

Media Law Briefing from Professor Tim Crook UK Media Law Pocketbook 2<sup>nd</sup> Edition.

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On 6th July 2023 the ICO finalised and submitted the ICO Code of Practice to the Government and Parliament for approval and implementation by statutory instrument.

The Code of Practice itself is 41 pages long (See: <https://ico.org.uk/media/for-organisations/documents/4025760/data-protection-and-journalism-code-202307.pdf>) and the accompanying reference notes or guidance 47 pages long (See: <https://ico.org.uk/media/for-organisations/documents/4025761/data-protection-and-journalism-code-reference-notes-202307.pdf> – considerably shorter than the drafts provided earlier for consultation. However, it could be said that the completed code and reference guide combines to be nearly the equivalent of the 93 page draft.

The Information Commissioner John Edwards said: ‘The crucial public interest role served by the media and its power is the reason journalism is covered by data protection law. The law includes important provisions that enable journalism, whilst also protecting people by ensuring that personal information is used lawfully.’

He re-affirmed that ‘A free media is at the heart of any healthy democracy – keeping us informed, encouraging debate and opinion, and entertaining us. It is a crucial part of the fundamental right to freedom of expression and information. A free media is also often called the public’s watchdog because of its role in uncovering wrongdoing and holding the powerful to account.’

The significance for all journalists and indeed their media lawyers is that under Section 12 of the Human Rights Act, the ICO Code of Practice for journalists becomes the fifth reference document that UK courts will need to take into account when adjudicating litigation pitching a conflict between Article 10 Freedom of Expression and Article 8 Privacy Rights.

Eloise Spensley of the *Hold The Front Page* Jaffa Media Law Column analysed this development 25th July 2023 ‘ICO publishes code of practice on data protection and journalists’ (See: <https://www.holdthefrontpage.co.uk/2023/news/law-column-ico-publishes-code-of-practice-on-data-protection-and-journalists/>) and warned: ‘Dry though it is, data protection cannot be ignored, and when breaches of the law are alleged, it’s a painful process to get to the bottom of what happened – and even more painful to try to extricate yourself from the problem. Trust me, I’ve been there!’

The professional challenge for journalists is in meeting the criteria for the exemption code so that the collection and processing of personal information in researching stories and content does not breach Data Protection Law. There is some concern that this is easier said than actually done. The ICO code says:

‘To apply the exemption, you must: use personal information for a journalistic purpose; act with a view to the publication of journalistic material; and reasonably believe both that: publication would be in the public interest; and complying with a specific requirement would be incompatible with your journalistic purpose.’

The potential *Achilles Heel* here is in failing to fulfil all those criteria in the heat of the growing complaints culture and process of litigation. The other worry is the judgements made about what the journalist considers ‘a reasonable belief’ to be ‘in the public interest’ and a ‘reasonable belief’ that complying would not be compatible with journalistic purpose’ will be made by non-journalists and this could go up the legal chain of precedent.



The highlights in the Code which need to be fully recognised and implemented:

Section 2 of the code says: ‘**Demonstrate how you comply**’ and ‘You cannot apply the journalism exemption to the requirement to demonstrate how you comply. However, if you meet the criteria to apply the exemption, you no longer have to comply with the specific requirement to consult us if a Data Protection Impact Assessment (DPIA) reveals a high risk you cannot mitigate.’

The obligations increase and multiply in proportion to the size of the publisher and journalist organisation.

Section 3 of the code says: ‘**Keep personal information secure**’ and ‘You cannot apply the journalism exemption to the requirement to keep personal information secure. However, if you meet the criteria to apply the exemption, you no longer have to comply with the specific requirement to tell people affected by a data breach when there is a high risk.’

Section 4 of the code says: ‘**Use personal information lawfully**’ and ‘If you meet the criteria to apply the journalism exemption, you can rely on it to make sure your use of personal information is lawful, rather than relying on one of the usual data protection lawful bases, such as legitimate interests or consent. This section of the code sets out what the legislation says and how to comply when you are not applying the exemption.’

Section 5 of the code says: ‘**Use personal information fairly**’ and ‘If you meet the criteria to apply the journalism exemption, you no longer have to comply with the requirement to use personal information fairly. This section of the code sets out what the legislation says and how to comply when you are not applying the exemption.’

Section 6 of the code says: ‘**Use personal information transparently**’ and ‘If you meet the criteria to apply the journalism exemption, you no longer have to comply with the requirement to use personal information transparently. This section of the code sets out what the legislation says and how to comply when you are not applying the exemption.’

Section 7 of the code says: ‘**Use accurate personal information**’ and ‘If you meet the criteria to apply the journalism exemption, you no longer have to comply with the requirement to use accurate personal information. This section of the code sets out what the legislation says and how to comply when you are not applying the exemption.’

Section 8 of the code says: ‘**Use personal information for a specified purpose**’ and ‘If you meet the criteria to apply the journalism exemption, you no longer have to comply with the requirement to use personal information for a specified purpose. This section of the code sets out what the legislation says and how to comply when you are not applying the exemption.’

Section 9 of the code says: ‘**Use only the personal information you need.**’ and ‘If you meet the criteria to apply the journalism exemption, you no longer have to comply with the requirement to use only the personal information you need. This section of the code sets out what the legislation says and how to comply when you are not applying the journalism exemption.’

Section 10 of the code says: ‘**Keep personal information only for as long as you need it**’. and ‘If you meet the criteria to apply the journalism exemption, you no longer have to comply with the requirement to keep personal information only for as long as you need it. This section of the code sets out what the legislation says and how to comply when you are not applying the journalism exemption.’

Section 11 of the code says: ‘**Be clear about roles and responsibilities**’ and ‘You cannot apply the journalism exemption to the specific requirements in this section. However, if the criteria to meet the exemption is met, you no longer have to comply with the general principles for restricted transfers of personal information.’

Section 12 of the code says: ‘**Help people to use their rights**’ and ‘If you meet the criteria to apply the journalism exemption, you no longer have to comply with the specific rights people can exercise relating to their personal information, except for rights about automated uses of personal information. This section of the code sets out what the legislation says and how to comply when you are not applying the journalism exemption.’

It might be wise to be highly cautious about engaging with Artificial Intelligence technology and processes with personal information data when researching stories since these could be interpreted as ‘automated uses of personal information.’

Section 13 of the code covers the application of **the journalism exemption** across pages 37 to 40.

These pages need to be studied and evaluated with great care and anticipation.

This is because they state the parameters and boundaries about what the ICO views as the methodology of determining ‘public interest’ and ‘reasonable belief.’

These are the key jurisprudential qualifiers in meeting the criteria for the journalism exemption.

At 13.11 and 13.12 the code explains:

‘13.11 However, journalism is not limited to professional journalists and media organisations. For example, members of the public may carry out journalism, typically online. This is sometimes known as “citizen journalism”.

13.12 The exemption can also apply when you use personal information for journalism, as well as another purpose. For example, a campaign group can use personal information for both journalism and campaigning.’

Section 14 ‘Complaints, enforcement and investigations’ informs journalists and their publishers: ‘People have the right to complain to you, us, and the courts about how you have used their personal information’ and at 14.8 the ICO last sentence of the code concludes rather bleakly: ‘We can also investigate and prosecute criminal offences when we consider it is in the public interest.’

The code’s accompanying reference document requires the same care and attention.

In particular the guidance for compliance with the journalism exemption code across pages 34 to 36 provides great detail and scale of referencing to case law.

**Case example 13 – Freedom of Information Act 2000 (FOIA) – definition of journalism (paragraph 13.9 of the code)** [UK Supreme Court Sugar \(Deceased\) v BBC and another \[2012\] UKSC 4](#)

**Case example 14 – DPA 1998 – definition of journalism (paragraph 13.9 of the code)** [High Court NT1 & NT2 v Google LLC and ICO \[2018\] EWHC 799 \(QB\)](#)

**Case example 15 – Data Protection Directive 95/46 – definition of journalism (paragraph 13.9 of the code)** [ECJ Satamedia \(Case C-73/07\)](#)

**Case example 16 – Data Protection Directive 95/46/EC – definition of journalism (paragraph 13.9 of the code)** [ECJ Buivids \(C-345/17\)](#)

**Case example 17 – DPA 1998 – meaning of “acting with a view to publication”**  
(paragraph 13.13 of the code) [Court of Appeal Campbell v MGN Limited \[2002\] EWCA Civ 1373](#)

**Case example 18 – DPA 1998 – meaning of “reasonable belief”** (paragraph 13.15 of the code) [High Court NT1 & NT2 v Google LLC and ICO \[2018\] EWHC 799 \(QB\)](#)

**Case example 19 – DPA 1998, Misuse of Private information – editorial discretion**  
(paragraph 13.16 of the code) [House of Lords Campbell v MGN \[2004\] UKHL 22](#)

**Case example 20 – Misuse of private information – editorial discretion and evidence to demonstrate decision-making** (paragraph 13.16 and 13.17 of the code) [High Court Sicri v Associated Newspapers Ltd \[2020\] EWHC 35 41 \(QB\)](#)

**Case example 21 – DPA 1998. Misuse of private information – public interest and proportionality** (paragraph 13.18 of the code) [House of Lords Campbell v MGN Ltd \[2004\] UKHL 22](#)

**Case example 22 – ECHR – Importance of the right to freedom of expression and information, and the role of the press** (paragraph 13.20 of the code) [Sunday Times v UK \(No.2\) 26 November 1991](#)

**Case example 23 – DPA 1998 and Misuse of Private information – Importance of right to privacy** (paragraph 13.22 of the code) [House of Lords Campbell v MGN \[2004\] UKHL 22](#)

**Case example 24 – ECHR and HRA 1998 – balancing Article 8 and Article 10 rights**  
(paragraph 13.22 of the code) [House of Lords In re S \(A Child\) \[2004\] UKHL 47](#)

**Case example 25 – DPA 1998 – meaning of “incompatible with a journalistic purpose”**(paragraph 13.26 of the code) [First-Tier Tribunal True Vision Productions \(TVP\) v ICO \(EA 2019 0170\)](#)

To list 13 precedents as guidance on the application of the journalism exemption might be considered as a useful indicator of any future framework for the ICO’s position in future litigation. Does it help or obfuscate, does it simplify or overcomplicate? These questions are a matter of open debate. The journalism industry and their legions of media lawyers may be justified in thinking the future road for journalism in data protection law is going to be hard, rocky and not so secure.

### **Secondary Media Law Codes and Guidelines**

IPSO Editors' Code of Practice in one page pdf document format  
<https://www.ipso.co.uk/media/2032/ecop-2021-ipso-version-pdf.pdf>

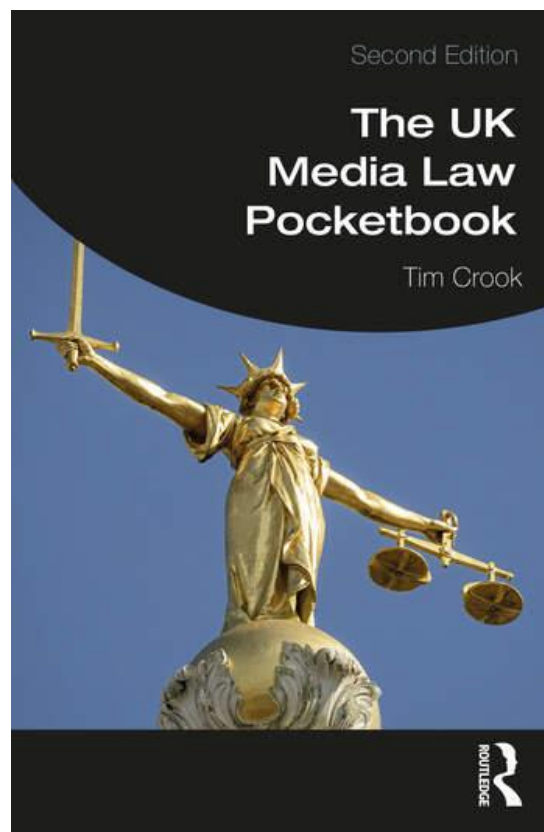
The Editors' Codebook 144 pages pdf booklet 2022 edition  
<https://www.editorscode.org.uk/downloads/codebook/codebook-2022.pdf>

IMPRESS Standards Guidance and Code 72 page 2023 edition  
<https://www.impress.press/wp-content/uploads/2023/02/Impress-Standards-Code.pdf>

Ofcom Broadcasting Code Applicable from 1st January 2021 <https://www.ofcom.org.uk/tv-radio-and-on-demand/broadcast-codes/broadcast-code> Guidance briefings at <https://www.ofcom.org.uk/tv-radio-and-on-demand/information-for-industry/guidance/programme-guidance>

BBC Editorial Guidelines 2019 edition 220 page pdf <http://downloads.bbc.co.uk/guidelines/editorialguidelines/pdfs/bbc-editorial-guidelines-whole-document.pdf> Online <https://www.bbc.com/editorialguidelines/guidelines>

Office of Information Commissioner (ICO) Data Protection and Journalism Code of Practice 2023 41 page pdf <https://ico.org.uk/media/for-organisations/documents/4025760/data-protection-and-journalism-code-202307.pdf> and the accompanying reference notes or guidance 47 page pdf <https://ico.org.uk/media/for-organisations/documents/4025761/data-protection-and-journalism-code-reference-notes-202307.pdf>



The second edition of *The UK Media Law Pocketbook* presents updated and extended practical guidance on everyday legal issues for working journalists and media professionals. This book covers traditional print and broadcast as well as digital multimedia, such as blogging and instant messaging, with clear explanations of new legal cases, legislation and regulation, and new chapters on freedom of information and social media law. Links to seven new online chapters allow readers to access all the most up-to-date laws and guidance around data protection, covering inquests, courts-martial, public inquiries, family courts, local government, and the media law of the Channel Islands and the Isle of Man. Tim Crook critically explores emerging global issues and proposals for reform with concise summaries of recent cases illustrating media law in action, as well as tips on pitfalls to avoid.

*The UK Media Law Pocketbook* is a key reference for journalists and media workers across England, Wales, Scotland, and Northern Ireland. The book's companion website provides downloadable sound files, video summaries, and updates all the developments in one of the most dynamic and rapidly changing fields of law. Visit <https://ukmedialawpocketbook.com>.

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