

Second consultation on the ICO's draft Data protection and journalism code of practice

Start date: 9 September 2022

End date: 23 November 2022

Introduction

We are seeking feedback on a revised version of our draft Data protection and journalism code of practice. This follows your feedback to a written public consultation that ran for 12 weeks from September 2021 and workshops.

You can read our summary of the feedback and individual responses on the ICO website – redacted in line with our privacy statement.

This is a draft of a statutory code of practice under section 124 of the Data Protection Act 2018 (DPA 2018). It will help those using personal data for journalism understand their legal obligations and comply with good practice.

The revised draft code is now out for further public consultation. Although the focus of this public consultation is the draft code, we would also welcome your views on the associated documents below. Please note that these documents do not form part of the statutory code.

- supporting reference notes for the code
- the code 'at a glance'
- 10 data protection tips for day-to-day journalism
- updated impact assessment

The public consultation will remain open until 4 November 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 respondents are acting in a private capacity (eg a member of the public). We will remove email addresses and telephone numbers from all responses.

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

Questions

When commenting, please bear in mind that the code does not aim to cover all of the legislation. Supporting reference notes contain key legal provisions, case law examples, and further reading.

Please also bear in mind that in line with your feedback, we plan to develop additional supporting resources, including guidance for smaller organisations and individuals.

Please let us know if you have any other comments about the code or associated documents in the general comment box at the end.

Section one: The statutory code

Q1 Overall, to what extent do you agree that the revised code sufficiently reflects the feedback provided to the ICO?

To inform your answer please ensure you have read the consultation summary report. This sets out the changes we made in response to your feedback.

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree

Q2 If you consider that the code does not sufficiently deal with the feedback, please specifically explain why and what you think we should change.

Q3 To what extent do you agree that the code provides useful guidance on the use of personal data for journalism?

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree

Q4 If you do not think it is useful, please explain why specifically and what you think we should change.

My comments are focused on the Draft Code's definitions and guidance on "journalism" and "journalistic material" and the implications those definitions and guidance have on the Draft Code's internal consistency, the Draft Code's consistency with the Data Protection Act 2018 ("DPA 2018"), and on the useability of the Draft Code for non-professional journalists or those aiming to publish journalistic material without the support of a media organisation, such as freelance journalists.

Sections 1.9-1.10 of the Draft Code defining journalism

There are several issues with this section. First, it conflates "journalism" and "material that is journalistic". The Data Protection Act, Part 5, section 26 uses these two terms separately:

26(1) In this paragraph, "the special purposes" means one or more of the following—

(a) the purposes of journalism;

...

(2) Sub-paragraph (3) applies to the processing of personal data carried out for the special purposes if—

(a) the processing is being carried out with a view to the publication by a person of journalistic, academic, artistic or literary material, and

(b) the controller reasonably believes that the publication of the material would be in the public interest.

As such, to fall under this exemption, one must be using data for "special purposes" meaning (in the context of journalism) for "the purposes of journalism". If that first stage is met, the next steps are outlined in section 26(2), which requires having (i) "a view to publication" of (ii) "journalistic material". The distinction between "the purposes of journalism" and "journalistic material" needs to be clear in the Draft Code to reflect the relevant test outlined in the DPA 2018. The Draft Code as currently worded (section 1.9 in particular) attempts to provide guidance on interpreting "journalism" but does so by referring to content, which is more appropriately "material that is journalistic". Greater clarity would be helpful, particularly to ensure the Draft Code is aligned with the wording of the DPA 2018 and to enable non-professional journalists and those with limited media organisation support to understand these provisions.

Section 1.9 of the Draft Code is further problematic in defining (either "journalism" or "journalistic material", but this is unclear as described in my above comments) as "content published by non-professional journalists, including members of the public (eg [sic] citizen journalism such as bloggers, eye witnesses [sic] or social networkers)". It is recommended that this section be redrafted. As currently worded, this section (a) does not qualify the words "content published" (which should be qualified to mean "journalistic material"), and (b) because of this lack of qualification, so long as one thinks they are a "social networker" or "blogger", that person could claim the exemption even if the content they publish online is devoid of any resemblance to journalistic material. This lack of qualification largely renders the guidance provided in section 1.10 meaningless such that no one would ever need to consult it. It is also recommended that broad and vague use of terms such as "social networker" which could have a plethora of meanings, be removed, or else be drafted with more precise meaning.

Although the Draft Code in the following section (section 1.10) provides further guidance on what may constitute (either “journalism” or “journalistic material” but again, this is unclear as described in my above comments), if the intention is to provide guidance to non-professional people aiming to publish journalistic material for the purposes of journalism, this section should provide greater detail. Right now, for example, section 1.10 refers to “whether you have made some attempt to align with typical journalistic standards or values (eg [sic] checking accuracy)”. There are many journalistic standards and values that are very important and should be better outlined here so that non-professionals can understand how they can meet this standard. Nearly all circumstances listed in section 1.10 could do with greater clarity.

I recommend that the ICO redraft these sections to provide for greater clarity generally but for non-professional journalists in particular. It would be helpful to have a step-by-step guide on what a person needs to consider (e.g., Step 1 = are you processing data for “the purposes of journalism”?; Step 2 = what does “with a view to publication” mean?; Step 3 = what does journalistic material mean?, and so forth). This information could be presented in a table or other visual format to aid usability and clarity. As part of this step-by-step guide, the factors currently enumerated in section 1.10 could be listed under the steps for “purposes of journalism” and “journalistic material” (whichever is appropriate) to provide guidance on what is expected, which would be particularly helpful to non-professional journalists.

Codes of Practice

The DPA 2018, part 5, section 26(5) states that the controller, “in determining whether it is reasonable to believe that publication would be in the public interest” “must have regard to any of the codes of practices or guidelines” that are “relevant to the publication in question”. Subsection 6 lists those codes of practices and guidelines as the BBC Editorial Guidelines, Ofcom Broadcasting Code, and Editors’ Code of practice. The requirements of this section of the DPA 2018 could be better set out in the Draft Code.

First, section 26(5) of part 5 of the DPA 2018 makes clear that the controller must refer to the relevant code(s). The Draft Code does not make clear what journalistic code, if any, is relevant to a non-professional journalist (e.g., a citizen journalist, blogger, eye-witness, or “social networker”), or how the ICO (and Courts) expect these to be used by a non-professional journalist.

Second, whether the controller referred to the relevant code goes to the reasonableness of their decision to determine what is in the public interest, not just to the controller’s determination of the public interest. (This is further made clear by the wording of subsection 4 which only refers to the “public interest” and not also the “reasonable belief” requirement. If the legislative drafters intended to only require controllers to refer to the relevant code(s) in determining the public interest than subsection 5 would likely have been drafted like subsection 4—without the inclusion of the “reasonable belief” requirement). The Draft Code, however, only requires the controller to refer to the relevant code to determine what is in the “public interest” and does not state that reference to the relevant code(s) is necessary to the “reasonable” requirement. The wording of the Draft

code should be changed to reflect the requirement as laid out in the DPA 2018 so that controllers have adequate notice of this requirement.

Further Comments on Substance

- In respect of section 1.11, it is unclear what this section means or what it applies to (e.g., websites? Comment sections? Platforms? Can a citizen journalist operating a website make use of this provision?). Also, the reference to "third party content" and "user-generated content" should be defined as it is unclear what those mean. Right now, this section is problematic as it requires a lot of guesswork to try and ascertain a meaning.
- In respect of section 1.23, as the Act mandates that the controller must consider code(s), the word "could" is not appropriate. Moreover, as there is uncertainty in the Draft Code as to what, if any, code(s) apply to citizen journalists, this should be redrafted to provide greater clarity.

Q5 Is there anything else you would like to tell us about the code?

Some further comments on useability

- The Draft Code should make clear (preferably at the start of the Draft Code) who has responsibility as the "controller", so journalists (and especially freelance journalists or citizen journalists) are aware of their legal responsibilities (e.g., that they may be the "controller"). As currently drafted, even if a journalist were to read through the whole Draft Code, they may still be uncertain as to whether they are a "controller".
- The Draft Code clearly is aimed at larger organisations. However, given that the Draft Code will enumerate legal rules applicable to citizens and non-professional journalists aiming to publish journalistic material, it should provide guidance to that group as well. Any further revisions to the Draft Code should ensure that the Draft Code is accessible to a wide range of journalists.
- I recommend that the Draft Code focus on useability and clarity. For example, a step-by-step guide would be helpful, and could be implemented in several places. As an example, sections 1.8-1.11 of the Draft Code outline what someone seeking to use the journalist exemption must do (e.g., first determine that the purpose of processing data is for journalism and enumerate the considerations one should make for that determination; second, determine whether the processing is being carried out with a view to the publication; third, determine whether the publication is of "journalistic material", and so forth). It may be helpful to present this information in a different format than text. This would assist with overall clarity, so that controllers (whether they be trained lawyers, media professionals, freelance journalists or citizen journalists) can better understand their obligations and know what the law requires them to do.

It also may help eliminate some of the confusion in the Draft Code (e.g., the conflation of “purposes of journalism” with “journalistic material”).

- The “navigating this code” from the first draft code was helpful and could be put back into the Draft Code (with any appropriate edits).

Section two: Supporting documents

Q6 To what extent do you agree that the supporting reference notes are helpful?

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree

Q7 To what extent do you agree that the code ‘at a glance’ is helpful?

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree

Q8 To what extent do you agree that the quick guide to support day-to-day journalism is helpful?

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree

Q9 Is there anything else you would like to tell us about the supporting reference notes, the code ‘at a glance’, quick guide for day-to-day journalism or impact assessment?

The quick guide to support day-to-day journalism assumes that journalists have the support of an organisation, when many freelance journalists and citizen journalists will not have this type of support. Specific guidance for individual journalists would be helpful.

Regarding the code “at a glance”, it would be helpful if the information was more concise (e.g., only a few pages) and was presented in other ways other than lists of text.

Section three: About you

Q10 What is your name?

Ricki-Lee Gerbrandt

Q11 If applicable, what is the name of your organisation and role?

PhD Researcher, University of Cambridge, Faculty of Law

Q12 Are you acting: (Please select)

- 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.

Q13 Are you a: (Please select most appropriate)

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

If other, please specify.

Further consultation

Q14 Would you be happy for us to contact you about our work relating to the Data protection and journalism code of practice?

- Yes
- No

If so, please provide the best contact details.

Q15 Would you be happy for us to contact you about the review of processing for journalism 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.