

NEWS UK RESPONSE

ICO call for views on a data protection and journalism code of practice

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. The current guidance reflects the significant work and consultation that the ICO led in its preparation: it addresses the needs and concerns of all stakeholders, not just publishers.

- 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. The code is intended to be read by publishers, and the current structure works well.

- 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?**

No.

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

The current guidance acts as a general primer to the then Data Protection Act as it applies to the media. However, in doing this, it does fail to address the main areas where we see issues arising. The guidance does not fully recognise the extensive jurisprudence that establishes the importance of the fundamental right of freedom of expression and information.

The guidance is focussed on the media. However, it fails to recognise that the journalism exemption may be relied on by third parties who seek to disclose information to the

media: this could include whistleblowers and non-media organisations. In particular, the code will need to address the exemption in relation to special category and criminal conviction data, permitted under paragraph 13 of Schedule 1, Data Protection Act 2018 (Journalism etc in connection with unlawful acts and dishonesty etc).

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?

The following changes are noted:

- The condition 'only' has been removed from Article 85 GDPR and the special purposes exemption in Schedule 2, paragraph 26(2)(a) Data Protection Act 2018. It is no longer the case that processing must be 'only' for the special purposes for the exemption to apply.
- Recital 153 GDPR gives explicit protection to new archives, i.e. *"The processing of personal data solely for journalistic purposes, or for the purposes of academic, artistic or literary expression should be subject to derogations or exemptions from certain provisions of this Regulation if necessary to reconcile the right to the protection of personal data with the right to freedom of expression and information, as enshrined in Article 11 of the Charter. This should apply in particular to the processing of personal data in the audiovisual field and in news archives and press libraries"*. It is important, in light of the right to freedom of expression and information that the integrity of archives, whether of published or unpublished information, be maintained and protected.
- The judgment in *NT1 and NT2 v Google* [2018] EWHC 799 is clear in that an individual who 'deliberately conducts himself in a criminal fashion' will be considered as some who has manifestly made public their personal data in connection with that alleged or actual criminal activity. Such information should therefore be considered as being in the public domain (Schedule 1, Paragraph 32 of the Data Protection Act 2018 refers).
- Principles derived from the law of defamation should be applied to data protection complaints of inaccuracy, in particular:
 - (i) the importance of context in assessing the accuracy of personal data complained of;
 - (ii) the protection of statements of opinion or evaluation;
 - (iii) the need for remedial discretion (which applies equally to the courts and the ICO); and
 - (iv) the latitude given by domestic law to those reporting the courts and/or parliament (*NT1 and NT2* [80]-[87] refers).

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?

No.

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

Case studies and scenarios are best avoided, as they tend to be over-simplistic and apply to a specific context that may not readily apply to others. The code should be principles-based, allowing interpretation and application to the particular context of the journalist.

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

There are opportunities for content of the current guidance to be clarified, more accurately reflecting the balance between the right of freedom of expression and information and data protection law, and made clearer. Notably:

- The current guidance states that "*Organisations will find it easier to rely on the exemption if they can show... appropriate record keeping for particularly controversial decisions*". However, the ICO's practice appears to require such documentation in all instances where the exemption is relied upon. For example, in a recent case in which a Monetary Penalty Notice was issued the ICO appears to consider that failure to keep contemporaneous records of editorial decisions in the form of a specific document meant that the media organisation could not rely on the journalism exemption. Such practice appears to go further than is suggested in the current guidance, and significantly is neither necessary nor proportionate and is thereby an inappropriate restriction on the right to freedom of expression and information.

We do not consider that the code should be prescriptive as to the specific recording of editorial decision making that may be appropriate, and consider that this is likely to depend on the relevant circumstances in any event, as the current guidance clearly recognises.

Confidential sources require the protections afforded to them in law, and the current guidance fails to reflect this appropriately by suggesting that there may be circumstances in which it would be reasonable, and therefore mandatory, for a media organisation to reveal the identity of a confidential source in response to a right of access request, for example. Article 10 of the European Convention on Human Rights and section 10 of the Contempt of Court Act 1981 require that only where a court is satisfied that disclosure is necessary for certain specified purposes, specifically in the interests of justice or national security or for the prevention of disorder or crime, can a journalist be required to identify a journalistic source. Any additional penalty would be an inhibition to freedom of expression.

- The current guidance uses 'impossible' and in doing so disregards the requirement for proportionality and reasonableness, although this is recognised elsewhere in the paragraph where 'impossible' is stated:

*You do not have to comply with a SAR by providing a copy of the information in permanent form if this would be **impossible** or would involve disproportionate effort. However, you still have to comply with the request in a different manner, for example by allowing inspection of the data, unless an exemption applies. (Page 15)*

*Your only purpose must be journalism (or art or literature), and you must be acting with a view to publication. You must reasonably believe publication is in the public interest – and that the public interest justifies the extent of the intrusion into private life. You must also reasonably believe that compliance with the relevant provision is incompatible with journalism. In other words, it must be **impossible** to comply and fulfil your journalistic purpose, or unreasonable to comply in light of your journalistic aims, having balanced the public interest in journalism against the effect upon privacy rights. (Page 27)*

*Organisations must also be able to explain why complying with the relevant provision of the DPA is incompatible with the purposes of journalism. In other words, there must be a clear argument that the provision in question presents an obstacle to responsible journalism. You should be able to show it was **impossible** to both comply with a particular provision and to fulfil your journalistic purpose. Alternatively, you can show that it was unreasonable in the circumstances to comply with a particular provision, by virtue of it being impractical or inappropriate. You must balance the detrimental effect compliance would have on journalism against the detrimental effect non-compliance would have on the rights of the data subject. (Page 37)*

‘Impossible’ should be removed.

- The current guidance does not appear to recognise the extent of the definition of journalism and this should be corrected. For example, the guidance states: *"the exemption cannot apply to anything that is not an integral part of the newsgathering and editorial process. For example, information created in response to a complaint about a particular story after publication is unlikely to be processed with a view to publication"*, in contradiction to the Supreme Court's acceptance in the case of *Sugar (Deceased) v BBC* [2012] UKSC 4 that the purpose of journalism encapsulates the act of publishing or broadcasting together with *"first, the collecting, writing and verifying of material for publication; second, the editing of the material, including its selection and arrangement, the provision of context for it and the determination of when and how it should be broadcast; and third, the maintenance and enhancement of the standards of the output by reviews of its quality, in terms in particular of accuracy, balance and completeness, and the supervision and training of journalists"* (paragraph 39). This clearly suggests that complaints material, which will in any event be relevant to the ongoing or further publication of journalistic material and the assessment of whether publication remains in the public interest, does fall within the scope of the exemption and should be recognised as such.

- With regard to transparency and whether data subjects should be notified that their personal data is being processed, the current guidance states that data controllers *"will need a valid reason"* for not notifying the subject of a journalistic investigation that their data is being collected and that this *"justification should reflect the privacy intrusion"*. This appears not just to undermine the journalism exemption provided in the Data Protection Act 2018 but also runs contrary to the judgment in European Court of Human Rights in *Mosley v United Kingdom* (48009/08) [2012] EMLR 1.
- The current guidance restates the requirement for incompatibility at various points and in different forms, in a way that can be confusing and in conflict with the law. For example, in the context of covert investigations it is stated that *"If you do need to use undercover or intrusive covert methods to get a story, such as surveillance, you may do so if you reasonably believe that these methods are necessary (in other words it is not reasonably possible to use a less intrusive way to obtain the information) and the story is in the public interest. To establish whether covert investigation is justified in the public interest, you must balance the detrimental effect that informing the data subject would have on the journalistic assignment against the detrimental effect employing covert methods would have on the privacy of any data subjects. The importance of the story, the extent to which the information can be verified, the level of intrusion and the potential impact upon the data subject and third parties are all relevant factors"*. This appears to expand and/or conflate certain of the requirements of the journalism exemption, in particular by introducing a proportionality test (which is properly found only in the requirement for a reasonable belief that publication would be in the public interest). Other examples are that it is stated that *"there must be a clear argument that the provision in question presents an obstacle to responsible journalism"*, and that it must be *"impossible to both comply with a particular provision and to fulfil your journalistic purpose"*; these overstate the requirements for reliance upon the exemption and ought not to be included in the code.

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:

