ICO call for views on a data protection and journalism code of practice: Response of Guardian News and Media Limited

1. About Guardian News and Media Limited ("GNM")

Guardian Media Group is one of the UK's leading commercial media organisations and a British-owned, independent, news media business. GMG is the owner of Guardian News & Media, which is the publisher of theguardian.com and the Guardian and Observer (and Guardian Weekly) newspapers, both of which have received global acclaim for investigations, including the Paradise Papers and Panama Papers, the Windrush scandal and Cambridge Analytica. As well as being the UK's largest quality news brand, the Guardian and Observer have pioneered a highly distinctive, open approach to publishing on the web and it has achieved significant global audience growth over the past 20 years. Our endowment fund and portfolio of other holdings exist to support the Guardian's journalism by providing financial returns.

GNM is content for this response to be published, with attribution to GNM. GNM has had sight of and approves of and supports the detailed Response submitted on behalf of the Media Lawyers Association. This Response is in addition and supplementary to the MLA Response.

2. Executive summary

GNM supports the protection of individuals' data protection rights – however there is an inherent conflict between these rights and freedom of expression rights and the ICO needs to exercise care in ensuring both are protected adequately. In order to safeguard journalism, the ICO must ensure that broad safeguards exist for freedom of expression. GNM has significant experience, as a UK based media organisation, of the difficulties of seeking to comply with data protection laws: journalism, by its very nature, requires the processing of large volumes of personal data, for instance through the gathering, collation, storage and retention of information. In many cases, only a tiny fraction of this information will be published, after careful consideration with regard to editorial standards and wider legal obligations. It is an integral part of many very important stories, from Panama Papers to investigations of the corporate and tax affairs of Sports Direct and Boots. GNM also deals with complaints both before and after publication relating to alleged compliance failures, as well as dealing regularly with requests for deletion and / or editing of archived articles.

The right to freedom of expression and information has long been recognised internationally as a fundamental right: the data protection rights of individuals must be appropriately balanced against that right. Data protection rights do not automatically trump those of freedom of expression and information and a balancing exercise, having regard to the specific facts of any given case, will have to be carried out. There is an inherent public interest in journalism itself, in all of its forms, which must be recognised and safeguarded. Any restriction on freedom of expression should only be made where strictly necessary and proportionate.

Lord Steyn in *R v Secretary of State for the Home Department, ex parte Simms* ([2000] 2 A. C. 115, at 126) provides a useful summary of the various rationales for according freedom of expression strong weight:

> *"Freedom of expression is, of course, intrinsically important: it is valued for its own sake. But it is well recognised that it is also instrumentally important. It serves a number of broad objectives. Firstly, it promotes the self-fulfilment of individuals in society. Secondly, in the famous words of Holmes J. (echoing John Stuart Mill), "the best test of truth is the power of the thought to get itself accepted in the competition of the market" ... Thirdly, freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety value: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country."*

In *McCartan, Turkington Breen (a firm) v. Times Newspapers Ltd.* [2001] 2 AC 277, Lord Bingham said (at p.290):

> *"The proper functioning of a modern participatory democracy requires that the media be free, active, professional and inquiring. For this reason the courts, here and elsewhere, have recognised the cardinal importance of press freedom and the need for any restriction on that freedom to be proportionate and no more than is necessary to promote the legitimate object of the restriction".*

The importance of freedom of expression is recognised in the fact that it is set out as a stand-alone fundamental right within both the European Convention on Human Rights (ECHR) and in the EU Charter of Fundamental Rights. The European Court of Human Rights ("ECtHR") has consistently emphasised the critical role of the press in a democratic society (see *Sunday Times v. United Kingdom (no. 1)*, 26 April 1979), including through websites and the creation of digital archives that greatly contribute to improving public access to information and its dissemination (see *Times Newspapers Ltd v. United Kingdom (no. 1 and 2)*, no. 3002/03 and no. 23676/03, and *Węgrzynowski and Smolczewski v. Poland*, no. 33846/07, § 59, 16 July 2013; see also Recommendation Rec(2000)13 of the Committee of Ministers).

To ensure that effective protection for freedom of expression and information is maintained, and to afford the necessary protection to editorial decision making, a margin of discretion is afforded to editorial decision makers and the role of the Information Commissioner's Office must be one of reviewing the reasonableness of such decision making, as expressed in the existing guidance, and not to take the role of editor by substituting its own view or to apply a purely objective assessment.

We agree with the principles-based approach adopted in the existing guidance.

We also support the safeguarding of the recognition that there is an inherent public interest in journalism itself, in all of its forms.

GNM understands that this "call for views" is the initial stage in the consultation process on the new code and expects, therefore, that the ICO will be consulting formally on its proposed terms, once a draft has been prepared which takes account of views received at this stage. GNM's expectation is that it will be treated as a formal participant in that further process of consultation.

3. Responses to the specific questions

Section 1: Your views on the code

1. We are considering using our current guidance "Data protection and journalism: a guide for the media" as the basis on which we will build the new journalism code. Do you agree or disagree with this approach?

Agree. We are supportive of the principles-based approach to the existing guidance, which is consistent with the approach of other regulators. We support the development of a code that is pragmatic and flexible, as an effective aid to compliance.

2. If you disagree, please explain why?

N/A

3. "Data protection and journalism: a guide for the media" is split into three sections:·

"Practical guidance" aimed at anyone working in the journalism sector;

"Technical guidance" aimed at data protection practitioners within media organisations; and

"Disputes", aimed at senior editors and staff responsible for data protection compliance.

Do you think we should retain this structure for the code?

Yes.

4. If no, do you have any suggestions about how we should structure the code?

N/A

5. Do you think the ICO's existing guidance for journalists addresses the main areas where data protection issues commonly arise?

Mainly, Yes

6. If no, what additional areas would you like to see covered?

Please see the MLA Response. GNM supports the inclusion in the guidance of a much fuller recognition of the importance of the fundamental right to freedom of

expression and information, and the specific jurisprudence that establishes this. See the cases referred to in the Executive Summary above.

7. The journalism code will address changes in data protection law, including developments in relevant case law. Are there any particular changes to data protection law that you think we should focus on in the code?

Please see the MLA Response.

- GNM is particularly concerned about the need for express recognition of the explicit protection afforded to archive material in the GDPR. Article 10 ECHR is not just about the right to freedom of expression it goes further - This right shall include freedom .... to receive and impart information and ideas without interference by public authority and regardless of frontiers. This includes the access to historic information, the historical value of such archives (with emphasis on the fact that once these online records are removed or changed, they will be changed forever ; invisible mending or deleting should be avoided). The Guardian online archive is available to anyone without subscription and therefore offers easy public access to information; simply because it is not as accessible as some (which may be accessible behind a paywall), does not mean such archives should be treated less well by the ICO, when they are arguably more important from a public access perspective.
  The ECtHR in its judgment of 28 June 2018, in the case of M.L. and W.W. v Germany *(Applications no. 60798/10 and 65599/10)* recognised that the press plays an ancillary but nonetheless important role in creating archives based on information already published and making them available to the public. Digital archives contribute to the collective memory, in helping to document contemporary history by storing their printed materials and information published in digital versions only. Imposing a permanent obligation on the media to verify their digital archives would constitute excessive interference and can result in the rewriting of history. It is also worth noting that these days many articles are published online only: in April 2019, 44.8% of GNM articles published were digital only; between January 2018 and April 2019, 48.6% of articles were digital only[1]; it is not an answer to say that printed records will suffice for historic research purposes.
  The media have a recognised role to participate in the formation of democratic opinion by making available to the public old information stored in their archives. The Court pointed out that the provision of archives on the Internet greatly contributes to the preservation and accessibility of news and information: "Digital archives are a valuable source for teaching and historical research, particularly as they are immediately accessible to the public and generally free of charge (*Times Newspapers Ltd v. United Kingdom (no. 1 and 2)*, no. 3002/03 and no. 23676/03, §§ 27 and 45,

[1] Source: Guardian Data Lake. N.B. data does not include Guardian Weekly articles or special supplements that were not also published online.

ECHR 2009, and *Węgrzynowski and Smolczewski v. Poland*, no. 33846/07, § 59, 16 July 2013 ; see also Recommendation Rec(2000)13 of the Committee of Ministers)." The ECtHR stressed that the public has an interest not only in being informed about a current event, but also in being able to research past events. Furthermore, according to the case law of the ECtHR, the legitimate interest of the public to be able to access the public electronic archives of the press is protected by Article 10 of the Convention and any measure limiting access to information that the public has the right to receive must be justified by particularly compelling reasons (*Timpul Info-Magazin and Anghel v. Moldova*, no. 42864/05, § 31, 27 November 2007, and *Times Newspapers Ltd (no. 1 and 2)*, referred to above).

- The existing guidance does not deal fully with statements of opinion, i.e. value judgments, which are also expressly protected by Article 10. Whereas the DPA 1998 expressly included statements of opinion within the definition of "personal data" [section 1(1) personal data means data which relate to a living individual who can be identified— ... and includes any expression of opinion about the individual"] that definition does not seem to appear in the DPA 2018. The definition of "inaccurate data" in s 205 continues to be ""inaccurate", in relation to personal data, means incorrect or misleading as to any *matter of fact*" (emphasis added). The current guidance states (Section 2 Technical Guidance) that "Personal data is not limited to hard facts: someone else's opinions about a person, or intentions towards them, can also be personal data." It also notes that an individual can apply for a court order under section 14 for rectification, blocking, erasure or destruction of inaccurate data, "or any expression of opinion based on inaccurate data (section 14(1))". While the guidance should continue to acknowledge that statements of opinion are covered by the journalism exemption, it should also note that some statements of opinion are intrinsically incapable of being either accurate or inaccurate. In such cases, the application of criteria such as accuracy is clearly inappropriate and potentially chilling.

8. Apart from recent changes to data protection law, are there any other developments that are having an impact on journalism that you think we should address in the code?

Please see the MLA Response.

In addition, it is worth highlighting how an overly onerous process can impact on individual journalists – especially freelancers and especially those based abroad - for example someone like Daphne Caruana Galizia in Malta – who have to make these decisions in their own head: journalists working independently, on their own, is likely to become more common as the commercial environment declines. Enforcing onerous processes will play into the hands of well-financed litigants, chilling against the rights of journalists to publish. The law appears to have changed in respect of the treatment of citizen bloggers as journalists (eg see CJEU in *Buivids*, 2019) - in which a person posting on YouTube a video he had taken in a police station in Latvia, was not considered to be posting for personal use. The Court found the question as to whether this amounted to journalism difficult and complex. In the first place, it acknowledged that in light of

the *"importance of the right to freedom of expression in every democratic society"*, it was necessary to interpret *"notions relating to that freedom, such as journalism, broadly"* (at [51]). The journalistic derogation could not be confined to an institutional or professional context but rather was applicable to *"every person engaged in journalism"* (at [52]). However, the Court emphasised that *"the view cannot be taken that all information published on the internet involving personal data, comes under the concept of journalistic activities"* (at [58]). Rather, in order to see whether the journalistic derogation was engaged, the national court was told to consider whether the recording and publishing of the video were *"intended solely to disclose information, opinions or ideas to the public"* (at [62]). The CJEU emphasised that even if this definition was met, the court would still need to determine *"whether the exemptions or derogations provided for ... are necessary in order to reconcile the right to privacy with the rules governing freedom of expression, and whether those exemptions and derogations are applied only in so far as is strictly necessary"* (at [68]).

9. Are there any case studies or journalism scenarios that you would like to see included in the journalism code?

Please see the MLA Response.

10. Do you have any other suggestions for the journalism code?

Please see the MLA Response.

Section 2: About you

11. **Are you?**

A media organisation

12. How did you find out about this survey?

ICO website

We may want to contact you about some of the points you have raised. If you are happy for us to do this please provide your email address:

Submitted on 24 May 2019 by the Editorial Legal Services Department, Guardian News and Media Limited.