

Elizabeth Archer

From: [REDACTED]
Sent: 09 January 2022 14:12
To: journalismcode
Cc: Todd, Elle; Gates, Tom
Subject: Journalism Code
Attachments: journalism-code-word-202110.docx

External: This email originated outside the ICO.
ICO journalism code team,

I attach our completed consultation survey response.

Do let us know if you have any questions or comments.

Kind regards,

Elle

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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.

- | | |
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| <p>(i)</p> | <p>Demonstrate compliance. Given the broad scope of the code (both in terms of the entities it applies to - from citizen journalists and large broadcasters as well as the breadth of journalism - and in terms of the types of journalism it covers - from live reporting to documentaries and print long form journalism), it remains too vague as to what the ICO's actual expectations are in terms of accountability in particular. It is not clear what 'good' looks like and</p> |
|------------|--|

too much is left for interpretation with phrases such as “*accountability is a flexible concept. As a general rule of thumb, what you do should be proportionate to the risks you are taking with personal data.*” The code mentions having appropriate measures without giving tangible examples of what would be considered proportionate for different forms of processing and journalism. A clear position in relation to accountability expectations for recording reliance upon the journalistic exemption in particular are crucial, not least in light of the challenges and risks shown in the *True Visions* case. When is a documented assessment form for the journalistic exemption needed for example, as opposed to what is commonly seen with compliance teams covering points at a high level in email advice to the business or in the notes of face to face meetings? Is documentation required at different stages – for example at a research stage and then again pre-broadcast or publication? Can this be documented retrospectively? Further to this, the code acknowledges that significant responsibility for compliance may be delegated to the ‘journalist on the ground’ however it does not elaborate as to how these journalists should approach accountability and how far they are required to go in terms of documentation whilst ‘on the ground’. This is the steer that we know clients have been waiting for in the new code since accountability is a central part of GDPR.

(ii) **Balance journalism and privacy.** The code makes it very clear how key the journalistic exemption is but, again, it remains too vague as to what exactly is expected of companies (for example references to “[*some stories*] may require more formal consideration and more editorial involvement” but without saying what form that should be in and what they should consider. It should be noted that many media companies face different requirements in different countries in the EU – for example some specific requirements in Ireland and almost zero obligations in Germany given how broad the exemption is applied there. The code is the key place that international media companies and those bringing claims need to be able to look to in order to know what is required without too much interpretation and guesswork. Another key issue is that many media companies already consider the Ofcom Broadcasting Code guidelines but crucially the terms and tests around substantial public interest are different. Companies need to be given clarity on this.

(iii) **Justify your use of personal data.** There are some missed opportunities to give more clear guidance on common issues in this section. For example: (a) consent under GDPR is different to informed consent from an Ofcom Broadcasting Code perspective and many companies don’t understand this nuance and need guidance. A clear reminder should be provided early on that informed consent under the Ofcom Broadcasting Code and consent under the GDPR are two different concepts – there is also a reference in this section to reliance on releases for programmes but these don’t fulfil the requirements for consent under GDPR because the consent is included as a contractual term amongst other contractual terms (which results in that consent not being valid) and to comply with GDPR would need to be separate. Additionally, references are made

to the withdrawal of consent and the 'problems' such withdrawal could cause – in many cases it is acceptable to collect consent for data processing and then, if that consent is withdrawn, the company can consider relying upon the journalistic exemption – the potential availability of the exemption should be mentioned here to avoid confusion; (b) the lawful basis of manifestly made public is little written about and causes problems in the context of journalism – for example can it be applied to information given in a live broadcast or (not mentioned in the code) only to personal data which is already in the public domain as is currently stated in the code and other ICO guidance? In addition, the section on criminal offences could raise more questions than it answers given that the referenced Courts and Tribunal service guidelines are not themselves clear – for example, is it only jury trial criminal offences which are deemed to be made manifestly made public and how in practice will a company track when offences are spent or not whilst complying with (for example) data minimisation obligations? In many cases, it would appear better to apply the journalistic exemption rather than rely on this (seemingly restrictive) lawful basis but further guidance is required on this topic; and (c) when setting out the requirements that must be met to process special category data under 'Journalism in connection with unlawful acts and dishonesty', the code states that the 'substantial public interest' that must be identified as part of such requirements should be 'considerably important and sufficient' but does not go into any further detail on what this means.

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.

Each section could be demarcated more clearly so that when scrolling through the PDF it is obvious you have moved into the next section.

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 comments and suggestions for areas where more detailed guidance is needed in relation to Q2 above. To emphasise, for each section it needs to be clearer what is expected of different types of journalist or journalistic enterprise and what type of journalism. Currently, everything is bundled together leaving it very unclear what is required when, with many sections simply referencing appropriateness and proportionality. It should be noted that this is a key issue that requires more detail as against the last version of the code which was published at a time when citizen journalism was not as prevalent. Since more types and forms of journalism are now in focus, the differences need to be more firmly described and guidance for each (or at least broad categories) given. We would recommend giving more detail on the 'tricky' areas for journalism (i.e. those we have covered in Q2 above) and in other areas, such as general obligations on security, data subject rights etc., the code can refer out to other existing guidance. This will help to keep the document length down whilst providing more sector specific guidance where it is needed.

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.

See responses to Q2.

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.

See responses to Q2.

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

- Live broadcast involving special category or criminal offence data about an individual who is there but also those who are not.
- The above but not live and instead in front of a studio or dictated to a journalist with a view to broadcast/publication.
- Covert filming.
- Filming in police cells, and in particular (as mentioned above) how documentation and accountability requirements can be complied with when decisions to film in these scenarios and based on the journalistic exemption can often be time sensitive.
- Release forms and the difference between informed consent and GDPR consent (see comments in Q2 above).
- Best practice for recording the journalistic exemption assessment. We have created forms and processes for many companies since there was no existing guidance or template and this could be useful for others.

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).

See recommendations given in responses above.

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).

See recommendations given in responses above.

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

- Yes
- No

Q9a If yes, please explain your answer to Q9.

Lack of clarity on compliance issues could lead to an increase in complaints and legal claims from individuals which could be avoided if companies in particular were clear as to what is expected of them.

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?

Elle Todd and Tom Gates

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

Partner and associate, respectively, Reed Smith LLP

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.

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.