

**From:** [REDACTED]  
**Sent:** 23 November 2022 21:32  
**To:** journalismcode  
**Subject:** ICO Journalism Code - second consultation

External: This email originated outside the ICO.

Dear Information Commissioner,

**Response of Newsquest Media Group to the ICO consultation on the second draft Journalism Code of Practice**

We are Newsquest Media Group, a leading publisher of local and regional newspapers, magazines and news websites. Thank you for this opportunity to comment on the second draft of the ICO's Journalism Code of Practice.

Newsquest Media Group fully endorses and repeats the comments, concerns and recommendations contained in the submissions of the Media Lawyers Association and their revised draft Code, together with the supporting submissions from the News Media Association (representing the national, regional and local press across the UK), subject to a few additional comments as set out below.

We also endorse the sentiments expressed by DMG Media in its submission to the ICO consultation, in particular its concern about the draft Code's restrictive concept of the right of free expression. This reflects the inherent tension in the GDPR between the prescriptive approach of the EU (telling you what to do and how to do it), and the proscriptive approach of English common law (which assumes freedom to do something unless the law specifically forbids it).

The local and regional news titles we publish document the daily ups and downs, the triumphs and tragedies of ordinary life. Some of their content might be dismissed as commonplace or unimportant to those with weightier things on their mind, but 'local' is of course where we all live and this is the stuff of everyday life that tells of who we really are. The creation and maintenance of the local journalistic record is essential to our democracy and cultural identity, and yet we now find it constantly challenged and threatened by individuals demanding personal data protection, subverting the established customs and practices of some 300 years of newspaper history and millennia of social practice before that. We are a society of individuals, but a society nonetheless, and as social animals we will see and talk about others, and we will be seen and talked about by others. The Code must reflect this fact of life and not treat the legitimate interests of daily journalism in the same way as it treats the personal data processing responsibilities of a finance company or a goods retailer. The right of free expression is a fundamental right under the European Convention and the Human Rights Act 1998. Data protection is not. The circumstances in which a newspaper's legitimate interests in saying something, big or small, might be restricted by data protection legislation will be exceptional. The simplistic 'balancing exercise' offered by the Code does not adequately explain the weight to be given to the right of free expression and, in our experience, data subjects have been misled to believe that they have ownership of personal data and a virtual veto over what is written.

The ICO expects it will be necessary to rely on the journalistic exemption only occasionally. The corollary is that the ICO must recognise the breadth and weight of the legitimate interest in journalism.

We vary a little from DMG Media's stance on 'consent'. We do not treat or rely on interviewee co-operation as 'consent' for data protection compliance, but we will take such co-operation into account when assessing the legitimate interest purpose or (where necessary under the legislation) whether or not publication is in the public interest.

We agree with the NMA's plea that time should be allowed to get this right because the Code will be a working document that will have legal effects and real consequences. We shall be happy to contribute to further consultation on any fresh draft of the Code. But also, like DMG Media, we consider that data protection legislation is basically incompatible with the right of free expression and we look forward to the day when it is reformed so as to exclude processing for the purposes of journalism unconditionally.

### **Additional comments on the Draft Code ( using the MLA's revised draft and numbering)**

New 1.16 under "With a view to publication ": *The exemption can apply to retention and re-use of information even after its publication, including retention of published stories in publicly accessible journalistic records and archives. This is an inevitable part and parcel of the journalistic process, which covers the whole process of publishing journalistic material end-to-end.*

\*This was a point made in *Campbell* and highlighted in the 2014 Code (The wording above is similar to that of the 2014 Code). It should not be lost, lest its absence encourages arguments for the destruction of news archives on the basis that they are 'out-of-date' rather than being an important social and historical record.

1.31 *This does not mean that there cannot be a public interest in other day-to-day reporting which keeps people informed about the world around them. Neither does it mean that (for example) lifestyle, entertainment or celebrity articles fall outside the scope of the Journalism Exemption. They are all protected by general public interest in the freedom of expression and information which a controller must take into account . What is ultimately "in the public interest" is determined by balancing factors in favour of publication against any harm to a person.*

\*It is necessary to manage data subjects' expectations. In our experience, complainants think that the terms 'public interest' and 'important' are synonymous. Most of what newspapers publish might not be considered 'important' information, especially where it is information about local communities – the village fete, the school sports day etc. Yet this is a lawful exercise of the right of free expression and it produces a record of life as it is actually lived. The freedom to report the ordinary as well as the important must be emphasised; we think this additional wording will help in that regard.

Add to the end of 1.35: *Claims of harm should be based on evidence and not merely subjective fears.*

\* Otherwise the right of free expression is defeasible by fancy or delusion.

4.10 *If you want to use this lawful reason, you should identify what your legitimate interests are. Legitimate interests can be your own or third party interests. For example, you will have a legitimate interest in pursuing your journalistic activities and your readers and viewers will have a legitimate interest in reading and viewing the material you publish. There is a wider legitimate interest in the practice of journalism itself because of the special public interest in freedom of expression and information (see About this code). Great weight will attach to the right of free expression, which is essential to social well-being and the democratic way of life.*

\*As discussed above.

4.12 *You must consider whether your legitimate interests are outweighed by harm to a person. You should consider their reasonable expectations and any unwarranted harm (see Use personal data fairly). Claims of harm should be based on evidence and not merely subjective fears.*

\*As in 1.35 above.

~~4.29 You should be cautious when applying this condition to information obtained from social media posts or other user-generated content. You must always consider whether it is fair to use the data, bearing in mind that people may make their personal data public without realising it.~~

\* Delete. This imposes an impossible burden on the journalist, who would be required to second-guess the workings of the data subject's mind. Common sense and practicality require an assumption that data subjects are people who treat their own personal data with reasonable care.

~~4.30 In the context of criminal trials, an offender may obviously make information about their offending public in line with the principle of open justice. However, you must consider whether using the personal data remains fair at a later date. An offender may reasonably expect privacy as a result of the passage of time, even if information is initially made public.~~

\*Information disclosed in open court is a matter of public record. The notion that it could acquire a cloak of privacy or confidentiality at some later time is very controversial does not reflect English law eg R v DVLA, ex p Pearson [2002] EWHC 2482 (Admin), never over-ruled and cited in the later case of KJO v XIM [2011] EWHC 1768 (QB). This notion could also be exploited to attack the integrity of news archives, which are important social and historical records.

~~4.31 You should also consider whether using the personal data would cause unwarranted harm. There is a ~~strong~~ public interest in the rehabilitation of offenders recognised in the Rehabilitation of Offenders Act 1974 (ROA 1974). Although this is generally a ~~strong~~ factor in favour of not publishing or broadcasting data once a conviction is spent, whether or not it is fair depends on all the circumstances. It will not affect retention of court stories in news archives.~~

\*The ROA does not prohibit publication, but rather discourages misuse of information by removing defences where actual malice is shown. That is high hurdle, so the factor cannot be described as "strong". And it should not be suggested that the ROA can be used to dismantle news archives – history is not recorded maliciously.

~~12.42 Protecting the integrity of records is vitally important, so any steps considered necessary are unlikely to include erasing, or deleting or anonymising the actual record. For example, you may be required to take steps to ensure that a link to an article does not appear in a search using someone's name, leaving the original record as it is and still accessible by less prominent means.~~

\* This is untested in English law and very controversial. Making information available is an integral part of the journalistic purpose and online search is an essential gateway to the news archives. Exclusion from third party search engine results is equivalent to erasure for all effective purposes. A 'no-indexing' request to Google and others could possibly form part of a balancing exercise when applying the 'legitimate interests' test, but that will always depend on the particular facts and circumstances of the data protection request, and it could not be imposed where the journalistic exemption applies. Of course data subjects have the right to make this request themselves to the

search engines directly in any event. In our view that is where such requests should properly be made. Internet search engines are not journalists and cannot avail themselves of the exemption.

## Supporting material

### Reference notes:

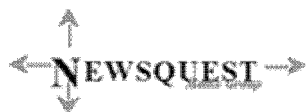
We are generally concerned about the selection of case law examples referred to, especially where they are first instance authorities which are liable to be superseded. While the reference notes do not have statutory effect, they can certainly set hares running and give rise to unhelpful differences of opinion. For example, case example 13 (*NT1 & NT2*) is a first instance case quoted here when the decision related to Google as a search engine and specifically not to newspaper journalists, who have a legitimate interest in reporting and archiving court cases and also benefit from the exemption, none of which is affected by the Rehabilitation of Offenders Act 1974. We also consider case example 21, *Hurbain v Belgium* ECHR, as highly controversial. ECHR rulings are not actually binding on the UK and this case has been referred to the Grand Chamber anyway. ECHR decisions also allow for a significant national margin of appreciation. The context of this case was distinctively rooted in Belgian law where a right of privacy is incorporated in the written constitution.

The **Code Summary** and **Tips** should of course reflect the Code itself as may be revised in line with the comments of consultee

This concludes our comments. We would be obliged if you could send us acknowledgement of receipt. Thank you.

Sincerely,

**Simon Westrop**  
Group Head of Legal  
Newsquest Media Group



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