliver Murphy and Fiona McAllister

Channel 4 Television