

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

Consultation response from The Financial Times Ltd

Questions

Q1 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

Q2 If you disagree, please explain why?

N/A

Q3 "[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

Q4 If no, do you have any suggestions about how we should structure the code?

N/A

Q5 Do you think the ICO's existing guidance for journalists addresses the main areas where data protection issues commonly arise?

Disagree

Q6 If no, what additional areas would you like to see covered?

We have had the benefit of seeing the consultation response of the Media Lawyers' Association (of which The Financial Times Ltd is a member). We endorse points made in the MLA's submission and reiterate some as part of our own response, below, in this document.

As regards journalists' obtaining of personal data for the purposes of public interest journalism, we believe the ICO should take this opportunity to highlight the new criminal law defence contained in S.170(3) of the Data Protection Act 2018.

The guidance should also make clear that in accordance with the wording of GDPR article 85 and paragraph 26(2)(a) of Part 5 of Schedule 2 to the Data Protection Act 2018, the 'journalism exemption' may now be applicable where the relevant data are not being processed *only* for the purposes of journalism.

Q7 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?

We look forward to having an opportunity to provide feedback in due course on any proposed guidance around provisions of law contained in the GDPR, UK Data Protection Act 2018 and court rulings that the ICO sees fit to prepare.

Q8 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?

The new code should make expressly clear that an online news report may be an accurate snapshot of events as at the date of its first publication, even if the events it reports are superseded by subsequent developments that occur on a later date.

We also believe that as regards editorial decision-making the guidance should not be too prescriptive about how, and by whom, decisions are made, and how they are to be evidenced. Global news organisations operate with hundreds of journalists in many different time zones, in jurisdictions all over the world. The new guidance should (like the existing ICO guide for the media) recognise that in many routine situations, the person making data protection assessments and holding the requisite 'reasonable beliefs' - e.g. in relation to the applicability of the 'journalism exemption' - may legitimately be an individual journalist. The guidance should recognise that, depending on the story and circumstances, an editorial decision may legitimately be taken and established in various ways and at various levels within a news organisation. It should not prescribe that there must be written or detailed 'audit trails' showing how a particular editorial assessment was made. The guidance should be realistic and reflect the practicalities of a digital, global newsroom. Reporters for a UK media organisation may be based in different parts of the world and often have to work under considerable time pressure to meet publication deadlines, as news is a perishable commodity and the public have a right to receive information under Article 10 of the European Convention on Human Rights.

Q9 Are there any case studies or journalism scenarios that you would like to see included in the journalism code?

We believe guidance based on principles is generally more useful, practical to apply, and easier to adapt to fact-sensitive scenarios than set-fact case studies.

Q10 Do you have any other suggestions for the journalism code?

We believe the new code should expressly recognise the special importance of freedom of expression in a democratic society, and the right of the press and public to receive and impart information without unnecessary interference. It should also expressly acknowledge the importance of news organisations' ability, as watchdogs, to hold powerful institutions and individuals to account without being fettered by any inappropriately restrictive interpretation of data protection issues.

As a general point, we would suggest that the ICO should make clear that in its approach to the 'journalism exemption' under paragraph 26 of Part 5 of Schedule 2 to the Data Protection Act 2018, it will continue to avoid substituting its own views for those of the relevant journalist or media organisation, and will simply assess the 'reasonableness of belief' on the part of any relevant journalist or news publisher seeking to rely on the exemption.

It is important that the guidance should reflect (as the existing guide does) that journalistic research material, and contact information, are vital journalistic resources that may be retained.

It is also important that the guidance should continue to reflect that there is an inherent public interest in various types and forms of journalism, across a broad spectrum, including 'tabloid', 'mid-market' and other types of press publication, and the full gamut of broadcast, audio, visual and blogging formats.

As to defining 'public interest', the guidance should avoid any inconsistency with the wording of the media's editorial codes in that regard, such as the non-exhaustive guidance on 'public interest' factors set out at the end of IPSO's Editors' Code of Practice.

The guidance should interpret the concept of 'journalism' broadly, as UK and European case law does - e.g. the *Satamedia C-73/07 (2008)* case (which is cited in the current guide) and e.g. Recital 153 of GDPR.

It should also continue to confirm that the phrase "with a view to the publication by a person of journalistic...material" in the 'journalism exemption' at paragraph 26(2)(a) of Part 5 of Schedule 2 to the Data Protection Act 2018 will be interpreted by the ICO as relating to *any* story, not just to one that is immediately planned for publication: the existing guide

rightly states that data may be “retained with a view to it being used in a different story or in updating a story that has already been published”.

As regards protection for confidential journalistic sources, we believe the new guidance should robustly recognise the vital importance of confidential-source protection. The new guidance should expressly confirm the importance (confirmed in case law such as *Goodwin v UK* (1996) 22 EHRR; and *The Financial Times Ltd v UK* (2010) 50 EHRR) of journalists being able to protect the identity of confidential sources. See also the provisions of S.10 of the Contempt of Court Act 1981.

We consider the ICO should acknowledge the immensely important contribution made by investigative journalism to political, economic and social discourse in a democratic society. The guidance should recognise the practicalities of investigative journalism and note that it will often be impractical, and incompatible with journalism, for journalists to be obliged to notify an individual who is a subject of a journalistic investigation that personal data about them is being collated and sifted for the purposes of the investigation. The guidance should also acknowledge that journalists may lawfully process personal data in a journalistic investigation where wrongdoing is suspected (i.e. even where wrongdoing is not certain, or is not yet ascertained).

We consider the existing guide is wrong in suggesting that the ‘journalism exemption’ cannot apply to information created in response to an editorial complaint. Personal data being processed by a journalist and/or media organisation and/or editorial complaints adjudicator as part of the handling of a complaint about journalistic content or journalistic activity is likely to be being processed with a view to the publication of certain material - e.g. to decide whether to continue publishing a particular article, or whether to publish it in some revised form, or to publish a correction or clarification (i.e. a continuing, or a new or additional journalistic publication). Accordingly, we consider that the guidance should recognise that the ‘journalism exemption’ may apply to data processed in an editorial complaints process.

Likewise, the new guidance should not be inappropriately rigid in its approach to assessing the concept of “incompatibility” with the purposes of journalism. The existing guidance states (at p.39) that “Even if a story is clearly in the public interest, if a journalist can reasonably research and present it in a way that complies with the standard provisions of the DPA, they must”. We submit that the use of an imperative such as “must” in this regard inappropriately strays into the legitimate ambit of editorial discretion.

About you

Q11 Are you answering these questions as?

- A media organisation?
- A trade association?
- An organisation representing the interests of data subjects?
- An academic?
- An individual acting in a professional capacity?
- An organisation that regulates press standards?
- An individual acting in a private capacity (e.g. someone providing their views as a member of the public)?
- Other?

If you answered 'other' please specify:

Q12 How did you find out about this survey?

- ICO website
- Social media
- Conference/seminar
- Trade/professional association
- Media
- Word of mouth
- Other?

Q13 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:

(Senior Legal Counsel, The Financial Times Ltd.)