Elizabeth Archer

From:
Sent: 23 December 2021 18:44
To: journalismcode
Cc: Jon Oakley
Subject: ICO consultation on the draft journalism code of practice - feedback
Attachments: Simkins LLP - Feedback on draft journalism code of practice 23.12.21.DOCX; Simkins LLP - Feedback on draft journalism code of practice 23.12.21.PDF

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Dear Sirs/Madams
Please see attached (in Word form as requested, and PDF for ease) our firm's feedback on the draft journalism code of practice for your consideration.
Hopefully the responses are self-explanatory, but please do let us know if you have any questions about any of them, and we would be more than happy to assist.
Yours faithfully
Thomas Moore
for Simkins LLP

Website www.simkins.com

This year, instead of sending Christmas cards, we have made a donation to Centrepoint. We wish all our clients and contacts a Merry Christmas and a Happy and Prosperous New Year. Please note that our offices will close at 3pm on 24th December 2021, re-opening after the Christmas break on 4th January 2022 at 9am.

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ICO consultation:

Draft journalism code of practice

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

ico.

Information Commissioner's Office

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.

Q1 To what extent do you agree that the code is clear?

☐ Strongly agree
☒ Agree
☐ Neither agree nor disagree
☐ Disagree
☐ Strongly disagree

Q1a If the code could be clearer, please tick which section(s) could be clearer.

☐ Summary
☐ Navigating the code
☒ About this code
☒ Balance journalism and privacy
☐ Be able to demonstrate your compliance
☐ Keep personal data secure
☒ Justify your use of personal data
☒ Make sure personal data is accurate
☐ Process personal data for specific purposes
☐ Use the right amount of personal data
☐ Decide how long to keep personal data
☐ Be clear about roles and responsibilities
☐ Help people to exercise their rights
☒ Disputes and enforcement
☐ Annex 1

Please explain your response to Q1a.

About this code

1. On page 19, at paragraph 3, and page 28 at paragraph 5, the draft code inaccurately describes the defence of publication on a matter of public interest under section 4 of the Defamation Act 2013 (**DA 2013**). The code sets out that *"defamation law also includes a defence if there is a 'reasonable belief' publication is in the public interest*". However, the code crucially omits that the publication must also be, or form part of, a statement on a matter of public interest.

The full defence from section 4 of the DA 2013 is as follows (emphasis added):

> *(1) It is a defence to an action for defamation for the defendant to show that—*
>
> *(a) the statement complained of was, or formed part of, a statement on a matter of public interest; and*
>
> *(b) the defendant reasonably believed that publishing the statement complained of was in the public interest.*

Further, section 4(2) of the DA 2013 sets out that *"in determining whether the defendant has shown the matters mentioned in subsection (1), the court must have regard to all the circumstances of the case"*.

Therefore, as well as including the full defence set out above, the code should say that defamation law *"can also include a defence"* of publication on a matter of public interest (rather than *"also includes a defence"*), because the defence will not always apply. All the circumstances of the case must be looked at.

Mr Justice Nicklin neatly summarises the defence under s.4 of the DA 2013 at paragraph 129 and 131 of his judgment in *Bruno Lachaux v (1) Independent Print Limited and (2) Evening Standard Limited [2021] EWHC 1797 (QB)*, by reference to (among other cases) the judgment of Lady Justice Sharp in *Economou v De Freitas [2016] EWHC 1853 (QB)* (emphasis added):

> *129. There are* ***three issues for the court to determine*** *under s.4(1):*
>
> ***i) was the statement complained of, or did it form part of, a statement on a matter of public interest? If so,***
>
> ***ii) did the defendant believe that publishing the statement complained of was in the public interest? If so,***
>
> ***iii) was that belief reasonable?***
>
> *- Economou [87].*
>
> *130.* ***The first issue is an objective question for the Court not a matter of the subjective judgment of a journalist or editor*** *… Matters of public interest are of potentially wide compass, but exclude matters which are "personal and private, such that there is no public interest in their disclosure" …*
>
> *131. The second issue, under s.4, concerns the defendant's actual state of mind at the time of publication …* ***This element of the defence is not established by demonstrating that a reasonable person could have believed that the publication was in the public interest*** *…* ***The defendant must prove that s/he did believe that publication was in the public interest****. A failure to do so will mean the defence will fail …*

We would respectfully suggest that the above must be reflected in any discussion of the defence under section 4 of the DA 2013, however brief, especially where direct comparison is being drawn with the special purposes exemption under data protection legislation, which applies a different test.

Section 1 – Balance journalism and privacy

2. On page 28, at paragraph 3, regarding the *"reasonable belief"* test for the special purposes exemption, the draft code suggests *that "the ICO, a court or a tribunal may not agree with your assessment but that does not mean your belief is not reasonable"*.

We understand the position, but wonder whether the point might be expressed a little differently, so as to minimise the risk of any confusion on the part of users of the code (**Users**). It seems to us it is conflating subjective and objective elements of the test where it should not. We appreciate the sentiment that the ICO, courts and tribunals should be only ruling on the reasonableness or otherwise of the controller's belief.

However, this section implies that the controller would still be able to avail themselves of the defence on the basis that they (wrongly) consider their own belief to be reasonable. We would suggest that this would not be an accurate reflection of the special purposes exemption. 3. On pages 30 and 31, the draft code sets out the factors to be considered in respect of public interest arguments for publishing information about an individual, including (on page 31) the *"likelihood and severity of harm"* that will be caused to the individual as a result of the publication. On the severity of harm, the code sets out (on page 31, at paragraph 3) that, *"if there would be a severe impact on individuals or other public interests, then this will carry a significant weight in the public interest. This is relevant if, for example, there is any risk of physical or mental harm to an individual"*.

We consider that this wording could be better clarified, as it currently reads as though a likely severe impact on individuals is a significant factor <u>in favour</u> of publication (which must not have been the intention of those who drafted the code). We would also suggest that the use of *"public interests"* in this context is confusing, given the frequent usage of the phrase *"public interest"* elsewhere in the draft code (e.g. in relation to the special purposes exemption), and indeed the use of *"public interest"* in the same sentence.

Alternative wording could be as follows: *"if there would be a severe impact on individuals or society more generally, then this will carry a significant weight against the public interest "*.

<u>Section 4 – Justify your use of personal data</u>

4. Page 49, paragraph 2 of the draft code sets out that one of the 23 conditions for processing special category under the DPA 2018 for criminal offence data is *"disclosure of information for the purposes of journalism in connection with unlawful acts and dishonesty"*, which (per the summary on page seven of the draft code) allows data controllers *"to disclose these types of sensitive personal data to journalists in some circumstances"*.

The draft code then lists a number of examples of what might constitute *"unlawful acts and dishonesty"* for these purposes (which paraphrase sections 10 and 11(2)(a) - (d) of Part 1, Schedule 1 of the DPA 2018), specifically:

- the commission of an unlawful act by a person;
- dishonesty, malpractice or other seriously improper conduct of a person;
- unfitness or incompetence of a person;

- mismanagement in the administration of a body or association; or
- a failure in services provided by a body or association.

However, the draft code omits entirely the requirements set out at section 10(1) and 11(1) of Part 1, Schedule 1, namely that the processing must be:

(a) necessary for the purposes of the prevention or detection of an unlawful act (for an unlawful act, per section 10(1)) or necessary for the exercise of a protection function (for the other examples per section 11(1));

(b) carried out without the consent of the data subject so as not to prejudice those purposes / the exercise of that function; and

(c) necessary for reasons of substantial public interest.

A *"protective function"* is defined at section 11(2) of Part 1, Schedule 1 of the DPA as *"a function which is intended to protect members of the public against"* the types of behaviours set out at section 11(2)(a) to (d).

We would suggest that tests set out at sections 10(1) and 11(1) must be included to give context to the examples set out above. This part of the draft code currently reads as though it is sufficient to establish that the publication merely relates to or *"is carried out in connection with"*, for example, the unfitness or incompetence of a person. In fact, a data controller must show that the publication is *"necessary … <u>to protect members of the public against</u>"*, in this case, the unfitness or incompetence of a person.

Whilst we appreciate it is impossible to set out every aspect of the law in this area in the code, we feel that the omission of this part of the legislation has the potential to materially mislead Users and/or lead to breaches being inadvertently committed by Users of the code. For this reason, we think that it is very important that clarity is provided on this point, namely via inclusion of the full test set out above.

Further, the draft code explains what *"substantial public interest"* means, but does not clearly set out that processing being *"necessary for reasons of substantial public interest"* is a prerequisite to relying on the conditions set out at sections 10 and 11 of Part 1, Schedule 1 of the DPA.

5. On page 54, under the "Public figures and public role" heading, the draft code quotes the judgment of Mann J in *Sir Cliff Richard OBE v the BBC [2018] EWHC 1837 (Ch)*. This quotation contains a typographical error (in the third line of the quoted paragraph) that we thought worth pointing out; the reference to *"some sort of* ***access*** *the board diminution"* should read *"* ***across*** *the board diminution"*.

<u>Section 5 – Take reasonable steps to ensure personal data is accurate</u>

6. At paragraph 3 of page 61, the draft code sets out that publishers *"should be as clear as possible that [they] are reporting on unconfirmed facts, and any potential inaccuracies [sic]"*. We believe that this may be a typo and should read *"and* ***highlight*** *any potential inaccuracies"*, or words to that effect.

<u>Section 10 – Help people to exercise their rights</u>

7. At paragraph 3 of page 84 (and in the fifth bullet point for section 10 on page 10, as well as the fifth bullet point on page 78) the draft code states that *"the right to erasure does not apply if the processing is necessary to exercise the right*

to freedom of expression and information". In fact, it is not that the right to erasure does not apply, but that the special purposes exemption provides a potential defence to, or potential exemption from, a right to erasure request or claim.

There is a danger that the current wording could be misunderstood to mean that the right to erasure does not apply in all circumstances in which freedom of expression and information is involved. It would be more correct to say that a processor is exempt from the requirement to erase personal data in circumstances where the three-stage test for the special purposes exemption is met.

Q2 To what extent do you agree that it is easy to find information in the draft code?

☐ Strongly agree
☒ Agree
☐ Neither agree nor disagree
☐ Disagree
☐ Strongly disagree

Q2a If it could be easier to find information in the code, please tell us how it could be easier.

N/A

Q3 To what extent do you agree that the code provides the right level of detail?

☐ Strongly agree
☐ Agree
☒ Neither agree nor disagree
☐ Disagree
☐ Strongly disagree

Q3a If the code could provide a better level of detail, please tell us how it could be improved.

Section 5 – Take reasonable steps to ensure personal data is accurate

1. At paragraph 5 of page 61, the draft code sets out that journalists *"may need to clarify the nature or context of some content specifically to avoid compromising the accuracy of the personal data. For example, check that headlines are supported by the text."*

We would suggest that the code reflects clause 1, paragraph (i) of the IPSO Code, which sets out (emphasis added): *"The Press must take care not to publish inaccurate, misleading or distorted information or images,* ***including headlines not supported by the text****"*.

Disputes and enforcement

2. On page 91, under the "Stay to proceedings heading", the draft code sets out the procedure set out at section 176 of the DPA 2018 for the so-called "statutory stay".

However, the draft code does not include in detail the fact that the ICO may make a written negative determination as to whether such a stay is appropriate. As drafted, the draft code makes it seem as though a data protection claimant has no process by which to resist a statutory stay, whereas in fact, it is open to a claimant to seek a determination under section 174 of the DPA 2018 and/or make a complaint to the Commissioner under section 165 of the DPA 2018.

Q4 To what extent do you agree that the code provides practical guidance to help individuals processing personal data for the purposes of journalism to understand and comply with data protection obligations?

☐ Strongly agree
☐ Agree
☒ Neither agree nor disagree
☐ Disagree
☐ Strongly disagree

Q4a If the code could be more practical, please tick which section(s) could be more practical and tell us how it could be improved.

☐ Summary
☐ Navigating the code
☐ About this code
☐ Balance journalism and privacy
☐ Be able to demonstrate your compliance
☐ Keep personal data secure
☐ Justify your use of personal data
☐ Make sure personal data is accurate
☐ Process personal data for specific purposes
☐ Use the right amount of personal data
☐ Decide how long to keep personal data
☐ Be clear about roles and responsibilities
☐ Help people to exercise their rights
☐ Disputes and enforcement
☐ Annex 1

Please explain your response to Q4a.

N/A

Q5 To what extent do you agree that the draft code covers the right issues about journalism in the context of data protection?

☐ Strongly agree
☒ Agree
☐ Neither agree nor disagree

☐ Disagree
☐ Strongly disagree

Q5a If we have not covered the right issues in the code, please tell us how it could be improved.

N/A

Q6 Please provide details of any cases, examples, scenarios or online resources that it would be useful for us to include in the code.

We set out below the cases referred to in our responses to questions 1a and 8a which we believe should be included or reflected in the code:

1. *Bruno Lachaux v (1) Independent Print Limited and (2) Evening Standard Limited [2021] EWHC 1797 (QB)*;
2. *Economou v De Freitas [2016] EWHC 1853 (QB)*;
3. *PJS v News Group Newspapers Limited [2016] UKSC 26*;
4. *NT1 & NT2 v Google LLC [2018] EWHC 799*; and
5. *Hurbain v Belgium [2021] ECHR 544*.
6. *Satamedia case C-73/07*, official English translation of the judgment: https://curia.europa.eu/juris/document/document.jsf?text=&docid=76075&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1149101
7. *R (L) v Commissioner of Police for the Metropolis [2009] UKSC 3*

Q7 To what extent do you agree that the draft code effectively protects the public interest in freedom of expression and information?

☐ Strongly agree
☐ Agree
☒ Neither agree nor disagree
☐ Disagree
☐ Strongly disagree

Q7a If the draft code could protect the public interest in freedom of expression and information more effectively, please tell us how it could be improved (bearing in mind the need to balance competing rights in the code).

This question is not strictly applicable to us as primarily claimant lawyers. However, we would observe that often, in consultations such as this, the bulk of responses emanate from large media organisations who have a vested interest in promoting freedom of expressions above other competing rights given that it suits their own purposes. We also believe in freedom of speech and support responsible journalism. However, we ask that appropriate weight is always afforded to the Article 8 rights of individuals, so that an appropriate balance is struck at all times, with individuals/citizens being provided with suitable protection and/or redress where appropriate. It must be kept in mind that individuals are unlikely to be as

organised (or as well resourced) as media organisations and other similarly likeminded parties (such as NGOs or other freedom of expression organisations) when it comes to campaigning for the advancement of their own rights.

Q8 To what extent do you agree that the draft code effectively protects the public interest in data protection and privacy?

☐ Strongly agree
☐ Agree
☐ Neither agree nor disagree
☒ Disagree
☐ Strongly disagree

Q8a If the draft code could protect the public interest in data protection and privacy more effectively, please tell us how it could be improved (bearing in mind the need to balance competing rights in the code).

About this code

1. On page 19, at paragraph 3, the draft code sets out *that "not all personal data is necessarily private"*. We consider that this is a slightly unhelpfully broad statement and could be usefully caveated with examples, such as *"not all personal data is necessarily private, for instance, where an individual has voluntarily placed information into the public domain (and chooses that it should remain there)"*.

Section 1 – Balance journalism and privacy

2. On page 23 at paragraph 1, journalism is defined by reference to the judgment in the *Satamedia case C-73/07*: *"the disclosure to the public of information, opinions or ideas by any means"*. However, we understand that the judgment in fact reads (at paragraph 61 of the official translation, referred to above) *"disclosure to the public of information, opinions or ideas, irrespective of the **medium** which is used to transmit them"* (our emphasis),rather than *"by any means"*. This may be a matter of translation, but we are concerned that the phrase *"by any means"* is misleading, as that phrase suggests that the methodology and ethics employed by an individual are irrelevant to the definition of journalism. We would suggest that *"by any medium"* would be clearer and a more accurate reflection of the judgment.

3. On page 25 at paragraph 1, the draft code sets out as follows: *"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."*

We wholly accept that there is a public interest in there being a free, open and diverse press. However, that should not be conflated with the principle that everything that the press does can or should be a matter of public interest in and of itself. There need to be appropriate checks and balances in place to ensure that individual rights are observed and respected by the press.

By way of comparison, the IPSO Editors' Code of Practice (which is infrequently referenced in the draft code), sets out as follows:

> *The Code … balances both the rights of the individual and the public's right to know.*
>
> *To achieve that balance, it is essential that an agreed Code be honoured not only to the letter, but in the full spirit. It should be interpreted neither so narrowly as to compromise its commitment to respect the rights of the individual, nor so broadly that it infringes the fundamental right to freedom of expression – such as to inform, to be partisan, to challenge, shock, be satirical and to entertain – or prevents publication in the public interest.*

In our view, the draft code should reflect the spirt of this wording in the IPSO Code. Plainly there is a public interest in freedom of expression itself, but it is not and cannot be an overriding interest that allows publication of anything in any circumstance.

4. At the bottom of page 26 and top of page 27, the draft code sets out that proving a reasonable belief in the public interest is *"less restrictive than other exemptions under the DPA 2018"*, that *"it is designed to respect the independent judgment and expertise of the controller regarding the public interest"* and that *"your judgment on the public interest is not to be disregarded lightly"*.

First, we consider this understates the importance of reasonableness in assessing a controller's belief that publication is in the public interest. Just because a controller believes publication to be reasonable does not make it so. Such a determination may be made by the courts or the ICO, and should take into account all of the circumstances, not merely whether the controller judged publication to be reasonable.

Secondly, it is not the case that all controllers have *"independent judgment and expertise"* in matters of public interest. Many controllers will have a self-serving interest in reaching the conclusion that something is indeed in the public interest, whilst some publishers will be citizen journalists with limited knowledge of the complex legal or regulatory position in this area.

5. On page 30, paragraph 4, the draft code sets out that there may generally be a stronger public interest where an individual is a public figure or has a role in public life more broadly, e.g. *"politicians, public officials, business people and members of regulated professions"*. While we accept that there may be a stronger public interest for publishing certain but limited information in such circumstances, this requires a degree of balance, given the private lives of individuals are still afforded protection under the law.

The Supreme Court's judgment in *PJS v News Group Newspapers Limited [2016] UKSC 26* provides useful guidance on how the courts will approach the private lives of public individuals. That case related to proposed publication of details of the private sex life of a high-profile individual. At paragraphs 21 and 24 of the judgment of Lord Mance, which concluded that there was *"no public interest in any legal sense in the story"*, he sets out as follows:

> *It is beside the point that the appellant and his partner are in other contexts subjects of public and media attention - factors without which the issue would hardly arise or come to court. It remains beside the point, however much their private sexual conduct might interest the public and help sell newspapers or copy.*

…

> … *accepting that article 10 is not only engaged but capable in principle of protecting any form of expression, [previous cases on the point] clearly demonstrate that this type of expression is at the bottom end of the spectrum of importance (compared, for example, with freedom of political speech or a case of conduct bearing on the performance of a public office). For present purposes, any public interest in publishing such criticism [of the appellant's private life] must, in the absence of any other, legally recognised, public interest, be effectively disregarded in any balancing exercise and is incapable by itself of outweighing such article 8 privacy rights as the appellant enjoys.*

Whilst it may be the case that publishing information about a public figure could attract less protection than a private individual, in our view the draft code ought to set out that the starting point in law is that public figures still have a reasonable expectation of privacy in respect of the publication of private matters. Further, *"business people"* and indeed those who might be known to the public (such as sports or entertainment personalities) but are not public servants will not necessarily be public figures in all circumstances.

<u>Section 4 – Justify your use of personal data</u>

6. On page 48, at paragraph 2, the draft code sets out that *"whether or not a conviction is "spent" under the Rehabilitation of Offenders Act 1974 (ROA 1974) is generally a weighty factor"* in considering whether an individual has a reasonable expectation of privacy in respect of the fact of or circumstances around a historic criminal conviction.

This is framed to suggest that publication about a spent conviction is not prohibited, but the fact that the conviction is merely a *"weighty factor"* to consider in the balancing act. However, the Rehabilitation of Offenders Act 1974 (ROA 1974) sets out at section 4(2) that a person whose conviction is spent *"shall be treated for all purposes in law as a person who has not committed or been charged with or prosecuted for or convicted of or sentenced for the offence or offences which were the subject of that conviction"*.

The draft code rightly points out at paragraph 3 of page 48 that *"there is a strong public interest in the rehabilitation of offenders that is recognised by the ROA 1974"*, and we broadly agreed with the draft code's guidance.

However, we query whether the framing at paragraph 2, referred to above, should be amended to reflect the will of parliament in enacting the ROA 1974, namely that the starting point should be that an individual whose conviction is spent is *"treated for all purposes in law"* as though they did not commit (and were not charged with, prosecuted for, convicted of or sentenced with) the offence in question. Any subsequent balancing act will of course include whether there is a public interest in publishing details of a spent conviction, but the starting point must be that no reference should be made by the media to a spent conviction, given the individual has a reasonable expectation that he or she will be treated *"for all purposes in law"* as though he/she did not commit the offence. Spent convictions also constitute private information within the meaning of Article 8 of the ECHR, per the judgment of Lord Hope in *R (L) v Commissioner of Police for the Metropolis [2009] UKSC 3*.

This is particularly the case where there is a new publication about a spent conviction, as distinct from the scenario in *NT1 & NT2 v Google LLC [2018] EWHC 799*, which related to a de-listing request about historic then-contemporaneous reporting of the proceedings that resulted in the claimants' convictions.

It is important that the code reflects that the right to erasure is not only available in respect of spent convictions. It must also apply, for instance, in scenarios where an individual is (a) publicly accused of criminal offence(s) and no action is taken by law enforcement; (b) arrested for such offence(s), but no further action is taken by the police and/or Crown Prosecution Service; or (c) charged with a criminal offence and not convicted. While publication of such matters may on occasion have been in the public interest at the time of publication, with the passage of time, such public interest arguments (to the extent they applied at the time) will potentially cease to apply, at which point the subject matter ought to be considered private.

To quote the official Press Release of the Registrar of the Court in relation to the recent judgment of the European Court of Human Rights (**ECtHR**) in *Hurbain v Belgium [2021] ECHR 544* (referred to below): *"With the passage of time, a person should have the opportunity to rebuild his or her life without being confronted with errors of the past by members of the public. Online searches for people by name had become common practice in contemporary society and such searches usually had nothing to do with any criminal proceedings or convictions against the person concerned."*

This principle plainly applies to the scenarios outlined above (among others), arguably to an even greater extent than in respect of an individual subject to a spent conviction, for it must be wrong in law that a person who has not been questioned and/or arrested and/or charged and/or tried and/ or convicted of any offence should be in a worse position than someone who has been.

7. On page 54 at paragraph 3, the draft code sets out that controllers should consider the unwarranted harm that their processing may cause. It sets out that *"not all harm is unwarranted however"* and that processors *"can process personal data by being clear about how you justify it even if it causes some harm"*. We consider it to be important to caveat this explanation to clarify that the more serious the harm (or likely harm) caused, the weightier the justification should be.

<u>Section 8 – Decide how long to keep personal data</u>

8. At the bottom of page 72, the draft code sets out that *"there is a strong, general public interest in the preservation of news archives, which contribute significantly to the public's access to information about past events and contemporary history. This is generally a weighty factor in favour of not erasing personal data from news archives"*.

Although we do not disagree with this general proposition, this section does not accurately reflect the balancing act that the courts will conduct, for example, between the subject of the story's right to privacy and/or erasure of their personal data, as balanced against the public interest in preserving news archives.

The recent judgment of the European Court of Human Rights (**ECtHR**) in *Hurbain v Belgium [2021] ECHR 544* is relevant and should be considered here and referred to if appropriate. In this case, the Court held that there had been no violation of Mr Hurbain's Article 10 rights in respect of a decision by the Belgian

courts to anonymise a historic article contained in the online archives of the daily newspaper *Le Soir*, of which Mr Hurbain was the editor. The ECtHR accepted the Belgian court's judgment that retaining the article online had the effect of creating a *"virtual criminal record"* for the subject of the story, in circumstances where his conviction was spent.

The ECtHR approved of the approach taken by the Belgian courts in weighing up the subject of the story's right to respect for his private life, on the one hand, and Mr Hurbain's freedom of expression, on the other, in accordance with the criteria laid down by case law. They were right to consider *"the harm sustained by the driver on account of the article being online, having regard to the passage of time (about 20 years) since its original publication and to the fact that its anonymisation on the website of Le Soir would not affect the text of the original article and would be the most effective and proportionate measure, among the various options"* (to quote from the ECtHR's press release about the judgment dated 22 June 2021). The was deemed by the ECtHR to be *"striking a fair balance between the competing rights at stake"*, again to quote the ECtHR's press release.

We accept that there may be a general public interest in the preservation of news archives (though news archives of today are very different to those of the past, in that they are available to the public in much the same way as current news, and often free of charge), but we are concerned that, at present, the draft code does not make it sufficiently clear that, in each case, a balancing exercise must be conducted between, on the one hand, the individual's right to erasure, and, on the other hand, the public interest in preserving news archives. The draft code at present only presents one side of this balancing exercise (namely the factors against erasure and/or anonymisation), whereas the courts have recognised that a fair balance must be struck, and erasure or anonymisation may be awarded in appropriate circumstances.

Section 10 – Help people to exercise their rights

9. At paragraph 4 of page 84, the draft the code sets out again that there is a *"strong, general public interest in the preservation of news archives, which contribute significantly to the public's access to information about past events and contemporary history. This is generally a weighty factor in favour of not erasing personal data form news archives. It may be proportionate to rectify inaccurate or incomplete information in a news archive from time to time"*.

While the preservation of lawful accurate historic information is important, this paragraph suggests that rectification of inaccurate or incomplete information is the only available remedy. In fact, cases such as *NT1 and NT2* and *Hurbain* (referred to above) demonstrate that anonymisation and/or erasure are available remedies, in circumstances where the rights of the individual override the public interest arguments regarding access to news archives.

Q9 Could the draft code have any unwarranted or unintended consequences?

☒ Yes
☐ No

Q9a If yes, please explain your answer to Q9.

We refer to our responses to questions 1a, 3a and 8a above, which set out where we believe Users are likely to be misled by the draft code as to the correct legal position, and the possible adverse consequences.

Q10 Do you think this code requires a transition period before it comes into force?

☒ Yes
☐ No

Q10a If yes, please tick the most appropriate option.

☐ 3 months
☒ 6 months
☐ 12 months

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

N/A

Section 2 About you
Please see privacy information above.

Q12 What is your name?

Thomas Moore, Jon Oakley, Gideon Benaim

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

Simkins LLP

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.