

# Media workshop to inform the development of the ICO's guidance on data protection and journalism, in light of the Leveson Inquiry recommendation

## Summary report

### Aims of the workshop

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In the report of the Leveson Inquiry into the culture, practices and ethics of the press, Lord Justice Leveson recommended that the ICO:

*"should take immediate steps, in consultation with the industry, to prepare and issue comprehensive good practice guidelines and advice on appropriate principles and standards to be observed by the press in the processing of personal data."*

The ICO accepted this recommendation, and published a framework consultation document in February 2013 to seek initial views from the industry and the public on the format, scope and content of its guidance.

Following that consultation, the ICO held a workshop with representatives of the media on 12 September 2013 to further inform the development of the guidance. Attendees included working journalists and editors from a broad cross-section of the British media, including print journalism, periodicals and broadcast media. The stated aims of the workshop were:

- To enable the ICO to understand the issues that journalists and editors face when balancing privacy rights against their role in communicating information to the public and freedom of expression, and to understand current practices and procedures in this area.

- To enable a discussion about what good practice looks like, and areas where data protection practice may need to improve and where proportionate guidance is needed – including a discussion about what the ICO can cover and what other bodies can cover.
- To further communicate the ICO's aims for the guidance, and to try and improve the level of industry input and support for the guidance.
- To demystify section 32 of the Data Protection Act and other misunderstandings around data protection.
- To build long term stakeholder links with the media and publishing sector.

The workshop was held under the Chatham House Rule. Only ICO speakers are identified in this report; all other comments are unattributed.

## Discussion points

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A document setting out the aims of the workshop and proposed points for discussion was provided in advance. The proposed questions for debate and discussion were as follows:

- What concerns have journalists got about the Data Protection Act (as it stands)?
- Can the attendees explain what existing guidance they use to guide decision making related to privacy and freedom of expression?
- How would journalists articulate the public interest in journalism, in general terms? how much weight can be given to this general interest, on its own?
- Can the attendees provide any specific examples of public interest journalism where using personal information was at the core of the story?

- How much weight should be on the public interest of the specific story, and how much on the general public interest in a free press?
- The ICO acknowledges that a privacy/freedom of expression balancing exercise is not always an overt/technical exercise – but when these judgements do take place:
  - what are the triggers that make a journalist seek a steer or a decision from someone in an editorial/managerial/legal role?
  - who is involved in these decisions?
  - are the decisions case by case?
  - what sort of audit trail is generated?
- Thinking about the lifecycle of developing a story – from idea/leads to a decision about publication or non-publication – where might considerations or discussions about privacy take place?
- Any views on what the ICO guidance should cover? Shouldn't cover? And if not the ICO – could the existing industry codes or guidance say more?

## ICO introductory remarks

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The Information Commissioner introduced the ICO staff in attendance at the event:

- Christopher Graham, Information Commissioner
- Steve Wood, Head of Policy Delivery
- Judith Jones, Strategic Liaison (stakeholder relations)
- John Kavanagh, Strategic Liaison (stakeholder relations)
- Lynsey Smith, Policy Delivery (writing the guidance)
- Robert Parker, Head of Corporate Affairs
- David Murphy, Senior Press Officer

The Commissioner began the workshop by explaining its background and purpose. Lord Justice Leveson recommended that the ICO should issue comprehensive guidance to the press on data protection. The ICO has accepted that it could have done more to provide guidance in the past. The ICO has already outlined the key areas it intends to cover in the [\*Data Protection and the press: Framework consultation on proposed ICO code of practice\*](#) published in February 2013.

The ICO has listened to the consultation feedback from the media about possible confusion with the Editors' Code – the ICO will not produce a formal Code of Practice, but will provide guidance explaining the law. In order to formulate useful and relevant guidance, the ICO wants to use the workshop to gain a better understanding of current working practices in relation to privacy, public interest and the decision-making process in journalism.

The ICO recognises that freedom of expression and the right to privacy are competing rights that must be balanced; neither can be considered dominant. The ICO is mindful of the need to ensure its guidance to the media does not undermine the proper role of the press in a democratic society, proscribe practices that constrain journalism and result in a chilling effect.

Steve Wood then gave a brief introduction to the Data Protection Act. He explained that the workshop discussions and guidance would focus on the Act as it already applies and not on any proposed changes to the law.

The starting point is that the Act does apply to the press and broadcasters, although the section 32 exemption can in effect provide a public interest defence for most of the provisions of the Act. The exemption depends upon a reasonable belief that the publication of a story is in the public interest, and a reasonable belief that complying with the relevant aspect of the Act would be incompatible with journalistic purposes. The Commissioner must have regard to compliance with existing codes of practice for the media - the Act does not mean that the

view of the ICO should replicate or replace any editorial oversight or industry codes. Clear evidence of process and governance, focused on the public interest, should make demonstration of 'reasonable belief' straightforward in most cases.

The Commissioner then chaired a discussion on relevant journalistic practices and how they relate back to data protection and privacy. The discussions have been grouped and summarised below under four broad themes:

1. Privacy and the public interest
2. Governance and decision-making
3. Wider data protection issues
4. ICO guidance

## Summary of discussion (by theme)

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### **1. Privacy and the public interest**

There was a strong sense amongst the participants that the media investigate and publish stories responsibly while paying due regard to matters of privacy and public interest, and that the public interest underpins everything they do. The strong professional training of journalists was cited numerous times to back up this point. One participant emphasised that the media do not go on fishing expeditions; all investigative stories must have a demonstrable origin.

Many participants from the press spoke about their existing industry codes and in-house guidelines regarding privacy and the public interest. The broadcast media spoke about their own codes, derived from Ofcom and the pre-existing guidance by the ICO.

There was a broad consensus on the sorts of factors which would affect whether publication was in the public interest, although inevitably some

differences were apparent between the broadsheet press, tabloid press, and other types of publication about what sorts of stories might be considered for publication. The participants were generally in agreement over the approach to stories relating to the private lives of public figures – a public interest threshold would first have to be crossed, for example publishing a story about an adulterous MP only after that MP has chosen to preach about family values and/or has a certain level of public profile. However, several participants emphasised the subjective nature of any public interest decision and the difficulties inherent in attempting to define the test or prescribe the outcome.

Other publications that concentrate on ordinary people or local figures who are not high profile face a different set of concerns. Stories are often permission-based. The concern here rests not with balancing the privacy of the principal subject with the public interest in public affairs, but with balancing the individual's freedom of expression against harm to any associated parties mentioned in or affected by the story, and ensuring a fair and even approach and a right to reply.

There was a recognition that there is a general public interest in a free press, which must be reflected in any public interest test. But that by itself wouldn't justify publication - decisions on publication would always be taken in the circumstances of each case.

A number of participants emphasised that determining whether and how to investigate or publish a story was done in the round, and was not explicitly labelled as a decision on data protection or the public interest. In fact, the media's focus tends to be on libel, privacy law, contempt of court, and PCC complaints. Decisions not to publish were made more from a legal risk assessment perspective than from purely a public interest viewpoint. Several participants did also point out that they don't generally receive complaints on data protection breaches; instead complaints tend to centre on accuracy and fair representation, or breach of privacy claims under Article 8 of the European Convention on Human Rights and the Human Rights Act 1998. Similarly, one participant mentioned that training

and reference materials for journalists focused on these other areas and did not highlight data protection issues.

## **2. Governance and decision-making**

All participants emphasised that they had robust governance. Reference was made to professional training and standards, internal policies, in-house legal teams, the use of external counsel, and close working relationships between reporters and editors.

During the workshop, it became apparent that the decision-making process can be very different depending on the corporate structure of a media organisation, the frequency of publication and the nature of the publication itself. The audit trail of a story's development may be quite formal in certain publications – for example, some periodicals have formal meetings to commission every story and then regular review meetings to discuss every aspect at each stage prior to publication. The commissioning and review panel is likely to include journalists, editorial staff and legal counsel. At the other end of the scale, the tight deadlines on daily papers mean that a formal audit trail is more difficult. There is a greater reliance on the journalist's professional judgment and informal contact with the editorial team. The journalist is expected to discuss the story with the news editor throughout, who will pass it up the chain and flag up any issues. There are strong in-built checks – but they rely on collective journalistic instinct rather than formal procedures.

Participants also said that there was no standard model of the lifecycle of a newspaper story, as there were too many different ways a story could start. The ICO cannot assume that data protection concerns will be addressed at the same stage in every story's lifecycle. Neither were there any standard triggers for formal decisions on the public interest – papers would put experienced reporters on stories likely to raise issues, and trust them to exercise sound judgment and flag up any concerns. Print journalists are trained professionals who must adhere to the Editors' Code and are expected to use reasonable common sense when considering how

they obtain information, and escalate concerns appropriately to their editors and legal advisors. Apart from the published content of the story, the nature of supporting information and the way it was obtained were both mentioned as factors which might trigger legal advice.

Data protection was not considered to be a prominent or explicit element of the decision-making process. Instead it is subsumed within a wider range of compliance and legal issues that shape journalistic processes and output, including compliance with industry codes of practice, the risks of libel or Article 8 claims, and contempt of court.

### **3. Wider data protection issues**

#### **(a) When does the Data Protection Act apply?**

There were serious concerns that very broad interpretations of the Act might prevent the media collecting and retaining information vital to their work. Journalists need to collect a lot of information with no intention of publication – many participants were unsure whether this constituted data processing and thus fell under the remit of the Data Protection Act. Information held by journalists is not always clearly delineated on a per-story basis. Instead much information needs to be kept indefinitely, in case it becomes useful for future stories. Contact details in particular are a vital journalistic resource. Any requirement to delete data after a set period of time or restrict its use to a particular story would stop journalists from being able to do their jobs.

Several participants said they would welcome more guidance on the basics of the Act, such as clarity over what is and is not personal data, what information is 'private', and what counts as processing. There was also a need for clarity on the effect of technological developments such as social networking and the increasing amount of information individuals are uploading about themselves.

## **(b) A barrier to obtaining information**

There were also concerns that the Data Protection Act is often used as a reason to withhold information from journalists, thus undermining their ability to investigate a story. Participants cited the case of the Crown Prosecution Service as one organisation that has set out clearly defined parameters of how it can engage with the media with regard to information release. The media would welcome similar developments elsewhere in both the public and private sector. The ICO could help by providing guidance on when information can be given out to journalists without breaching data protection. The key sentiment here was that the Data Protection Act should be permissive, not restrictive, and should not stand in the way of public interest journalism.

## **(c) Security**

There were very few examples of measures taken to keep information secure. One example was given of a high-profile story where information was encrypted and kept on non-networked computers, but this type of measure was seen as only necessary in extreme circumstances. One participant suggested that around 80% of information held by journalists is in the form of personal notepads written in shorthand. Such information is not easily deciphered by the public or, most likely, by other journalists. The ICO queried whether technological advancements (eg tablets and smartphones) have had any effect on working practices, but the audience seemed to expect shorthand notepads to remain the main method of recording information.

## **4. ICO guidance**

Most participants seemed to accept that ICO guidance would be helpful, given the lack of training or other reference materials on data protection law. However, some others were uncertain as to why the new ICO guidance was necessary given the historic lack of data protection complaints, and what it would add to existing industry codes or the current PCC note on data protection (which was written with input from

the ICO). One participant was strongly of the view that any ICO guidance would be an inappropriate constraint on freedom of the press.

Several participants commented that guidance should clarify the basics of the Act – what is personal data, what is processing, what can be given out to journalists, whether they can hold information without publishing it. The guidance should help journalists do their job, not restrict them.

There were concerns as to what status the ICO guidance would have, and what the consequences would be for breaching it. Some participants raised concerns about potential conflicts with the Editor's Code, and considered that ICO guidance should ideally not be finalised until the Code Committee has been reconstituted.

There were also concerns that ICO guidance should not give examples of risky or borderline areas of investigative journalism, as this could be used against the media and would have an excessive chilling effect on journalism. There was a strong feeling that the guidance could not and should not attempt to define the public interest test. Any guidance on the public interest test must reflect the right to freedom of expression under Article 10 of the European Convention on Human Rights, and the subjective nature of public interest decisions.

## Next steps

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The Commissioner confirmed that the ICO will press ahead with drafting guidance for consultation, to meet its commitment in response to the recommendation of the Leveson Inquiry. The Commissioner recognised the value of consulting with the Code Committee and the ICO would endeavour to ensure a comprehensive consultation with all stakeholders, but he was clear that the ICO's timescales could not be dependent on other external developments.

He explained that this work is independent of wider developments in press regulation and the Ministry of Justice's consultation on potential changes to the law, where the timetable is currently unclear. However the ICO will bear in mind ongoing developments in those areas and will seek to align consultation periods wherever possible.