

Second consultation on the ICO's draft Data protection and journalism code of practice

Start date: 9 September 2022

End date: 4 November 2022

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Information Commissioner's Office

Introduction

We are seeking feedback on a revised version of our draft Data protection and journalism code of practice. This follows your feedback to a written public consultation that ran for 12 weeks from September 2021 and workshops.

You can read our summary of the feedback and individual responses on the ICO website – redacted in line with our privacy statement.

This is a draft of a statutory code of practice under section 124 of the Data Protection Act 2018 (DPA 2018). It will help those using personal data for journalism understand their legal obligations and comply with good practice.

The revised draft code is now out for further public consultation. Although the focus of this public consultation is the draft code, we would also welcome your views on the associated documents below. Please note that these documents do not form part of the statutory code.

- supporting reference notes for the code
- the code 'at a glance'
- 10 data protection tips for day-to-day journalism
- updated impact assessment

The public consultation will remain open until 4 November 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 respondents are acting in a private capacity (eg a member of the public). We will remove email addresses and telephone numbers from all responses.

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

Questions

When commenting, please bear in mind that the code does not aim to cover all of the legislation. Supporting reference notes contain key legal provisions, case law examples, and further reading.

Please also bear in mind that in line with your feedback, we plan to develop additional supporting resources, including guidance for smaller organisations and individuals.

Please let us know if you have any other comments about the code or associated documents in the general comment box at the end.

Section one: The statutory code

Q1 Overall, to what extent do you agree that the revised code sufficiently reflects the feedback provided to the ICO?

To inform your answer please ensure you have read the consultation summary report. This sets out the changes we made in response to your feedback.

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

Q2 If you consider that the code does not sufficiently deal with the feedback, please specifically explain why and what you think we should change.

I think that the redraft in the main does respond well to the feedback received. At the same time, the changes made have created or exacerbated the following problems:

1. Definition of "journalistic purposes":

A number of the submissions asked for more clarity as regards this crucial threshold question. However, much of the detail here has been stripped away (see especially pp. 16-17 of old draft) and when shorn of this what has been left lacks clarity. As can be seen discerned from *Satamedia* and *Google Spain* combined, it is important to focus on the purposes of the processing and whether these are orientated to the dissemination of information, opinions and/or ideas to the collective public or a section thereof. The moving of the expectation that the processing be "only" for the special expressive purposes from the operative part of the law to a recital does allow an overlapping purpose to be present e.g. campaigning. However, it is not enough that "material that is journalistic" be used for "another purpose" to gain this benefit – for example, a series of news stories included in a human resources file would not be covered but the wording on p. 12 at 1.9 would seem to indicate otherwise. Also the objective test needs to be applied to all content which is different from saying ipso facto that all "content published by non-professional journalists" and "everything published in

a newspaper or magazine" will be covered as it is e.g. perfectly conceivable that a non-professional journalist may on occasion disseminate to an indeterminate number content which is not objectively orientated towards a collective public or a section of this.

2. Relationship between data protection and other personality laws

The material drawing specific linkages between data protection, defamation law and misuse of personal information law was helpful but has unfortunately been dropped. It is useful that other law is still referred to on p. 27. Nevertheless, what is said there is confusing from two aspects: firstly, the Human Rights Act 1998 does not bind private actors so the reference should rather be to e.g. the tort of the misuse of private information. Secondly, it is problematic to state that using personal data "may be" unlawful if it is e.g. "in contempt of court" as the correct words here seems obviously to be "will be". This issue partly relates to issues of structure which will be dealt with further below.

A rather different problem concerning legal relationships is that at the start of the Code data protection is now incorrectly stated to be a "part of the broader right to privacy" (p. 3 and p. 6) and further that following the Code will help ensure compliance with "data protection law, as well as other privacy laws". In fact, data protection in informational law terms is broader than privacy as it protects all "fundamental rights and freedoms of natural persons" which may be affected by the processing of their personal data. This can include such matters as reputation, non-discrimination, rehabilitation and even matters concerning fair treatment more generally. This breadth should be acknowledged. The reference to other law should either be to other laws concerning "personality rights" or if that is seen as unacceptable then other laws concerned with "privacy and reputation".

3. Code clarity and conciseness

There was an understandable concern that the Code be as clear as possible as regards which aspects attempt to set out peremptory requirements and which were more or less matters of guidance only. There was also a concern about the length of the Code. The latter has in particular resulted in the case law and examples being stripped out into separate reference notes. There has also been an attempt to emphasise and make more precise the use of "must" "should" and "could" in the various sections of the Code. However, the combination of these changes has made more uncertain what the purpose of the sections other than section 1 on the journalistic exemption and sections 2 and 11 of security and integrity actually is. In sum, there is confusion as to whether (i) these sections are just setting out what the law would be in the complete absence of the journalistic exemption or (ii) are setting general expectations concerning journalistic which nevertheless could be overridden by the journalistic exemption where applicable. Approach (i) is liable to cause confusion and also doesn't seem to add value. It would simply result in a truncated and inevitably partial analysis of law summarised in other ICO guidance and would could give the erroneous impression that even the substantive rules set out are generally to be applied when undertaking journalism. However, there are indications that this is what is going on in especially in section 6 on transparency where a whole series of "musts" are set out about providing individual privacy notices which are very

inappropriate in the context of the exercise of the right to receive and impart information in the exercise of journalism. This section therefore requires fundamental revision but the problem applies also to considerable parts of the other sections. On the other hand, approach (ii) is in principle much more helpful and the previous version, through the inclusion of the case studies as well as the rather open discussion, made it clearer that this was largely what was aimed for. This also still seems what is intended in some of the sections. To take one example, on p. 26 when it states "You should make sure you can justify identifying a suspect" as if this was outside the journalistic exemption then the word here surely would have to be "must" not "should". Similarly, the discussion of balancing interests in favour of rehabilitation against rights and interests in favour of publication on page 30 is clearly specifically about the special expressive purposes and seems to be much broader than the specific issue of "manifestly made public" that is ostensibly being discussed. Indeed, from a data protection perspective it would be better suited to the section of fairness as opposed to lawfulness e.g. on page 36. These important points need to be systematically addressed in sections 2 through 11 of the Code.

4. ICO's role and powers

The new draft of the Code has dropped most of the analysis of the ICO's role and powers in relation to journalism. This is rather different from a number of the specific points made in the consultation. Especially given the various duties which the ICO has in relation to journalism, it will be important that other prominent mechanisms are found to lay this out clearly. The statement "Before complaining to the ICO, we expect people to raise their concerns with you first" should be "Before complaining to the ICO, we expect people to try to raise their concerns with you first" as there may be circumstances especially as regards various forms of online communication which are potentially journalistic where this may not be practicable.

Q3 To what extent do you agree that the code provides useful guidance on the use of personal data for journalism?

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

Q4 If you do not think it is useful, please explain why specifically and what you think we should change.

Whilst there is much useful guidance in the draft Code, it is vital that all the above points listed in answer 2 are attended to in the final version.

Further matters of substance:

There are number of additional places where the law or guidance stated seems wrong or misleading and so this should also be corrected. In particular:

- On page 22 the statement "You must record all personal data breaches" appears misleading as there is arguably a de minimis threshold for recording given that the purpose of this provision appears to be to demonstrate compliance with the reporting of breaches to the ICO likely to cause harm. It would at least be best therefore to drop the reference to "all".
- On page 24 the statement that you should "keep devices and papers with you and store them securely" should instead read you should "keep devices and papers with you or store the security" as one or the other is surely sufficient.
- On page 29 the statement that data will not be special category "if you could also infer or guess these details" is different from the use of the term "reveal" in the statutory wordings of most of the special data categories and is unsupported by case law. It is also entirely different from the Grand Chamber judgment of the Court of Justice in C-184/20 dated 1 August 2022 which remains persuasive precedent despite Brexit.
- On page 32 it is stated that (aside from the journalistic/special purposes exemption) the only difference with the lawful requirements for criminal offence data and special category data is that as regards the former "consent does not need to be explicit". However, in addition, the requirement for there to be "substantial public interest" where applicable vis-à-vis special category data does not apply to criminal offence data.
- On page 36 the statement "The child's best interests must be your main consideration" does not correctly state the general law of data protection as there are clearly circumstances where data of a minor may be processed as a result of other interests being overriding e.g. where data is being processed in order correctly to ensure their conviction for serious criminality. At the least, this would best be phrased as "The child's best interests must be a main consideration".
- On page 51 it is stated "you should consider who decides why and how the data is used, known in the UK GDPR as a controller". The danger of the use of "should" here is that it appears to give the impression that it might not be important in some circumstances to think clearly about who is or who are data controllers.
- On page 53 there is a reference to making "information available outside the European Economic Union" and on page 56 to the right to complain to "the ICO or another supervisory authority". These statements are inapposite post-Brexit: the first statement should refer to "outside the UK" and the second just to the ICO.

It is also unfortunate that a number of crucial issues such as responsibility for "below-the-line" comments are not confronted in the draft Code and it is to be hoped that this will at least be analysed in future guidance.

Further matters of structure:

It is particularly problematic that in section 4 issues relating to "criminal offence" data is discussed on p. 30 before "criminal offence" data is introduced on page 31.

Q5 Is there anything else you would like to tell us about the code?

Not at this stage.

Section two: Supporting documents

Q6 To what extent do you agree that the supporting reference notes are helpful?

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

Q7 To what extent do you agree that the code 'at a glance' is helpful?

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

Q8 To what extent do you agree that the quick guide to support day-to-day journalism is helpful?

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

Q9 Is there anything else you would like to tell us about the supporting reference notes, the code 'at a glance', quick guide for day-to-day journalism or impact assessment?

The "at a glance" material is generally helpful but as with the draft Code itself states the law incorrectly in a number of places and is not clear whether when it uses the words such as "must" or "should" it is referring to the law in general or to law in the context of journalism. Thus:

- Statements such as "You must be able to restore personal data if there is a security incident" go beyond the law in a journalistic context and "You should consider whether you need a DPIA if you collect personal data from a source other than the person it is about without providing them with privacy information" go beyond reasonable guidance in this context also.
- The statement that (aside from the journalistic exemption) you can only process special category or criminal offence data if you have "a relevant condition under the DPA 2018" is wrong as a number of conditions are set out in the UKGDPR and not in the DPA 2018.

The "day-to-day" guidance seems only helpful to journalism being pursued in highly structured hierarchal organisations. If this guidance is to be retained then this needs to be made clear in order to avoid confusion.

Section three: About you

Q10 What is your name?

David Erdos

Q11 If applicable, what is the name of your organisation and role?

Professor of Law and the Open Society, Faculty of Law, University of Cambridge

Q12 Are you acting: (Please select)

- 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.

Q13 Are you a: (Please select most appropriate)

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

If other, please specify.

Further consultation

Q14 Would you be happy for us to contact you about our work relating to the Data protection and journalism code of practice?

- Yes
- No

If so, please provide the best contact details.

Q15 Would you be happy for us to contact you about the review of processing for journalism 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.