

ICO consultation: Draft journalism code of practice

Start date: 13 October 2021
End date: 10 January 2022

Introduction

We are seeking feedback on the draft code of practice about processing personal data for the purposes of journalism. This is a statutory code under section 124 of the Data Protection Act 2018 (DPA 2018).

The code provides practical guidance about processing personal data for the purposes of journalism in accordance with the requirements of data protection legislation and good practice.

The code updates our previous guidance, [Data protection and journalism: a guide for the media](#), which was published in 2014.

It will also help us to assess compliance as part of the periodic review of processing for the purposes of journalism that the ICO must carry out under section 178 of the DPA 2018.

Before drafting the code, we launched a [call for views in 2019](#). You can view a [summary of the responses and individual responses on our website](#).

The draft is now out for public consultation. The public consultation will remain open for 12 weeks until 10 January 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 the respondent indicates that they are an individual acting in a private capacity (eg a member of the public). All responses from organisations and individuals responding in a professional capacity will be published. We will remove email addresses and telephone numbers from these responses but apart from this, we will publish them in full.

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

Questions

When commenting, please bear in mind that we aim to focus on key points and practical information relevant to journalism where possible. The code does not aim to cover all of the legislation and may assume knowledge of some general data protection terms and concepts. Where relevant, the code may link to further reading such as the [Guide to the UK GDPR](#) but this does not form part of the statutory code.

Please also bear in mind that we intend to provide a 'quick guide', and perhaps other resources, to support day-to-day journalism and smaller organisations, as we did with our previous media guidance. Please let us know if you have any ideas about resources to support this code in the general comment box at the end of this survey.

Q11 Is there anything else you want to tell us about the draft code?

General comments

Hacked Off campaign on press conduct, and our response applies to the press only.

There is a long history of press failure to comply with data protection law, going back at least as far as the findings of Operation Motorman in 2003. The officer who led that investigation, Alexander Owens, was critical of an alleged reticence to hold those responsible to account. Sir Brian Leveson agreed that significantly more should have been done by the ICO in his 2012 Report¹.

It is known that:

- Various newspaper publishers relied on the services of companies which breached data law to obtain content for stories. There are relatively recent allegations that The Sunday Times hired a "blagger" to breach individuals' data rights for the purposes of news-gathering.²
- There is evidence that, at least in some cases, those publishers may have been aware of those companies' unlawful activities³
- New evidence continues to emerge of data protection breaches committed by or on behalf of the press⁴

This context is relevant, because the importance of the guidance in this Code is secondary to how effectively publishers' compliance with the law is monitored.

An industry with such an extensive record of breaches of data protection law must be closely and proactively monitored to ensure wrongdoing does not

¹ Leveson Report, Volume 3, "The Relationship: The ICO and the Press", pages 1097 - 1100

² <https://www.theguardian.com/media/2018/mar/07/i-was-nothing-more-than-a-common-thief-master-of-fleet-streets-dark-arts-reveals-trade-secrets>

³ Evidence that the Daily Mail continued to pay Steve Whittamore, even after he had been convicted for data theft: <https://www.opendemocracy.net/en/opendemocracyuk/daily-mail-faces-fresh-blagging-scandal/>

⁴ <https://www.bbc.co.uk/news/uk-56444635>

persist. It is not reasonable to have any confidence in publishers' stated commitments to data protection law alone, or of having certain processes or policies in place.

Whilst most national newspapers have, or seem to have, data protection policies that speak to its consumer's data protection right, none, it seems, have *any* publicly accessible policies on how they handle/process/retain subject data for the purposes of the news-gathering process. This is a major problem but, oddly, one that the ICO seems entirely unaware of, and which is not even mentioned in this code consultation.

Hacked Off engages with individuals every year whose data rights have been breached as part of the news-gathering process. The ICO must take more proactive steps to police data protection law among newspaper publishers.

Specific comments

Further, we make these specific proposals in respect of the Code.

1. Throughout the Code, in respect of most of the provisions, the following comment is made:

"Where necessary, the special purposes exemption specifically protects journalism."

This is insufficiently detailed (and inaccurate). The tests which apply for the special purposes exemption to take effect are not "necessity" – they are that processing was undertaken with a view to publication, material is reasonably believed to be in the public interest, and the belief that compliance would be incompatible with journalism. In some cases, the exemption applies even when not necessary.

Presently, the code conveys the erroneous impression that the journalistic exemption applies to all journalistic activity or, otherwise, is easily available to newspapers by virtue of their engagement in journalism production. As the test makes clear, the exemption is much narrower and more stringent concerning the circumstances in which it applies. It protects not journalism per se but public interest expression where *compliance* would be incompatible with the dissemination of that valuable public resource.

Propose all references to this line are changed to the following:

"Where the relevant criteria have been met, the special purposes exemption applies."

2. On Page 4, the Code refers to a need to balance "journalism and privacy" (page 4). Data rights extend well beyond privacy (the accuracy principle, for example, is not generally a matter of privacy). Propose this and other similar references are changed to "journalism and citizens' data rights".

2. Page 18 states:

"However, this code is generally well-aligned with the above codes and complements industry guidance. Where relevant, we will take industry codes of

practice into account. Complying with industry codes will therefore also help you to comply with data protection law.”

The Editors’ Code, used by IPSO, falls short of what is required under data protection law. The privacy clause (clause 2) is vague, stating only that intrusions will have to be “justified”. It lacks the clarity and the higher thresholds of the special purposes exemption in the Data Protection Act. If this Code were to be well-aligned with the Editors’ Code, then it would be unfit for purpose. Propose this paragraph is removed.

3. Page 23 lists the following criteria for what might qualify as “citizen journalism”:

“the purpose of the publication, including any reasons provided by the individual for publishing the information. For example, informing the public; how closely the activity resembles activities that the media carry out; the content of the information, including any public interest in publication; the means by which the information was published; the extent to which the information has been promoted to the public, and any restrictions on its use.”

It’s not clear why the second (activity “resembles” media activity) and fifth (means of publication) of these apply. Propose they are removed.

4. Page 25 states:

“It is widely accepted that a free press, especially a diverse press, is a fundamental component of a democracy. It is associated with strong and important public benefits worthy of special protection. This in itself is a public interest.”

This is erroneous. First, it presupposes that press freedom is an absolute right, which, clearly, it is not given the plethora of pre-existing laws that limit speech compatibility with the qualified right to freedom of expression under Art 10 ECHR, from laws on contempt to the law of defamation, laws concerning privacy to the Official Secrets Act. There is no such thing as an absolute right to free speech and it serves no purpose for the ICO to entertain the romantic notion that there is. Secondly, describing press freedom as a public interest in itself debases the currency of data protection since it invites publishers to rely on the “public interest” in a free press as a basis for the test of “reasonable belief publication was in the public interest” for non-compliance with the Act – which might be relied upon for the publication of literally anything. The ICO’s statement is entirely meaningless, not least for its disregard for the equal and opposite public interest in the ICO upholding citizens’ data rights. Propose this line is removed.

5. Page 27, describing part of the exemption, states,

“You can rely on the exemption to cover all the background information you collect, use or create as part of your journalistic day-to-day activities, even if you: do not include those details in any final article or programme; and do not actually publish a story, as long as there remains “a view to publication” in the future.”

The second clause here needs significantly more detailed guidance to ensure it is not exploited. A "view to publication" could be claimed to last indefinitely.

6. Page 29 states,

"You may also find it helpful to consider complaint outcomes by IPSO involving the balance of the public interest."

There is no reasonable basis for the Code to rely on the findings of IPSO. Unlike the Editors' Code, IPSO itself is not recognised in legislation nor is it subject to any form of external auditing or verification process. Consequently, there is no safeguard to ensure that its 'findings' are reliable. Given that, typically, around 99% of complaints are not upheld by IPSO, with the vastly overwhelming number dismissed without public record of the reasons why, the number of complaints actually upheld is so vanishingly small as to be statistically insignificant. In contrast with IMPRESS and Ofcom, it is not a regulator which meets statutorily-set standards for regulators. Its findings are unreliable and should not be cited as guidance here. Propose this line is removed.

7. Page 30 states, in guidance about the public interest,

"In general, there may be a stronger public interest for publishing information where an individual: is a public figure (individuals who have a degree of media exposure due to their functions or commitments); or has a role in public life more broadly, where the public has an interest in having access to some information about them. Politicians, public officials, business people and members of regulated professions are examples of individuals with this type of role."

Although this comment is qualified ("there may be.."), it remains unhelpfully broad. The question of public interest should focus on the content of the story, in its full context, which may include the occupation or profile of the subject. The fact someone is in the public eye does not in itself affect their data rights.

8. Page 32 states, regarding one of the criteria for the special purposes exemption to be met,

"You can rely on the exemption by demonstrating a reasonable belief that complying with a particular provision is incompatible with the purposes of journalism. In other words, it is necessary to not comply with data protection law in order to achieve your journalistic purpose.

Deciding what is proportionate may involve considering whether an alternative method is reasonably practicable. There may be resource implications, for example. Even if you cannot comply fully, you should still comply to whatever extent you believe is proportionate in order to achieve your journalistic purpose."

It is not clear on what basis "proportionality" is introduced as part of this criterion. The general comment that "there may be resource implications" suggests that individuals' data rights can be circumvented where it might be expensive to comply. That would be wrong. If this comment is to remain, there

needs to be more detail; for example the Code might elaborate that this only applies for publishers below a specific level of turnover.

9. Page 47 states,

“Individuals may not be aware of their default settings and may make their personal data public without realising it. Considering whether you are acting fairly in line with the first data protection principle will help you to handle appropriately online personal data you want to use. You may also find it helpful to consider IPSO’s Guidance for journalists: Using material from social media.”

IPSO’s guidance in this area is weak and the organisation’s record is poor. It commonly finds that anything posted on social media – even when intended for a small audience – is legitimate to reproduce in a national newspaper⁵. Propose the link to the guidance is removed.

10. Page 55 states, regarding fairness,

“Under data protection law, it is likely to be unfair to mislead people about a journalist’s identity or intentions. However, you can consider the special purposes exemption if you plan to use undercover or intrusive covert methods to get a story (see What is the special purposes exemption?). Before doing so, it is helpful to consider whether it is necessary to use these methods.”

If it is unfair to mislead, then doing so would be a breach of the Act. The exemption may apply, and if it does, then it is a requirement to hold the reasonable view that noncompliance is necessary (i.e. it is not a matter of being “helpful” to do so). The other two criteria would also apply. Propose this is set out fully.

11. Page 56 states,

“What does “transparent” processing of personal data mean? Transparency is fundamentally linked to fairness. It means that you are clear, open and honest with people from the start about who you are and how and why you use their personal data. Individuals have the right to be informed about the collection and use of their personal data. This type of information is known as privacy information. You are normally required to provide privacy information to people when you collect their personal data. When obtaining personal data from other sources, you do not need to provide individuals with privacy information if: • the individual already has the information; • providing the information would be impossible; • providing the information would involve a disproportionate effort; • providing the information would render impossible or seriously impair the achievement of the objectives of the processing; • you are required by law to

⁵ For example, in this ruling a complainant had a historic conviction, which was private to her. When she discovered she was to be the subject of a story, and feared her conviction would be mentioned, she published a YouTube video aimed at her local business clients which explained this to mitigate its effect on her business. Despite the video was intended for a small viewership – and was only made in anticipation of the story being published – IPSO found the fact of its publication meant she no longer had any Privacy protection over her long spent conviction.

<https://www.ipso.co.uk/rulings-and-resolution-statements/ruling/?id=20864-17>

obtain or disclose the personal data; or • you are subject to an obligation of professional secrecy regulated by law that covers the personal data.”

As set out under “General comments” above, no national newspaper appears to have any published policy on data handling when it comes to the news-gathering process. Propose this is set out as a specific requirement.

Section 2 About you

Please see privacy information above.

Q12 What is your name?

Nathan Sparkes

Q13 If applicable, what is the name of your organisation and your role?

Hacked Off, Chief Executive

Q14 Are you acting: Please select the capacity in which you are acting.

- 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.

Q14a Are you: Please select most appropriate.

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

Other

If other, please specify.

Further consultation

Q15 Would you be happy for us to contact you regarding our consultation on the journalism code?

Yes

No

If so, please provide the best contact details.

Q16 Would you be happy for us to contact you regarding our work to develop a process to review processing for journalism in accordance with the statutory requirement 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.