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# The Journalism Exemption

How is it being used?



**WHITE PAPER CONFERENCE**

Wednesday 15 March 2023

**Jonathan Price**

“Egregious”  
“A godsend”  
“WTAF”

# ARTICLE 6, UK GDPR: LAWFULNESS OF PROCESSING

1. Processing shall be lawful only if and to the extent that at least one of the following applies:
  - a. the data subject has given **consent** to the processing of his or her personal data for one or more specific purposes;
  - b. processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract;
  - c. processing is necessary for compliance with a legal obligation to which the controller is subject;
  - d. processing is necessary in order to protect the vital interests of the data subject or of another natural person;
  - e. processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;
  - f. processing is necessary for the purposes of the **legitimate interests** pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.

# ARTICLE 85: PROCESSING AND FREEDOM OF EXPRESSION AND INFORMATION

1. Member States shall by law **reconcile the right to the protection of personal data pursuant to this Regulation with the right to freedom of expression and information, including processing for journalistic purposes** and the purposes of academic, artistic or literary expression.
2. For processing carried out for journalistic purposes or the purpose of academic artistic or literary expression, Member States shall provide for **exemptions or derogations from** Chapter II (principles), Chapter III (rights of the data subject), Chapter IV (controller and processor), Chapter V (transfer of personal data to third countries or international organisations), Chapter VI (independent supervisory authorities), Chapter VII (cooperation and consistency) and Chapter IX (specific data processing situations) **if they are necessary** to reconcile the right to the protection of personal data with the freedom of expression and information.

...

# DPA 2018, SCHEDULE 2, PART 5, PARA 26

## *Journalistic, academic, artistic and literary purposes*

(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.

(3) The listed GDPR provisions do not apply to the extent that the controller reasonably believes that the application of those provisions would be incompatible with the special purposes.

(4) In determining whether publication would be in the public interest the controller must take into account the special importance of the public interest in the freedom of expression and information.

(5) In determining whether it is reasonable to believe that publication would be in the public interest, the controller must have regard to any of the codes of practice or guidelines listed in sub-paragraph (6) that is relevant to the publication in question.

## BACKGROUND

- Art. 9, Council Directive 95/46/EC, predecessor to Art. 85, GDPR
- Implemented by s.32, DPA 1998
- Discussed in *Campbell v MGN Ltd* (CA) [2002] EWCA Civ 1373; [2003] QB 633 by Lord Phillips MR

# CAMPBELL (CA):

- The provisions giving the conditions for its protection to take effect were described as ‘simple’ [117]: **(i) that publication would be in the public interest, and (ii) that compliance with the provisions is incompatible with journalism;**
- The provisions governing the conditions of notice to a data subject, rectification, blocking, erasure or destruction, “are **not appropriate for the data processing which will normally be an incident of journalism**” [121] “... because the definition of processing is so wide that it embraces the relatively ephemeral operations that will normally be carried out by way of the day-to-day tasks, involving the use of electronic equipment, such as the laptop and the modern printing press, in translating information into the printed newspaper. **The speed with which these operations have to be carried out if a newspaper is to publish news renders it impractical to comply with many of the data processing principles**” [122];
- **Without s.32, the 1998 Act, “would impose restrictions on the media which would radically restrict the freedom of the press.”** [123]

# ICO CODE OF PRACTICE

- ICO statutorily required by s.124, 2018 Act to produce a code of practice (previously there had been only 'guidance' (2014))
- Code must contain **“practical guidance”** (s.124(1)(a)) that will **“promote good practice in the processing of personal data for the purposes of journalism”** (s.124(1)(b))
- Having consulted trade associations and data subjects
- “Good practice” must have regard to:
  - the interests of data subjects; and
  - the “special importance of the public interest in the freedom of expression and information”

# THE CONSULTATIONS

First consultation closed in January 2022

Second consultation closed in Nov 2022

Chris Taylor ICO Head of Assurance:

*“We have engaged with the media industry and journalists for the past few months, including holding workshops and considering the feedback they sent us through the first consultation. The insight gathered has been very valuable to us when updating the code and putting together new resources, and we are now seeking your views on them. **Ultimately, we want to provide practical tools and guidance for anyone using persona data for journalism, so your feedback is crucial to achieve this.**”*

# CRITICISM OF THE DRAFT CODE

- Data protection law shouldn't be regulating journalism
- The definition of data is too wide (and includes opinions)
- The ICO takes too strict a view of consent (requiring 'genuine control')
- 'Legitimate interests' is construed too narrowly
- So all journalists have is the JE
- But examples of the public interest are too lofty

# GDPR AT THE COALFACE

The JE is now 'front and centre' in many newsrooms

In house lawyers report a 'steady stream' of GDPR requests

Though not usually pre-action, and actual litigation is so far scant

Publishers increasingly facing demands under Arts. 9-10, 15-18

- Art. 9: prohibition on processing special cat data without explicit consent etc

- Art. 10: processing relating to criminal convictions

- Art. 15: right of access

- Art. 16: right to rectification

- Art. 17: right of erasure (right to be forgotten)

- Art. 18: right to restriction of processing

If a GDPR request is made to a publisher, the following questions arise:

- i. Is the subject's data being processed with a view to publication?
- ii. Does the publisher believe that publication is or will be in the public interest?
- iii. Is that belief reasonable?
- iv. Would acceding to the request (access, deletion/removal, rectification etc) be incompatible with the purpose of journalism?

Removal requests are frequent particularly from those caught up in the criminal justice system.

- i. Historical article fairly and accurately reporting proceedings
- ii. Individual now rehabilitated
- iii. Expresses remorse (at least in his or her request)
- iv. Or it might be a third party mentioned

The publisher probably needs to conduct a balancing exercise similar to that in the *NTL* case (though note that was a pure RTBF case like *Google Spain* and did not engage the JE)

Access requests under Art. 15:

- i. 'Arduous'
- ii. Requires a trawl through (unpublished) documents to assess on a line-by-line basis whether the JE applies

# IS IT COMPATIBLE WITH JOURNALISM TO REMOVE HISTORICAL ARTICLES?

The ICO's draft code acknowledges the strong public interest in maintaining a news archive

## **BUT**

- i. Hurbain v Belgium (2021)*: a person who is not a public figure may acquire notoriety in the context of a criminal process/trial but that may decline with the passage of time, with the effect that they may be able to rely on the right to be forgotten in order to go back to being someone who is unknown to the public. (referred to GC)
  
- i. Biancardi v Italy (2021)*: An order to de-index (and so make less accessible without altogether deleting) an article containing a report of criminal proceedings did not violate Art. 10. Whilst there was a need to inform the public, that need ceased at some point in time, and had ceased when those mentioned in the article filed a formal notice for its removal

# ISSUES

- Are publishers treated as public authorities (having to lay down policies about how public interest decisions must be taken)?
- Will the administrative burden of operating the JE shut out small-scale independent investigative journalists?
- Has the ICO become a de facto media regulator?
- Should the ICO routinely refer complaints to existing media regulators, and how should it treat their decisions?
- Will the media courts continue to apply the old libel concepts to data protection law? (meaning, damages, will s.4 merge with the JE?)
- Could a well-drafted code ease the publishers' burden?

# HOW TO ESTABLISH THE PUBLIC INTEREST



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**The Lockdown Files will help us learn from the experience of Covid**

The Telegraph's reporting of leaked messages underlines the importance of maintaining a public record of these private transcripts

**JOHN EDWARDS**  
INFORMATION COMMUNICATIONS  
3 March 2023 - 7:30pm

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