

Society of Editors response to the ICO's second consultation on the draft Data protection and journalism code of practice

Introduction

The Society of Editors welcomes the opportunity to respond to the ICO's second consultation on the revised data protection and journalism code of practice. We would also like to record the Society's thanks for the invitation to share the views of our members in a meeting between the ICO and the Society's Campaign and Advocacy Officer Claire Meadows earlier this year.

While the Society recognises that significant amendments and improvements have been made to the draft Code following extensive feedback received, we remain concerned that further amendments are essential if the Code is to be of both practical use to journalists and editors and support, rather than threaten, freedom of expression. Alongside ongoing concerns in relation to the Code's length and complexity and clarity around the ICO's relationship with existing media regulators, the Code still fails to give due weight to the public interest in freedom of expression itself and the importance and scope of editorial discretion. We also remain concerned that a disproportionate and unnecessary level of attention is diverted to privacy law rather than data protection law within the Code and the inclusion of such detail fails to acknowledge the existence of established regulatory and professional standards codes that journalists are both aware of – and abide by.

In addition to consulting with our members, the Media Lawyers' Association (MLA) and Editors' Code of Practice Committee have shared their responses to the second draft of the Code with the Society and we support the amendments and concerns that they have outlined, many of which we reiterate below.

Summary

As previously outlined in discussions, the Society felt that the length and complexity of the initial draft Code meant that it would speak principally to in-house lawyers rather than journalists and editors. In addition, it was felt that the inclusion of case law within the framework of the Code risked giving precedential value to examples cited where it should not exist. We welcome therefore the decision to move such examples to within complementary material separate to the Code itself. That said, while the Society welcomes the fact that the revised Code has been reduced in length and that the language contained within it has been tailored to appeal to a broader audience, the Code itself is still far too long to be of practical use to journalists that are on-the-go. In addition, if the Code is to be of everyday use, it would benefit from re-structuring. As suggested by the MLA, a better structure would be to outline the general requirements of data protection law before then addressing the Journalism Exemption and specific aspects of the law in relation of journalism.

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As it stands, the revised Code does not give sufficient weight to the exemption that journalists can rely on and the public interest in freedom of expression itself. It is our belief that it remains essential that the Code makes clear the special importance of this public interest.

As discussed in earlier meetings, the Society felt that the initial Code included onerous and unnecessary obligations on journalists in relation to policies and record-keeping and that greater clarity was needed to distinguish between legal requirements and good practice. We welcome, therefore, the ICO's decision to add references to obligations that can be considered under "must" "should" and "could" in the revised version. The Society supports the suggestion by the MLA of a further helpful distinction along the lines of "must...unless an exemption applies". The inclusion of this additional distinction would signpost journalists earlier to the fact that some obligations they "must" abide by may be qualified by the existence of the Journalism Exemption which, at present, is not made clear. The Society also supports the MLA's recommendation that the revised Code should make clear that in relation to "accuracy", personal data contained within an article or broadcast should not be considered "inaccurate" by reason of "later occurring events so long as the date of the article is clearly stated". The same approach should also be taken in relation to opinions. As stated by the MLA: "If it is clear when an opinion was expressed and clear that an opinion related to the factual position that existed at the time, no question of inaccuracy should arise from this".

As outlined in our introduction, it is essential that for the sake of clarity, the Code makes clear the relationship between the ICO and the remit of existing media regulators. In addition, and as outlined in the submission by the Editors' Code Committee, we remain concerned that, at present, the Code risks undermining the Editors' Code of Practice which, in turn, will likely lead to public confusion over the differing regulatory remits and where to direct complaints.

As called for by the MLA in its detailed response to the first Code consultation, the Society supports the inclusion within the Code of a statement confirming that where an issue falling within the remit of a media organisation's regulator (such as the Independent Press Standards Organisation (IPSO) or Ofcom) occurs, the ICO will refer the matter to the relevant media regulator in the first instance. By confirming this in the Code, it would help give clarity to the public over where their complaints should be addressed.

In addition to the above, we remain concerned that a great deal of space is given within the Code to detailing privacy rights without duly acknowledging the fact that journalists will already be aware of such rights as they are contained within industry regulatory codes and professional codes of conduct – in particular the Editors' Code of Practice. As you will be aware, the Editors' Code sets the framework for the highest professional standards that journalists undertake to maintain and balances the rights of the individual with the public's right to know. Journalists endeavour to adhere to these high standards on a daily basis and they recognise their responsibilities under it.

Journalists understand the Editors' Code because of its simplicity and clarity. It is made clear what they can and can't do. It is our belief that it would be helpful if the ICO's Journalism Code was written in the same spirit.

Conclusion

In conclusion to our response, the Society welcomes the fact that the ICO has listened to feedback received from the draft Code's initial consultation and significant improvements have been made to the revised Code.

That said, if the Code is to be of practical use to journalists and editors and support rather than threaten freedom of expression, further amendments are essential as outlined above.

If you feel that it would be helpful to have any further meetings with representatives of the Society to discuss the consultation and our response in more detail, please do not hesitate to get in touch.

Yours sincerely,

Claire Meadows
Campaign and Advocacy Officer on behalf of the Society of Editors