

24 May 2019

NMA response to the ICO Call for Evidence on the Data Protection and Journalism Code

The News Media Association represents national, regional and local news media companies.

As a trade association for news media publishers, the NMA has a strong interest in any interaction between data protection and journalism in respect of the GDPR, Data Protection Act 2018 and ICO. The NMA participated in the ICO's consultations on the existing current ICO data protection and journalism guidance. We would be very happy to facilitate and participate in further consultation and discussion involving the ICO, NMA, representatives of its member national, regional and local news media organisations, as the ICO develops the draft data protection and journalism code.

Section 124 of the Data Protection Act 2018 requires the Commissioner to draw up a 'practical guidance' 'having regard to the special importance of the public interest in freedom of expression'. Such consultation with the industry will thus be vital, as it will be of crucial importance that the Commissioner take account of the practicalities of news media and journalism and potential practical impact of any proposed guidance. Otherwise, instead of the 'practical guidance' stipulated by statute, an ICO code might create new layers of discretionary regulation and new legal restrictions on the media, backed by sanctions, which would fetter rather than respect freedom of expression rights.

The news media companies in membership of the NMA publish around 1,000 titles, which are read by 48 million adult readers each month, in print and online. These include all sectors of the industry, from the largest groups to family owned independent companies. Their publications span national titles, such as The Sun, The Guardian, The Times and Sunday Times, the Daily Mail and Mail on Sunday, the Daily Mirror, the Daily Telegraph through to regional and local titles -the Yorkshire Post, the Manchester Evening News, the Belfast Telegraph, the Kent Messenger, the Eastern Daily Press, the Monmouthshire Beacon, the Henley Standard.

Collectively these news media publishers are by far the biggest investors in news, accounting for 58 per cent of the total spend on news provision in the UK. Their commitment to journalism and some idea of its real range and scope are vividly illustrated by the recent 'Journalism Matters' week and national and regional press awards.

[.http://journalismmatters.co/Making-a-Difference](http://journalismmatters.co/Making-a-Difference) ;

[http://www.newsmediauk.org/Power-of-News
national press awards winners](http://www.newsmediauk.org/Power-of-News-national-press-awards-winners)

REGIONAL PRESS AWARDS WINNERS

Such examples of the journalism provided by titles across the sector help demonstrate the role of a free press in a democracy- holding power to account, acting as the public's representative and public watchdog, investigating wrongdoing, campaigning on behalf of their readers, providing a forum for

stimulation of debate and exchange of views, ideas and information. Following close upon World Press Freedom Day, the poignant tributes which prefaced both national and regional press awards to journalists killed in the course of their work illustrate the grave risks faced by some journalists in the course of their day to day work, when this might be reporting a war in Syria or riot in Londonderry.

The Government is committed to sustaining and promoting such journalism. There is the cross-government recommendations to assist the most local of titles advocated by the Cairncross review and taken up by the DCMS Secretary of State and the Foreign Secretary's initiative on global media freedom.

Our members' journalism not only covers events, issues and actions of global and national import, or in depth investigations and related campaigns, but the everyday work of courts, councils, public services, stories addressing education, health, environment, business, transport, encompassing anything from crime, to sport, features of all kinds, and entertainment. All incorporate the newsworthy activities of individuals, organisations and communities of all kinds. Their contemporaneous reports become historic archives, the only records of significant events or chronicles of everyday life.

Hence the NMA stresses the importance of the ICO working with the industry in order to ensure that any data protection guidance produced is practical, workable and respects the right to freedom of expression and information which underpins press freedom and the practice of journalism.

In addition to the statutory requirement set out in section 124 for the ICO to have regard to the special importance of the public interest in the freedom of expression and information, when drawing up the practical guidance, we trust that the ICO will respect the specific freedom of expression safeguards set out in the GDPR including Article 85 and special purposes protections and exemptions in the Data Protection Act 2018, the freedom of expression exemption under Article 17 GDPR, the Human Rights Act 1998 (and section 12 of the HRA 1998), ECHR Article 10- and Charter of Fundamental Rights of the European Union Article 11 and Article 16 as appropriate.

In recognition of the special importance of the citizen's right to freedom of expression, Parliament and the courts have given and safeguarded press and public rights of access to information; press and public rights to attend and to report, to the wider public, on the work of the courts, Parliament, local and other governmental authorities and a range of other bodies; stipulated legal protections for journalistic sources and journalistic materials; created defences against civil actions; introduced defamation reforms to enable reporting, promote press freedom and freedom of expression; framed offences and defences to protect journalistic activities against criminal liability; and maintained legal safeguards against injunction or its equivalent. They have also set strict limits on the remit of the ICO, particularly in respect of any pre-publication powers. These crucial freedom of expression and information rights and press freedom safeguards must not be undermined. Great care must be taken to ensure that the code drawn up by the ICO on compliance with data protection legislation or recommendation of 'good practice', does not directly or indirectly extend the remit of the ICO and the application of data protection controls and sanctions, counter to press freedom and the right to freedom of expression and information.

Section 1: Your views on the code

1. We are considering using 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?

We would support this approach. Industry consultation on any such principles based guidance will be crucial to ensure that it is practicable, flexible, workable and, in practice, fully respects freedom of expression and press freedom. We refer you to comments below.

2. If you disagree, please explain why.

Not applicable.

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?

We have no objection to this structure, subject of course to detailed consultation on its draft content. It may be helpful to review the new ICO media redress guidance and the draft disputes section of the new guidance, so as to avoid any inconsistency, impracticality, inaccuracy or chilling effect.

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

Not applicable

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

Please see comments below.

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

The new guidance should retain the approach of the current guidance and expressly state that it is not intended to create new legal restrictions, nor introduce new layers of regulation.

The new guidance must give greater emphasis to the importance of the fundamental right to freedom of expression and information.

As required by the Data Protection Act 2018 including the specific provision binding upon the ICO in drawing up the new code, the new guidance must also give full weight to the special importance of the public interest in the freedom of expression.

It must therefore continue expressly to recognize the inherent public interest in the freedom of expression itself and in a free and independent press, informing the public about current events and providing information of general interest to an audience. It must continue to set out the ICO's acceptance that there will be a public interest in the full range of media output, from day to day stories about local events, to celebrity gossip to major public interest investigations.

The new guidance should additionally expressly recognise the wider application of the public's right to freedom of expression and information. This includes strong and comprehensive protection of journalistic sources and the legal protections, defences and statutory exemptions (obviously including all those set out in the Data Protection Act 2018 and GDPR) which enable lawful disclosure of information by others to the media, as well as disclosure and publication by the media. Such sources, will include whistle-blowers from the public sector as well as private.

The new guidance must accurately and fully reflect the law's protection of journalistic sources, which requires amendment of the existing text.

The guidance must recognise the immense importance of news organisations' archives and the robust legal protections for such news media archives, specifically provided by the freedom of expression provisions and special purposes exemptions of the GDPR (Article 17 and Article 85) and the Data Protection Act 2018.

Any new guidance must take note of the practicalities of journalism and it should usefully reflect the approach of certain sections of the current guidance:

Role of the ICO: The new guidance should repeat the current guidance's acknowledgment that the ICO is not a specialist media regulator and ought not usurp that role, nor seek to impose its own interpretation of industry codes. In considering any aspect of the journalistic exemption, ICO focus should continue to be on the reasonableness of editorial decision-making, the reasonableness of belief, rather than the ICO substitute its own view on the decision reached. The ICO must also maintain flexibility as to who is the editorial decision-maker, recognising that in practice this will usually be the individual journalist.

Scope of the exemption: it is important that the guidance recognises the broad and ever evolving scope of the journalistic exemptions: whilst retaining its view on its potential application to everything published in a newspaper (in print or online) and to any dealings with information as part of a journalist's day to day activity. The guidance on 'view to publication' must also continue to encapsulate the key intention of the journalistic exemptions, that this should enable not just the investigation and publication of a particular story, but also developing stories, different stories, archives, the deferment and discontinuance of investigation at any stage or publication at any stage and apply where there is no publication at all. The new guidance should also reflect case law developments- for example the recognition of the application of special purposes exemption to the work of campaigning organisations such as Global Witness.

Vital journalistic resources: The guidance on collection and retention of research and contact information for long periods and indefinitely should be retained.

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

All special purposes and freedom of expression provisions, exemptions and defences which promote and protect the right of freedom of expression and information should be properly and fully recognised in the new guidance. These will include the matters listed below.

Under Article 85 and the Data Protection Act 2018, Schedule 2, Part 5 para 26, the journalistic and special purposes exemption is no longer confined to circumstances where the processing is 'only' for the purposes of journalism or special purposes. (This will require extensive revision of the current

text and require removal of provisions that unduly narrow the application of the journalistic exemption e.g. any suggestion that information created in response to a complaint does not qualify for the journalistic exemption).

Full recognition of all the special purposes exemptions set out in the Data Protection Act 2018, Schedule 2, Part 5, Para 26.

Full recognition of the robust protection of news media archives under GDPR Recital 153 and the special purposes exemption of the Data Protection Act 2018, as expressly confirmed by DCMS Minister Margot James in the course of the House of Commons Data Protection Public Bill Committee Tuesday 13 March 2018 at col 79:

'I hope that recent debates have left no doubt in hon. Members' minds that the Government are absolutely committed to preserving the freedom of the press and maintaining the balance between privacy and freedom of expression in our existing law, which has served us well for so many years.

As set out in the Bill, media organisations can already process data for journalistic purposes, which includes media archiving. As such, we believe that amendment 170 is unnecessary and could be unhelpful. I agree with the right hon. Gentleman that it is crucial that the media can process data and maintain media archives. In the House of Lords, my noble Friend Lord Black of Brentwood explained very well the value of media archives. He said:

"Those records are not just the 'first draft of history'; they often now comprise the only record of significant events, which will be essential to historians and others in future, and they must be protected."—[Official Report, House of Lords, 10 October 2017; Vol. 785, c. 175.]

However, recital 153 indicates that processing for special purposes includes news archiving and press libraries. Paragraph 24 of schedule 2 sets out the range of derogations that apply to processing for journalistic purposes. That includes, for example, exemption from complying with requests for the right to be forgotten. That means that where the exemption applies, data subjects would not have grounds to request that data about them be deleted. It is irrelevant whether the data causes substantial damage or distress.'

Full recognition of the GDPR Article 17 freedom of expression exemption and its implementation in the Data Protection Act 2018.

Full recognition of all the special purposes exemptions set out in Data Protection Act Schedule 1 para 13. (*Journalism etc in connection with unlawful acts and dishonesty etc*) which facilitate disclosure to the media as well as by it. This includes the facilitation of media investigation and reporting of alleged or actual criminality and other wrongdoing.

In addition, any new guidance must avoid any creation of any new restrictions upon open justice, or upon public oversight, media scrutiny and media report (and subsequent archive) of the criminal and civil justice system, the police and other state, investigation and enforcement authorities, regulatory authorities, agencies and Parliament.

Full recognition of all the relevant and special purposes defences in the offences under section 170 (unlawful obtaining etc) and section 171 (re-identification of de-identified personal data) of the Data Protection Act 2018.

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

Section 124 of the Data Protection Act 2018 requires the Commissioner to prepare ‘practical guidance.’ The Commissioner must take account of the realities and practicalities of all aspects of journalism, as provided by news media publishers of vastly different sizes, staff, location, resources, audiences, its speed and scope, the ever evolving and innovative news services, which operate continuously across many different media platforms, in accordance with the demands of their local, regional, national and international audiences and against fierce competition. Any new code must not impose impractical restrictions or procedures which would fetter otherwise lawful editorial investigation, publication and dissemination. Nor should it restrict innovation, vital to sustaining the trusted journalism of long-established news media organisations, whether national, regional or local.

Any practical guidance must take due account of the scope and speed of news gathering, publication and dissemination and the realities of news operations. Small local newspapers do not have tiers of journalists, editors and lawyers to whom editorial decisions are deferred and processes documented. It is very important that any new code does not stipulate new or onerous process requirements, which, in practice, all too easily might result in heavy ICO or court sanction of a news organization, not for breach of the law or Editors’ Code of Practice, but merely for some failure to record its decision-making.

The new guidance should not adopt the existing text relating to prior notification of subjects of media attention, and should instead reflect the rejection of any such requirement of prior notice by the ECtHR (*Mosley v United Kingdom*) and the application of the special purposes exemption, although the helpful reference to practicalities should be retained.

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

Not applicable.

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

The Data Protection Act 2018 requires the Commissioner in compiling good practice guidance to have regard to the special importance of the public interest in the freedom of expression and information. We therefore suggest that the new guidance properly reflects the current law on

protection of journalistic sources, under section 10 of the Contempt of Court Act 1981 and Article 10 ECHR, especially in the context of a subject access request. The new guidance must not engender any attempted abuse of such rights to uncover journalistic sources or disrupt investigations and publication.

We also suggest avoidance of (legally) questionable interpretations of 'incompatibility' in the current guidance which unduly narrow the application of the special purposes exemption, suggesting 'impossibility' tests, or that it cannot be invoked if in the ICO's view, a story could have been differently researched or presented or have a different focus, or that some balance of detriment is to be applied.

The NMA also refers the ICO to the individual submissions made by news media organisations and to the submission of the Media Lawyers Association.

Section 2: About you

11. Are You?

The News Media Association is a trade association.

12 How did you find out about this survey:
ICO and ICO website.

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