

The public interest

ROBUST journalism is a force for good and is very much in the public interest.

Journalists can almost always produce brilliant stories that shine a light into dark corners of society while still observing the strict rules of the Editors' Code of Practice. On rare occasions, if they are to act in the public interest, they may have to do things that might otherwise be contrary to the Code.

For example, going undercover and using subterfuge might expose a major scandal, or intruding into a person's private life might reveal hypocrisy and prevent the public being misled. If a complaint was made, the editor would claim to be acting in the public interest – and IPSO would be the final arbiter of the issue.

Decisions to break the Code should never be taken lightly – and citing public interest is not an easy way to dodge censure. It is not a Get Out Of Jail card to be played after flouting the rules or dropping a clanger. Editors must demonstrate that they deliberately took the decision to breach the provisions of the Code after due consideration in justifiable circumstances.

What is the public interest? It is really impossible to define exactly, so the Code does not attempt to do so. Instead, it

provides examples of public interest in a non-exhaustive list that reflects the values of the society that the British press serves.

In January 2016, the list of examples, and the circumstances in which editors can invoke public interest, was updated and expanded in line with the Defamation Act, Data Protection Act and Crown Prosecution Service guidance.

Although the list is longer, it is still not exhaustive and the spirit of the Code allows flexibility. The Code does not work, for example, on the basis that public interest is essentially whatever the public is interested in. At the same time, it is not the case that every story that is published must be justified by public interest.

Many stories are published simply because they are interesting or entertaining, and if they do not breach the Code there is no need to show a public interest justification for publication. Nor should public interest be interpreted so narrowly that it prevents investigative journalism, or exposure of serious wrongdoing.

The Code states that there is a public interest in freedom of expression itself and IPSO will consider the extent to which information is already in the public domain or will become so.

A public interest defence cannot be put forward for seven clauses of the Code. Put simply, there could be no public interest justification for breaking these clauses of the code:

- Clause 1 – Accuracy
- Clause 4 – Intrusion into grief or shock
- Clause 11 – Victims of sexual assault

WHAT THE CODE SAYS

1. The public interest includes, but is not confined to:
 - i. Detecting or exposing crime, or the threat of crime, or serious impropriety.
 - ii. Protecting public health or safety.
 - iii. Protecting the public from being misled by an action or statement of an individual or organisation.
 - iv. Disclosing a person or organisation's failure or likely failure to comply with any obligation to which they are subject.
 - v. Disclosing a miscarriage of justice.
 - vi. Raising or contributing to a matter of public debate, including serious cases of impropriety, unethical conduct or incompetence concerning the public.
 - vii. Disclosing concealment, or likely concealment, of any of the above.

- Clause 12 – Discrimination
- Clause 13 – Financial journalism
- Clause 14 – Confidential sources
- Clause 15 (i) – Witness payments in criminal trials

And IPSO will need convincing that public interest is an adequate defence in complaints involving the other nine clauses. There are three key factors involved:

2. There is a public interest in freedom of expression itself.
3. The regulator will consider the extent to which material is already in the public domain or will become so.
4. Editors invoking the public interest will need to demonstrate that they reasonably believed publication – or journalistic activity taken with a view to publication – would both serve, and be proportionate to, the public interest and explain how they reached that decision at the time.
5. An exceptional public interest would need to be demonstrated to over-ride the normally paramount interests of children under 16.

First, editors must demonstrate that they reasonably believed publication – or journalistic activity taken with a view to publication – would serve the public interest. Of course, IPSO will decide if the editor's belief that the Code should be breached to serve the public interest was reasonable at the time that the decision was taken, based on all the evidence;

Second, editors must demonstrate that the publication or journalistic activity was proportionate to the public interest involved. Disproportionate action – taking a sledgehammer to the proverbial nut – will not impress IPSO. For example, if the story did not merit the level of intrusion, or if the material could have been obtained by other means, the public interest defence may be rejected by IPSO;

Third, editors must explain in detail how they reached the decision to breach the Code at the time. That means producing a detailed and convincing account of the evidence available and the discussions that took place before the breach of the Code was authorised.

Editors who believe a story involves public interest may find they can effectively demonstrate that to IPSO in the event of a complaint by keeping a simple, contemporaneous, written record, which might take the form of an email or some kind of memo. It would help if it included the decision taken, the evidence being relied on, and an outline of what the public interest in the story is.

If such a record is created in cases where legal advice has been taken, editors may wish to consider in what form it could later be sent to IPSO without compromising legal professional privilege or revealing sources.

And IPSO offers confidential, non-binding advice on public interest.

Throughout the Code the most vulnerable members of society are given special protection and this is the case in complaints involving children in which a public interest defence is put forward. The Code sets the bar very high

indeed, declaring that there must be an “exceptional public interest” demonstrated to over-ride the normally paramount interests of children under 16.