

Elizabeth Archer

From: [REDACTED]
Sent: 10 January 2022 20:26
To: journalismcode
Subject: Response Document from The Privacy practice.
Attachments: journalism-code-word-202110 jlg.docx

External: This email originated outside the ICO.
Please see my response to your Journalism draft Code.
Yours JLG

James Leaton Gray [REDACTED]

PRIVACY PRACTICE



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ICO consultation: Draft journalism code of practice

Start date: 13 October 2021
End date: 10 January 2022

Introduction

We are seeking feedback on the draft code of practice about processing personal data for the purposes of journalism. This is a statutory code under section 124 of the Data Protection Act 2018 (DPA 2018).

The code provides practical guidance about processing personal data for the purposes of journalism in accordance with the requirements of data protection legislation and good practice.

The code updates our previous guidance, [Data protection and journalism: a guide for the media](#), which was published in 2014.

It will also help us to assess compliance as part of the periodic review of processing for the purposes of journalism that the ICO must carry out under section 178 of the DPA 2018.

Before drafting the code, we launched a [call for views in 2019](#). You can view a [summary of the responses and individual responses on our website](#).

The draft is now out for public consultation. The public consultation will remain open for 12 weeks until 10 January 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 the respondent indicates that they are an individual acting in a private capacity (eg a member of the public). All responses from organisations and individuals responding in a professional capacity will be published. We will remove email addresses and telephone numbers from these responses but apart from this, we will publish them in full.

For more information about what we do with personal data please see our [privacy notice](#).

Questions

When commenting, please bear in mind that we aim to focus on key points and practical information relevant to journalism where possible. The code does not aim to cover all of the legislation and may assume knowledge of some general data protection terms and concepts. Where relevant, the code may link to further reading such as the [Guide to the UK GDPR](#) but this does not form part of the statutory code.

Please also bear in mind that we intend to provide a 'quick guide', and perhaps other resources, to support day-to-day journalism and smaller organisations, as we did with our previous media guidance. Please let us know if you have any ideas about resources to support this code in the general comment box at the end of this survey.

Q1 To what extent do you agree that the code is clear?

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree

Q1a If the code could be clearer, please tick which section(s) could be clearer.

- Summary
- Navigating the code
- About this code
- Balance journalism and privacy
- Be able to demonstrate your compliance
- Keep personal data secure
- Justify your use of personal data
- Make sure personal data is accurate
- Process personal data for specific purposes
- Use the right amount of personal data
- Decide how long to keep personal data
- Be clear about roles and responsibilities
- Help people to exercise their rights
- Disputes and enforcement
- Annex 1

Please explain your response to Q1a.

Lack of emphasis of importance of freedom of expression in the body of the advice leads to a lack of clarity over when the code is applicable and in force. The starting point of the code seems to be the reverse of my understanding of the legal position. It appears to be asserting that the GDPR applies, unless and until, it can be shown that the journalism exemption needs to apply to a specific circumstance. My understanding is that if the special purposes exemption is in force, then there is a derogation in relation to the relevant sections of GDPR. Therefore, the significant element is the four part test in

the DPA 2018 (quoted on page 5). Whilst apparently a semantic point, to an unskilled observer the lack of clarity on this point is significant. It might encourage an individual to believe that GDPR rights apply to their circumstance when in fact they are derogated. It may confuse journalists as to exactly when they need to comply with GDPR in their work.

Both of these fundamental rights need to be protected and I do not think the language of the code as presently drafted gets that balance right or emphasises the importance of the DPA test in each circumstance and section of the code.

Q2 To what extent do you agree that it is easy to find information in the draft code?

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree

Q2a If it could be easier to find information in the code, please tell us how it could be easier.

The code overall should be shorter and more focused on a principles-based approach. The guidance and other support material should be alongside, not inside the code. This would allow it to be much briefer, more focused and therefore easier to find information.

There is also a degree of duplication that has the effect of making it more difficult to find the specific areas that are required.

The Code will be used by courts and the ICO itself as the basis of regulatory action. Clarity will be key in this regard.

Q3 To what extent do you agree that the code provides the right level of detail?

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree

Q3a If the code could provide a better level of detail, please tell us how it could be improved.

See answer to Q2a. Too much detail is included in the code. More, such as legal cases and examples, would be better moved to accompanying material.

Q4 To what extent do you agree that the code provides practical guidance to help individuals processing personal data for the purposes of journalism to understand and comply with data protection obligations?

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree

Q4a If the code could be more practical, please tick which section(s) could be more practical and tell us how it could be improved.

- Summary
- Navigating the code
- About this code
- Balance journalism and privacy
- Be able to demonstrate your compliance
- Keep personal data secure
- Justify your use of personal data
- Make sure personal data is accurate
- Process personal data for specific purposes
- Use the right amount of personal data
- Decide how long to keep personal data
- Be clear about roles and responsibilities
- Help people to exercise their rights
- Disputes and enforcement
- Annex 1

Please explain your response to Q4a.

You have stated that the code is designed to cover all journalism from a citizen blog to multi-national press or broadcasters. Yet the language is (perfectly understandably) couched in terms that are only familiar to those operating in a data protection sphere (for example DPIAs, Special category data, high risk processing).

The code needs to be shorter with guides made available for the different audiences: citizen journalists/bloggers; freelance professional journalists and small companies; and larger media organisations. Each will have very different needs and will require appropriate guidance couched in terms they understand.

Q5 To what extent do you agree that the draft code covers the right issues about journalism in the context of data protection?

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree

Q5a If we have not covered the right issues in the code, please tell us how it could be improved.

I do not think there is enough emphasis on the balance between data protection and freedom of information in the sections where the derogation might apply. I fear that this will lead to greater conflict between these two vital rights.

The test in the DPA for the derogation to apply is outlined in the summary on page 5 and in more detail in Section 1 but then mention of the derogation and its implication is often very limited. For example, in section 9 the journalism exemption is not mentioned until the final paragraph in the chapter. However, it is likely that most of the third parties involved in a newsgathering operation will not be engaged until the moment of exchange of the information. In most cases there will be no contract, or expectation or possibility to create one. Yet the collection of personal data is fundamental to the creation and processing of the journalism. The derogation is highly likely to apply but is hardly mentioned.

Q6 Please provide details of any cases, examples, scenarios or online resources that it would be useful for us to include in the code.

Q7 To what extent do you agree that the draft code effectively protects the public interest in freedom of expression and information?

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree

Q7a If the draft code could protect the public interest in freedom of expression and information more effectively, please tell us how it could be improved (bearing in mind the need to balance competing rights in the code).

The test for the engagement of the journalistic exemption appears to be that any processing cannot be conducted unless it is necessary to exempt it. Surely it should be that it is incompatible with journalism?

A practical example of this difference would be in the application of Subject Access Rights (SAR). You emphasise, rightly, that the confidentiality of a source could be a reason why the exemption would be engaged, and the access request denied. But there is a broader issue of SARs requests on journalism which is not considered. If every individual had the right to request a copy of all the rushes they were included in, interviews or video General Views (GVs) the cost and resources would be huge. Even for one individual the organisation would need to identify all rushes or electronic notes the individual was included on. Then they should arrange for just those sections to be copied onto a format that the individual could access. For some media this could mean booking an edit suite, or a significant time commitment from the individual journalist. Both would have immediate cost implications and therefore reducing the available time and money to be spent on journalism. If you multiply this by every interviewee, or anyone included in a GV, for example a school assembly, the implications for the amount of journalism that can be created are huge. So, the general position on the availability of SARs is more significant than the immediate impact on the journalism of one request.

Another aspect of the use of SARs by individuals interacting with the press needs to be considered. Only a small element of an interview may be included in a report, or an article and the individual may not agree with the elements selected. However, this is the nature of the editorial process. The opening up of this to further pressure and the individual's view on what should, or should not be included would lead to an additional pressure on individual journalists and potentially significant time pressure, particularly on freelance journalists or small companies. The individual already has the right to complain about any editorial lapses in material selection or editing through the media regulators. There is a significant incompatibility in the resources pressure that too narrow an interpretation of the journalistic exemption in this area implies.

The guide does state that resource implications may be a relevant factor, but this wording would allow an individual to point out that the cost of their one SAR is not significant and therefore it is not necessary to reject the request on the grounds of the derogation, thus ignoring the cumulative effect. The same is true of many of the other data subject rights.

Q8 To what extent do you agree that the draft code effectively protects the public interest in data protection and privacy?

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree

Q8a If the draft code could protect the public interest in data protection and privacy more effectively, please tell us how it could be improved (bearing in mind the need to balance competing rights in the code).

Where the journalistic exemption does not apply the code is covering the necessary compliance processes and procedures.

Q9 Could the draft code have any unwarranted or unintended consequences?

- Yes
 No

Q9a If yes, please explain your answer to Q9.

Significant hidden costs – for example in SARs as explained above. Also a new compliance burden, (e.g, DPIAs for all programme types, styles and types of journalism, each of which would need a separate review. Or the potential for separate complaints processes if there is some doubt about the necessity of the journalistic exemptions application). This would particularly be problematic for smaller organisations and freelancers.

There is also a danger of regulatory double jeopardy. If an individual asserts that the derogation does not apply to their complaint or dispute with a journalistic entity, that entity will need to be dealing with two simultaneous systems, one for the ICO, the other for a media regulator. It is true to say this is the case for other industries, for example Financial Services, but in many of these cases the firms involved are significantly larger and better resourced, which would not apply to the journalistic world where many are freelancers or small companies.

The way the code is presently drafted will lead to the ICO becoming a media regulator by default. If following a complaint, the ICO were to deem the journalistic exemption did not apply in a specific case it would then need to make a judgement on the specifics of the case. For example, a complaint is made by someone with a criminal conviction and related to an article that referred to that conviction and suggested that the Rehabilitation of Offenders Act should apply and the article should be taken down. The ICO would then need to make what is an editorial decision about whether the particular circumstances of the case warrant the continued publication. It is highly likely that a media regulator will be asked to make the same decision by the requestor. Leading to potential conflict of outcome and confusion both for the individual and the journalistic organisation.

Q10 Do you think this code requires a transition period before it comes into force?

- Yes
 No

Q10a If yes, please tick the most appropriate option.

- 3 months
- 6 months
- 12 months

Q11 Is there anything else you want to tell us about the draft code?

Section 2 About you

Please see privacy information above.

Q12 What is your name?

James Leaton Gray

Q13 If applicable, what is the name of your organisation and your role?

The Privacy Practice, Director

Q14 Are you acting: Please select the capacity in which you are acting.

- 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.

Q14a Are you: Please select most appropriate.

- A member of the public
- A citizen journalist
- A public figure (eg individuals 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)
- A representative of a newspaper or magazine
- A representative of a broadcaster
- A representative of an online service other than those above
- A representative of the views and interests of data subjects
- A representative of a trade association
- A representative of a regulator
- A representative of a 'third sector'/'civil society' body (eg charity, voluntary and community organisation, social enterprise or think tank)
- A freelance journalist

- A private investigator
- A photographer
- An academic
- A lawyer
- Other

If other, please specify.


External Independent Data Protection Officer for a number of clients, some of whom work in the media and journalistic arena. Co-ordinator of an informal group of large broadcast and press organisations. Former DPO of the BBC, also a former journalist and programme maker.

Further consultation

Q15 Would you be happy for us to contact you regarding our consultation on the journalism code?

- Yes
- No


If so, please provide the best contact details.



Q16 Would you be happy for us to contact you regarding our work to develop a process to review processing for journalism in accordance with the statutory requirement 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.