



The Information Commissioner's Office (ICO) response to the The Independent Monitor for the Press (IMPRESS) consultation on a new standards code for the press ('the consultation')

The ICO has responsibility for promoting and enforcing the Data Protection Act 1998 (DPA), the Freedom of Information Act 2000 (FOIA), the Environmental Information Regulations 2004 (EIR) and the Privacy and Electronic Communications Regulations 2003 (PECR). We also deal with complaints under the Re-use of Public Sector Information Regulations 2015 (RPSI) and the INSPIRE Regulations 2009. We are independent from Government and uphold information rights in the public interest, promoting openness by public bodies and data privacy for individuals. The ICO does this by providing guidance to individuals and organisations, solving problems where we can, and taking appropriate action where the law is broken.

Background

The stated aim of this consultation is to seek feedback on the IMPRESS Draft Standards Code (the Code) for the press. We understand that the Code will only apply to members of IMPRESS and that other existing codes of practice and in-house bespoke guidance apply to non-IMPRESS members of the press. In seeking to draft the Code, IMPRESS have stated that a standards code should embody the ethical standards expected of publishers, while not unduly infringing their capacity to investigate and report on important stories in the public interest.

One such ethical standard expected of publishers is a respect for individuals' privacy. Whilst the ICO is not a regulator for privacy rights granted under human rights law, nor a specialist media regulator, we do have a role in protecting individuals' personal data as regulator of the DPA. Processing personal data for the purposes of journalism is covered by the DPA, and the ICO can be asked to assess complaints received from individuals who are concerned by how their data have been processed by a media organisation.

The role of the ICO in regulating the processing of personal data by the press was discussed in the 2012 report of Lord Justice Leveson's inquiry into the culture, practices and ethics of the press¹. Part H of the report made several recommendations to the ICO; we issued a formal response to these recommendations in January 2013².

Following a robust and lengthy consultative process with the press and wider media, interest groups and academics, the ICO published guidance in September 2014 on data protection and journalism³. This guidance was published specifically in response to the Leveson Inquiry's recommendation that the ICO "should take immediate steps, in consultation with the industry, to prepare and issue comprehensive good practice guidelines and advice on appropriate principles and standards to be observed by the press in the processing of personal data." The ICO's guidance helps those working with personal data in the course of journalistic activity to understand their obligations under the DPA and promotes good practice.

We have therefore confined our comments to the aspects of the draft Code that raise data protection issues.

The privacy clause of the Code

Clause 7 of the Code relates to privacy, and is by some way the longest section within the Code. Privacy is clearly an important concern for media organisations and individuals alike. It is encouraging that IMPRESS have undertaken a wide-ranging research and consultation project as part of the drafting of the Code. We note that this research found that a privacy clause is a common feature of press standards code worldwide. We also note that privacy was one of the most common ethical standards identified by unprompted members of the public who took part in IMPRESS workshops during this drafting process.

Clause 7 begins by stating that "Except where justified by the public interest, publishers must respect people's reasonable expectation of privacy." The term 'reasonable expectation of privacy' is given further elaboration on page 21 of the consultation document and includes the statement that "Whether a person has a reasonable expectation of privacy will be specific to the circumstances of a particular news story."

¹ <http://webarchive.nationalarchives.gov.uk/20140122145147/http://www.official-documents.gov.uk/document/hc1213/hc07/0780/0780.asp>

² <https://ico.org.uk/media/about-the-ico/documents/1042562/ico-response-to-leveson-report-012013.pdf>

³ <https://ico.org.uk/media/for-organisations/documents/1552/data-protection-and-journalism-media-guidance.pdf>

The above statement is welcomed by the ICO as it demonstrates an understanding that the right to privacy and the public interest should always be considered on a case-by-case basis. Whilst the DPA does include an exemption for personal data processed for the purposes of journalistic, artistic or literary purposes, the exemption is not a blanket one and should only be relied upon insofar as compliance with the DPA would unduly interfere with a journalistic purpose. The exemption, which appears at section 32 of the DPA and is included here as Annex A, was drafted in order to safeguard the right to freedom of expression under the European Convention on Human Rights. The ICO's guidance on data protection and journalism acknowledges this special status for freedom of expression:

The right to respect for privacy and the right to freedom of expression are both important rights, and neither automatically trumps the other. The DPA protects people's information privacy, but also recognises the importance of freedom of expression, aiming to strike a fair balance. The ICO must consider the importance of freedom of expression when deciding how best to use its powers in the public interest⁴.

Where the journalism exemption is engaged for a particular story, the ICO's guidance on journalism makes clear that this should be supported by evidence of the rationale for this editorial decision and why it was reasonably believed to have met the public interest threshold. The ICO's guidance provides some examples of public interest considerations but does not set out to provide a comprehensive or authoritative list. The ICO more likely to accept there was a reasonable belief that publication was in the public interest if an organisation:

- has clear policies and procedures on public interest decisions;
- can show that those policies were followed;
- can provide a cogent argument about the public interest; and
- has complied with any relevant industry codes.

We therefore welcome the statement by IMPRESS in the public interest section of the Code that:

Where a publisher identifies a public interest justification for a particular method of newsgathering or item of content, they should, when undertaking an action that may otherwise breach the Code, make a contemporaneous note, which:

- i. Establishes their reason for believing that the action is in the public interest;*
- ii. Demonstrates that relevant code-compliant measures have been considered before authorising the action;*

⁴Data protection and journalism: a guide for the media - Page 18

<https://ico.org.uk/media/for-organisations/documents/1552/data-protection-and-journalism-media-guidance.pdf>

- iii. *Explains their view that the action is likely to achieve the desired outcome; and*
- iv. *Explains their view that any likely harm caused by the act does not outweigh the public interest in the action.*

Publishers following this requirement when considering if the public interest justifies overriding the privacy clause of the Code will therefore find this of assistance when demonstrating their compliance with the DPA.

The ICO also welcomes the statement in clause 7.2 of the Code in relation to the use of information sourced from social media for journalistic purposes, and that individual users' privacy settings will be respected; albeit there will still remain a public interest exemption. Personal data is defined widely under the DPA and content posted by an individual on their social media profiles is likely to fall under this definition. Respecting an individual's privacy choices online is one way of demonstrating compliance with the DPA.

It is encouraging that IMPRESS intend to update the Code in future, where necessary to keep pace with both technological and societal change. Societal attitudes to the use of personal data posted online, and the rights relating to that data, are evolving – the ICO's annual survey of attitudes has shown an increase in the past two years of individuals' awareness of their right to prevent the processing of information if it would cause unnecessary damage or distress. Code revisions should go some way to keeping up with such changes in attitudes and expectations.

The status of the IMPRESS Code under the Data Protection Act

When assessing concerns about a media organisation's processing of personal data, section 32(3) of the DPA states that the ICO may take into account compliance with any relevant code of practice as designated by the Secretary of State⁵ when considering whether that organisation's view that publication would be in the public interest was reasonable.

Currently there are three designated codes; the Editors' Code, the BBC's Editorial Guidelines, and the Ofcom Code. Therefore the new Code for IMPRESS members would not immediately be covered by this section of the DPA. However, the designation of any new press standards code under section 32(3) of the DPA would be a matter for the Government rather than the ICO.

It is not the ICO's role to decide whether a media organisation has complied with an industry code. However, the ICO will take any relevant

⁵The Data Protection (Designated Codes of Practice) (No. 2) Order 2000
<http://www.legislation.gov.uk/ukxi/2000/1864/made>

decision of an industry body into account, even though we are not bound by its decision. Not all media organisations are subject to oversight by industry bodies and the weight we give to the decision of an industry body will depend upon the nature of that body (for example whether it oversees compliance with one of the designated codes under section 32(3) DPA) and the nature of its investigation of complaints, including its rigour.

Compliance with the law and the role of IMPRESS

Page 1 of the Code states that the Code is separate from the law and that it is the responsibility of individual publishers to ensure compliance with the law. The ICO welcomes this statement as it makes clear that even if a member publisher believes that they have complied with the IMPRESS Code, that publisher would still have to separately justify their compliance with other laws, including those on data protection.

In the case of data protection law, the publisher would be acting as a data controller⁶ as per the term used in the DPA. It is the data controller who is responsible for ensuring that any processing of personal data they engage in is compliant with the DPA. Aside from the journalism exemption, there are many other aspects of the DPA which all data controllers, including press publishers, must be aware of and adhere to.

As an industry regulator with a role in educating and promoting best practice, and with a standards code based on the law, IMPRESS is in an influential position to raise awareness of obligations such as those under data protection legislation. The ICO has previously worked with the Press Complaints Commission on the DPA guidance note⁷ that sits behind the Editors' Code. In addition, the Editors' Code of Practice Committee Codebook⁸ includes a specific section on data protection – this section goes beyond the content of the journalism exemption and covers data protection more widely.

We note that in the IMPRESS consultation document, it states that the Code will be updated at regular intervals and will be supported by accompanying guidance. As privacy was identified during the earlier consultation stages as an important standard for the press, we would encourage IMPRESS to consider issuing further guidance to its members on privacy and data protection. The ICO would welcome any approach from IMPRESS to seek our input on the data protection aspects of the

⁶ Data controller is defined in the DPA as a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be, processed.

⁷ http://www.editorscode.org.uk/guidance_notes_4.php

⁸ <http://www.editorscode.org.uk/downloads/codebook/codebook-2014.pdf>

Code's accompanying guidance or on future revisions to the privacy and public interest sections of the Code.

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Annex A

The Data Protection Act 1998

Part IV – Exemptions

Section 32 - Journalism, literature and art

(1) Personal data which are processed only for the special purposes are exempt from any provision to which this subsection relates if—

- (a) the processing is undertaken with a view to the publication by any person of any journalistic, literary or artistic material,
- (b) the data controller reasonably believes that, having regard in particular to the special importance of the public interest in freedom of expression, publication would be in the public interest, and
- (c) the data controller reasonably believes that, in all the circumstances, compliance with that provision is incompatible with the special purposes.

(2) Subsection (1) relates to the provisions of—

- (a) the data protection principles except the seventh data protection principle,
- (b) section 7,
- (c) section 10,
- (d) section 12, and
- (e) section 14(1) to (3).

(3) In considering for the purposes of subsection (1)(b) whether the belief of a data controller that publication would be in the public interest was or is a reasonable one, regard may be had to his compliance with any code of practice which—

- (a) is relevant to the publication in question, and
- (b) is designated by the Secretary of State by order for the purposes of this subsection.

(4) Where at any time ("the relevant time") in any proceedings against a data controller under section 7(9), 10(4), 12(8) or 14 or by virtue of section 13 the data controller claims, or it appears to the court, that any personal data to which the proceedings relate are being processed—

(a) only for the special purposes, and

(b) with a view to the publication by any person of any journalistic, literary or artistic material which, at the time twenty-four hours immediately before the relevant time, had not previously been published by the data controller,

the court shall stay the proceedings until either of the conditions in subsection (5) is met.

(5) Those conditions are—

(a) that a determination of the Commissioner under section 45 with respect to the data in question takes effect, or

(b) in a case where the proceedings were stayed on the making of a claim, that the claim is withdrawn.

(6) For the purposes of this Act "publish", in relation to journalistic, literary or artistic material, means make available to the public or any section of the public