

## Elizabeth Archer

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**From:** [REDACTED]  
**Sent:** 07 January 2022 12:43  
**To:** journalismcode  
**Cc:** Sarah McColl  
**Subject:** BBC submission - ICO consultation on the draft journalism code of practice  
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Dear Sir/Madam,

Please see attached a submission made on behalf of the BBC to the ICO's consultation on its draft journalism code of practice.

We appreciate the opportunity to provide feedback on this draft Code. Please feel free to contact myself or my colleague Sarah (copied in) if the ICO has any questions about our submission.

Kind regards,

Brigit

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*\*enrolled as a solicitor in Australia*



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## **BBC submission**

### **ICO's consultation on its draft journalism code of practice**

#### **1. Overview**

- 1.1 The BBC welcomes the opportunity to respond to the draft journalism code of practice ('the draft Code') produced by the Information Commissioner's Office ('the ICO').
- 1.2 This submission is made by the BBC Public Service and supported by BBC Studios, a separate data controller.
- 1.3 The BBC supports the aims of the draft Code, particularly to the extent it ensures consistency with the ICO's existing media guide, 'Data protection and journalism: a guide for the media' ('the current Guide') and the framing of the draft Code as principle-based rather than prescriptive.
- 1.4 The BBC is encouraged to see reference to the broad definition of 'journalism' from *Sugar (Deceased) v BBC* [2012] UKSC 4 (pg. 23), as well as the characterisation of the 'broad' special purposes exemption (pg.22) which is correctly explained throughout as disapplying most data protection obligations concerning the processing of personal data in the context of journalism. The BBC is further encouraged to see the value ascribed to freedom of expression and the importance of the retention of news archives in the draft Code.
- 1.5 However, in our carefully considered judgement, there are aspects of the draft Code that require significant revision. In summary, we ask the ICO to;
  - 1.5.1 Revise its recommendations concerning the need for new accountability processes where these new processes replicate existing editorial and legal compliance processes;
  - 1.5.2 Remove references to case law and non-binding Tribunal decisions that could quickly become out of date;
  - 1.5.3 Remove guidance that strays into editorial decision-making; and
  - 1.5.4 Reduce the length of the draft Code by removing repetition and summaries of case law
- 1.6 The BBC also endorses the submission of the Media Lawyer's Association of which the BBC is a member.

- 1.7 Like the MLA, the BBC would appreciate the opportunity to further review any revised draft Code (and any complementary resources) the ICO produces before it is finalised.

## **2. Balance of rights**

- 2.1 Before the BBC makes detailed submissions on aspects of the draft Code, we want to highlight the importance of the balance between privacy rights and freedom of expression as enshrined in Articles 8 and 10 of the European Convention on Human Rights and the UK's Human Rights Act 1998.
- 2.2 The BBC is encouraged that the draft Code recognises that 'journalism should be balanced with other rights that are also fundamentally important to a democracy, such as data protection and the right to privacy' (pages 4 and 25). However, the draft Code should make clear the importance in making that assessment of independent editorial decision-making and the breadth of editorial discretion afforded by the law; an important principle stemming from case law on the application of Article 10. (See: *Axel Springer AG v Germany (2012) EHRR 6, the ECtHR (Grand Chamber); Campbell v MGN Ltd [2004] 2 AC 457; and Re BBC [2010] 1 AC 145 [25]*).
- 2.3 As noted in the submissions of the MLA, in the case of *Ali v Channel 5 Broadcasting Ltd [2019] EWCA Civ 677* the Court emphasised the importance of editorial discretion and stated that "*... where there is a rational view by which public interest can justify publication, giving full weight to editorial knowledge and discretion, then the court should be slow to interfere.*"
- 2.4 This principle and its importance should be addressed in both the introduction to Section 1, and again when addressing the reasonable belief aspects of the special purposes exemption.

## **3. General issues**

- 3.1 The BBC welcomes the principle-based nature of the draft Code.
- 3.2 The BBC notes that the ICO intends to produce 'complementary resources', potentially including case studies, for journalists. Given the Code is intended to act as a statutory code, the BBC cautions the ICO against producing such case studies. The draft Code should be a stand-alone document intended to

guide the work of specialist advisors and not seek to duplicate existing legal guidance or industry codes of practice for the media such as the BBC's Editorial Guidelines. Examples that are overly prescriptive while helpful in specific contexts, may be difficult to extrapolate to the varied work of content makers and journalists and risk creating fact patterns not fit for each purpose. We believe a better approach is a principle-based document like the draft Code that can be interpreted by lawyers and advisors when assessing the different and diverse scenarios that arise for media organisations.

- 3.3 Further, the draft Code is currently too lengthy to serve as a practical guide for lawyers and advisors. To aid accessibility and useability, the draft Code should be shortened so that it is more in line with the length of the current Guide which can, in part, be achieved by the removal of unnecessary repetition. In particular accountability and record keeping are dealt with in various sections of the draft Code and could be confined to the Accountability section. Removal of the lengthy passages regarding areas of law other than data protection and the various case summaries will also serve to shorten the document.

#### *Inclusion of case law*

- 3.4 The BBC urges the ICO to remove case law and non-binding Tribunal decisions as this creates a serious risk the draft Code will quickly become out of date. This issue arises most acutely in the section on processing of criminal convictions data where the draft Code references case law that, at the time of writing, is on appeal.
- 3.5 There are some specific legal references that are inaccurate and should be amended if retained.
- 3.5.1 First, the explanation of the principles arising from *Attorney-General v MGN Limited and News Group Newspapers Ltd* [2011] EWHC 2074 (Admin). The inclusion of this case implies that the mere publication of a name on arrest gave rise to a finding of strict liability contempt. In fact it was not just the publication of the name but the extensive details of the allegations against the accused which resulted in that finding.

3.5.2 Second, the explanation of the effect of section 10 of the Contempt of Court Act 1981 omits the words ‘necessary’ and ‘disorder’ which are included in the statutory wording.

*References to other causes of action*

- 3.6 The draft Code includes summaries of legal developments in misuse of private information and defamation law that should be more clearly framed as distinct from data protection law or removed altogether.
- 3.7 This is particularly problematic in the section on processing criminal convictions data on pages 50-53. The current framing of developments in privacy law set out in the draft Code could contribute to the conflation of the separate causes of action for misuse of private information, defamation and breaches of data protection law.
- 3.8 While data protection law borrows from these other causes of action, they remain separate actions that protect the rights of individuals in different ways and could confuse readers of the Code who are not legally trained. Our position is that such analysis should be outside the scope of the Code. If the ICO decide to retain references to other causes of action, the BBC suggests these sections are isolated in clearly marked text boxes to more clearly differentiate them from the data protection aspects of the Code.
- 3.9 Further, the law in relation to whether a person has a reasonable expectation of privacy concerning criminal allegations about them is not settled. This section could be better future proofed by removing references to case law especially matters such as *ZXC v Bloomberg LP* [2020] EWCA Civ 611 on page 51; at the time of writing that the case is on appeal to the Supreme Court.
- 3.10 The first sentence at the top of page 20 should be amended to make clear ‘a court or tribunal must take into account any provision of this code that appears relevant *in a data protection claim ...*’. The omission of the text inserted in italics invites courts and tribunals to consider this Code in other, related but separate, causes of action.

#### **4. Accountability Principle**

- 4.1 The BBC recognises the importance of accountability for the work of content creators and journalists; indeed considering the privacy rights of individuals is already an important part of existing industry codes. For example, the BBC's Editorial Guidelines pertaining to secret recording and/or filming require careful consideration of any potential infringement of privacy in both gathering and potentially broadcasting material before that material is gathered and an assessment of whether such intrusion is editorially justified by the public interest it serves. Journalists are also required to consider whether alternative and less intrusive means could be used. The Guidelines also stipulate that 'a record must be kept of the approval process, even if the request is turned down or the material gathered is not broadcast' (section 7.3.11.)
- 4.2 The draft Code appears to go further than the requirements of the UK General Data Protection Regulation ('the UK GDPR') which provides that data controllers must 'demonstrate compliance' (Article 5(2)). Importantly, there is no prescription as to how compliance can be demonstrated or that compliance necessarily means an explicit focus on data protection principles. Journalists and media organisations must be able to interpret this requirement in a proportionate manner consistent with the scale and sensitivity of the personal data processed and through the use of existing privacy compliance systems.
- 4.3 It is important to avoid the creation of unnecessary and complicated systems that risk undermining the capacity of journalists to work in fast-paced environments. Where existing codes and procedures require a detailed assessment of individual privacy rights vs the public interest in freedom of expression, we believe it is unlikely to be necessary to conduct a further balancing exercise for data protection purposes. This accords with the legislative intention of the Data Protection Act 2018 ('the DPA') when including the 'public interest' assessment at the heart of the special purposes exemption, and properly acknowledges industry codes like the BBC's Editorial Guidelines that are prescribed in regulation.
- 4.4 The accountability provisions of the draft Code should be carefully revised to recognise that existing editorial and legal measures designed to ensure that private information is handled appropriately (e.g under existing industry

- codes and internal compliance processes) may satisfy the accountability requirement (as noted elsewhere in the draft Code e.g. on p.33) and to explicitly recognise that journalists and content makers would not be expected to evidence data protection decision-making or record-keeping processes that duplicate existing editorial or legal compliance processes.
- 4.5 We agree with the statement on p.37 of the draft Code that; “Accountability is a flexible concept. As a general rule of thumb, what you do should be proportionate to the risks you are taking with personal data”. However, other areas of the draft Code, for example on pp.33-34 under “Demonstrating Your Decision” go further, and are more prescriptive in relation to the decision making and record keeping process. We think that a prescriptive approach is unhelpful and undermines the flexibility referred to in the Accountability section itself. It also risks the ICO and the courts taking the suggestions in the Code as mandatory requirements or a minimum standard that should be met. We also agree with the MLA’s submission that the guidance on accountability should be confined to Section 2 of the Code.
- 4.6 Currently, pages 33 to 35 (inclusive) of the draft Code recognise that existing processes and industry codes ‘can be easily adapted if necessary to include data protection considerations’. This implies that such current processes and codes do not adequately reflect the requirements of the DPA, yet the decisions of the ICO and the courts, we would suggest, does not show this to be the case.
- 4.7 If this section is to be retained the BBC suggests it should be moved to the Accountability section of the Code and that it should go on to explain that where they are sufficient to address data protection concerns, robust parallel processes may be *all* that is required to demonstrate compliance.
- 4.8 The draft Code should also explicitly recognise the need to consider the demands of fast-paced journalism when implementing record-keeping processes that identify consideration of privacy and public interest issues when processing personal data for the purposes of newsgathering. Page 33 appropriately recognises that ‘journalism often involves working at pace, under pressure ...’. That section should be moved to the accountability section later in the draft Code to recognise that the environment in which some journalists and content-makers work will not be conducive to the kind of data processing record-keeping suggested by the ICO in many cases. While the ICO recognises that the level of record keeping will depend on the

circumstances, the draft wording on page 34 (if retained) could do more to acknowledge that even a 'simple checklist or template' is unlikely to be practical in relation to the fast-paced environment of a newsroom.

- 4.9 The draft Code suggests media organisations must comply with Article 35 of the UK GDPR requiring the processing of Data Protection Impact Assessments ('DPIAs') for newsgathering data processing that is 'likely to result in a high risk to the rights and freedoms' of data subjects (pgs. 38-39).
- 4.10 Requiring multiple, specific DPIAs for journalistic work could create serious administrative impracticalities for work conducted in a high-paced environment. A new requirement that DPIAs be prepared would imply that there is currently a systemic failure to address data through existing legal and editorial processes. Whilst there may be individual failings of those processes, we do not believe that a case has been made that there a systemic failure of the processes to adequately protect data subjects. The BBC would expect to see specific mention of the adequacy of existing editorial and legal processes adopted by media organisations which would negate the requirement for a DPIA.
- 4.11 Such acknowledgement would promote the positive caveats around the use of DPIAs on page 39 of the draft Code which the BBC supports:

*You do not need to carry out a DPIA for every individual story that is likely to involve high risk processing. The ICO recognises that DPIAs need to be practical in the journalism context. A more general DPIA, or series of DPIAs, that apply to the overall type of processing (eg special investigations journalism) is very likely to be sufficient in most cases, as long as it:*

- *covers the different types of processing you carry out;*
- *identifies the associated risks; and*
- *identifies where those risks can be mitigated.*

## **5. Special purposes exemption**

- 5.1 The BBC welcomes the adoption of existing ICO guidance to explain the special purposes exemption and the frequent caveat that the exemption, when engaged, will often 'disapply all requirements of data protection law'.



- 5.2 However, the order of the draft Code – placing the exemption at the start of the draft Code - does not reflect the operation of UK data protection legislation or decision-making processes. Without diminishing the important protection the exemption affords freedom of expression, it should appear after the details of the data protection principles for consistency and to promote a clearer more intuitive user journey through the document.
- 5.3 The draft Code uses the term “necessary” on a number of occasions. For example on pg.32 under the section defining “incompatible with journalism” the draft Code states that you can rely on the journalism exemption in circumstances where “it is **necessary** to not comply with data protection law to achieve your journalistic purpose.” We would submit that this is an incorrect phrase to use in describing what incompatible with journalism means, particularly as “necessary” carries a specific legal meaning. When this was pointed out at the round table sessions it seemed that the ICO representatives didn’t intend the term to carry its strict legal meaning, however it must be noted that if the draft Code is considered in court proceedings then it is likely that the legal definition of “necessary” will be applied. We would therefore ask for this term to either be replaced or for it to be defined within the document. We support the MLA’s submission which suggests the wording on p.32 should be replaced with “In other words, it is impractical to comply with data protection law while still achieving your journalistic purpose.”

## **6. Accuracy Principle**

- 6.1 The BBC strongly encourages the ICO to revise Part 5 of the draft Code on the Accuracy Principle to remove sections that significantly stray into editorial decision-making. The draft Code includes unhelpful sections on, for instance, the distinction between fact and opinion, as well as how to verify the accuracy of personal data used for newsgathering and content creation. Page 62 goes so far as to suggest that in order ‘to comply with the accuracy principle, try to provide what information you can about the source, if appropriate, and not say anything inaccurate about their status’. With respect, it is not the role of the ICO to take a view on such matters.

- 6.2 The draft Code should specifically refer to existing industry codes that require high standards of editorial compliance to achieve 'due accuracy' (see, for instance, Part 3 of the BBC's Editorial Guidelines).
- 6.3 Greater prominence should be given to the concepts of editorial discretion and express reference should be made to clarify that the ICO's role is not to step into the shoes of an editor or journalist. The draft Code should explain that the ICO will normally not intervene if other regulators such as OfCom are more appropriate to deal with a matter involving privacy concerns.

## **7. Individual rights**

- 7.1 Part 10 of the draft Code on individual data subject rights requires revision to explain the limits of these rights when engaged by data subjects who are identified in journalistic data processing. This will also assist to manage the expectations of data subjects.
- 7.2 Article 17(1)(3) of the UK GDPR disapplies the application of the right to erasure 'to the extent that processing is necessary for exercising the right of freedom of expression and information'. The draft Code reflects this important caveat at page 84, albeit at the end of a lengthy section on the right to erasure. In contrast, the BBC believes this should be afforded greater prominence.
- 7.3 The guidance on other data subject rights is also problematic as it strays into editorial decision-making. Of most concern to the BBC is the characterisation of the right to restriction on page 81 which provides considerable detail about the temporary removal of online journalism where a data subject 'contests the accuracy of their personal data and you are verifying it'. As explained previously in this submission, the draft Code must reference existing and complementary legal and editorial processes implemented by media organisations to deal with accuracy complaints such as the provisions of section 5 of the Defamation Act 2013 which deal with defamation complaints about third party content. Clearly where media organisations receive accuracy or defamation complaints that immediately trigger editorial and legal risks, these may be quickly removed, restricted or amended.

7.4 The draft Code should specifically acknowledge the fact that these decisions must be made in the context of a specific request rather than immediately accepting its merits as is currently implied by this section.