

# Guidelines on Safeguarding Privacy in the Media

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## 1 INTRODUCTION

The present guidelines comprise a collection of standards of the Council of Europe (the Council/CoE) and the European Court of Human Rights (the Court) concerning the protection of privacy of public figures and private individuals in the media<sup>1</sup>. They also include data protection principles based on various regulatory instruments and best practices.

As regards the standards for balancing and mutually reinforcing the rights to private life and to freedom of expression, they are structured into five sections and first provide an overview of the right to freedom of expression, the role of the media and the notion of responsible journalism. They then elaborate the concept of private life and conditions for publishing private matters, providing specific examples of cases involving reporting on the private aspects of life. Lastly, the standards contain key standards on safeguarding privacy during crime reporting. There is an additional section on the importance of journalistic codes of ethics and other self-regulatory tools.

The guidelines target journalists<sup>2</sup> and other media professionals and aim to help them with the practical application of the mentioned standards to the individual ethics-related dilemmas. For this reason, the details of legal tests and exercises of balancing rights are omitted.

References to Court cases are included in the last section of the guidelines for those interested in examining Court case law and Council soft law standards from a legal perspective.

The guidelines focus solely on the existing standards of the Council and the Court (except in the part addressing the data protection principles which also include national and EU standards and best practices); they neither introduce new standards nor have any legal force. They should be considered as an advice-giving tool. Given that they aim to be concise, brief and user-friendly, the guidelines focus only on the most crucial points of protecting privacy in the media. Journalists using them are encouraged to provide feedback and the guidelines are open for further updates and future improvements.

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<sup>1</sup> For the purposes of these Guidelines, the term “media” is to be understood in accordance with the applicable standards of the Council of Europe set out in the References section, and in particular with Recommendation CM/Rec(2018)1 on media pluralism and transparency of media ownership and Recommendation CM/Rec(2011)7 on a new notion of media.

<sup>2</sup> For the purposes of these Guidelines, the term “journalist” is to be understood in accordance with the applicable standards of the Council of Europe set out in the References section, and in particular with Recommendation CM/Rec(2016)4 on the protection of journalism and safety of journalists and other media actors.



## **2 FREEDOM OF EXPRESSION, THE ROLE OF THE MEDIA AND RESPONSIBLE JOURNALISM**

### **2.1 Freedom of expression**

The right to freedom of expression is a right guaranteed to everyone. It includes the right to hold opinions and receive and disseminate information and ideas without interference by public authorities. However, states do have the right to require licensing for broadcasting, television or cinema enterprises.

This right is an essential element of a democratic society and a basic condition for its progress and for each individual's self-fulfilment. Going beyond information and ideas that are favourably received or regarded as inoffensive or with indifference, the right to freedom of expression extends to information that could offend, shock or even disturb.

Pluralism of the media is an important aspect of the right to freedom of expression. In a democratic society, pluralism of opinions in the media must not only be tolerated, but actively promoted and facilitated. Different voices and opinions present in a society must be included and reflected in the media. In this way, tolerance and broadmindedness are built.

### **2.2 Media as public watchdogs with rights and responsibilities**

Members of the media are considered to be public watchdogs with a vital role in a democratic society. They have a duty to disseminate information and inform the public regarding all matters of public interest, which the public also has a right to receive.

Nonetheless, a journalist's right to freedom of expression is not absolute. Journalists have rights and responsibilities. In this regard, the term "rights" is construed as journalist's prerogative to exercise their profession and report on matters of public interest, whereas the term "responsibilities" means that they should act in good faith and provide accurate and reliable information in accordance with the ethics of journalism.

Journalists are required to verify facts before they publish them, though the same requirement does not apply when they report and disseminate value judgments (opinions). However, even opinions must have some factual grounds. In *Bodrožić v. Serbia*, the Court found it acceptable for a journalist to criticise a historian by calling him "idiot" and "fascist" because his opinion was published in response to an appearance by the historian on a television show where he had discussed ethnic and national tensions in the Balkans. The offensive words were thus not to be interpreted as statements of facts, but as an opinion in reaction to the historian's own intolerance towards national minorities.

In special circumstances, it is justified for journalists not to verify factual statements. For example, when journalists report on the content of official reports or information from the government or public records, they are not required to conduct additional independent research to verify those facts.

It is up to journalists to decide how a press article is presented, and they are allowed to use a certain degree of exaggeration or even provocation. They may therefore enhance articles and attempt to present them attractively, provided they do not misrepresent or mislead readers.

In reporting matters of privacy, journalists might be limited by court injunctions because prior restraint on publications is not prohibited. However, it is important to know that judicial authorities are required to carefully assess injunctions concerning the press, because news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest.

Whenever possible and practical, journalists should ask for comments from the subjects of their reports, though they are not bound to inform them before the publication or broadcast. In *Mosley v. UK*, the person concerned was photographed and filmed participating in sado-masochistic activities with prostitutes. He successfully sued a newspaper for a violation of his right to privacy, but also sought to legally force the media into notifying persons concerned in advance of their intention to publish material. The Court, however, decided that it was not necessary for the media outlets to give prior notice of intended publications to those whom they feature in them.

### **2.3 Responsible journalism v. tabloid journalism**

Responsible journalism means that journalists exercise their profession by acting in good faith and collecting and disseminating information in line with the journalistic ethics. They make sure the reporting is balanced by repeatedly attempting to contact persons concerned for a comment before publication.

Tabloid journalism means that personal information (especially photos) is collected in a climate of continual harassment, which can instil a very strong sense of intrusion into private life or even of persecution of the persons concerned.

Whether personal information is published by a journalist adhering to the principles of responsible journalism or by tabloids publishing such information solely to satisfy the curiosity of the public is an important element of the legal assessment. Journalists practising responsible journalism enjoy stronger protection of their right to freedom of expression. It is however not for the national authorities to decide what reporting techniques should be adopted by journalists.

Journalists should be mindful that the public does not need to know the whereabouts of a well-known person or how he or she behaves privately even when that person appears in places that could not always be described as entirely private.



Publishing photos with accompanying commentaries relating exclusively to details of private life, when without consent and especially when taken secretly from a distance, are likely to infringe the right to privacy of public figures. It is not necessarily considered that such photos contribute to a debate of general interest. This standard is even stricter in cases concerning private individuals.

Journalists are in principle obliged to respect the law and ethical codes while reporting news and should exercise utmost caution in situations which may amount to a violation of applicable laws. Law-breaking can only be justified in situations where the interest in the public's being informed outweighs the duty to obey ordinary (criminal) law. For example, a journalist must comply with a police order to leave the scene during public demonstrations or risks being detained by law enforcement officers. Likewise, journalists who opt to, for instance, illegally buy firearms to prove that weapons can be easily accessible may not expect to be exempt from prosecution.



## **3 PRIVATE LIFE AND CONDITIONS FOR PUBLISHING PRIVATE MATTERS**

### **3.1 Private life**

The right to private life is guaranteed to everyone.

The notion of private life is a broad term with no strict definition, covering but not limited to the physical and psychological integrity of a person and multiple aspects of a person's identity such as gender identification and sexual orientation, name or elements relating to a person's right to their image. A person's reputation is also part of the right to private life.

Private life extends to the right to freely establish and develop relationships (including romantic ones) with other human beings. In addition, information relating to medical conditions, home addresses, fathering a child out of wedlock and sexual activities are considered to fall within the sphere of private life.

The right to privacy means that everyone, i.e. private and public figures, have the right to live privately away from unwanted attention (subject to some exceptions).

As a principle, a publication concerning strictly private matters infringes the right to respect for private life, unless consent of the concerned person is obtained or such publication is considered in the public interest. As such, decisions on what is considered to be a private matter and what has entered into a public sphere need to be taken by journalists themselves on a case-by-case basis.

The more intimate the aspect of private life being disclosed, the more serious the justification must be.

### **3.2 Consent**

As a general rule, personal information should not be made public without the consent of the concerned person. Consent is an important element in determining whether a publication of a detail from private life interferes with the right to privacy.

That being said, information about individuals can also be published without consent if there is an overriding public interest, i.e. if the disclosure of information is justified by a general interest or concern, which is considered to prevail over the considerations of the concerned individual's privacy. The concept of public interest may therefore constitute an "alternative justification" for a publication.

Alleging a violation of her right to privacy, Princess Caroline Von Hannover complained several times about the publication of photographs from her private sphere in German magazines. The Court examined also the manner in which photographs were obtained, stressing the importance of obtaining the consent of the persons involved.

For example, in *Von Hannover 2 v. Germany*, a picture of the Princess on a skiing holiday was published alongside an article about her father's illness, which was found to contribute to a debate of general interest. Therefore, even in the absence of her consent, the publication was found to be justified.

However, in any publication without consent the rule is: the more private the matter, the greater the call for caution. For example, a person's romantic relationships are in principle a strictly private matter. Accordingly, details concerning an individual's sex life or intimate relations are only permitted to become public without consent in exceptional circumstances. This was the case in *Couderc and Hachette Filipacchi Associés v. France*, elaborated below.

In practice, information and images published with the consent of the persons involved generally do not pose problems. Judicial proceedings are mostly initiated in cases where no such consent was obtained. In the following chapters, a number of Court's cases will be presented where material was published without the person's consent. The authors, however, argued that the respective publications were in the public interest.

### 3.3 Public interest

Generally speaking, public interest relates to matters affecting the public to such an extent that it may rightfully (legitimately) take an interest in them, attracting its attention or concerning the public significantly.

Areas considered to be of public interest include yet are not limited to misuse of public office, improper use of public money, protection of public health, safety and environment, protection of national security, crime and social behaviour and similar political and socioeconomic topics.

Journalists may publish ordinarily personal information when it serves a greater value and is used to discuss a matter in the public interest (published personal information should serve some important purpose). The greater the information value for the public, the more the interest of a person in being protected against the publication has to yield, and *vice versa*.

Along these lines, journalists may republish personal information already made public by the concerned person. In *Krone Verlag GmbH & Co. KG v. Austria*, a journalist took and used a picture of a politician from the website of the Parliament to accompany an article revealing that he had allegedly received unlawful salaries. Journalists can also republish information and photographs of private individuals which were originally published with their consent, insofar as the information is a matter of legitimate public interest (*Eerikainen and others v. Finland*).

News reports need not entirely be devoted to a debate of public interest to contribute to that debate, as it may suffice for the article to be concerned with the debate or contain one or several elements thereof.

It is difficult to define public interest clearly because of the risk of excluding some matters or of proposing an overly narrow definition. The decision on whether to publish personal information about a public figure or private person will always depend on the circumstances of the case. Journalists are thus expected to apply the public interest test and balance the strength of considerations in favour and against disclosure on a case-by-case basis.

In determining public interest, what should matter to journalists is whether the news report is capable of contributing to a debate of general interest and not whether they will manage to fully achieve that objective. In *Erla Hlynsdottir v. Iceland (no. 2)*, a journalist reported that the director of a Christian rehabilitation centre and his wife had been involved in sex games with the patients of the centre. Although the wife was not ultimately convicted, reporting about the allegations, which involved private sexual activities, contributed to the public interest.

Public interest applies among other to matters which are capable of giving rise to considerable controversy, or involve a problem that the public would have an interest in being informed about, but it cannot be reduced to the public's thirst for information about the private life of others or to the reader's wish for sensationalism or even voyeurism, as was the case of publishing details of the sexual activities of Max Mosley in the aforementioned Court case. If the sole aim of an article is to satisfy curiosity of the readership regarding details of a person's private life, it cannot be deemed to contribute to any debate of general interest to society.

### **3.3.1 Public figures**

Public figures are persons holding public office and/or using public resources. More broadly speaking, public figures include anyone with a role in public life, regardless of whether the domain is politics, the economy, the arts, the social sphere, sports or other.

People's private lives have become a highly lucrative commodity for some media outlets. The targets are mostly public figures, since details of their private lives serve as an impetus for sales. Yet public figures should know that the position they hold in society – in many cases by choice – automatically entails increased pressure on their privacy.

In determining whether a person is a public figure, it is of little importance for journalists whether a certain person is actually known to the public. Journalists cannot be limited by the claims of concerned persons that they are not actually known to the public. What matters is whether the person has entered the public arena by participating in a public debate, by being active in a field of public concern or in public debate.

Public figures inevitably and knowingly lay themselves open to close scrutiny of their every word by both journalists and the public at large. Their right to keep their private life protected from the eyes of the public is therefore more restricted.

Freedom of expression in the sphere of politics would receive a fatal blow if public figures could censor the press and public debate in the name of personality rights.

When reporting matters involving private aspects of life, journalists should pay special attention to the role or function of the concerned person and the nature of the activities subject of the news report. Depending on whether or not he or she is vested with official functions, an individual will enjoy a more or less restricted right to his or her intimacy. For example, Princess Caroline von Hannover is considered to be a public figure, but does not exercise any official functions, which allows her the right to enjoy a higher degree of privacy than that enjoyed by a person holding a public office.

Public figures with the lowest expectation of privacy are politicians. The exercise of a public function or aspiration to political office necessarily exposes an individual (also after death) to the attention of the public, including in many areas that come within one's private life. In *Editions Plon v. France*, a journalist and the former private physician to former French President Mitterrand wrote a book describing the state of his health during his term of office. The president's heirs successfully sued to prohibit further dissemination of the book, alleging that it invaded the former president's privacy and interfered with the personal life and feelings of his widow and children. The Court, however, ruled in favour of the journalist and the physician, finding that was in the public interest to discuss the history of the president who served two terms in office.

Certain private actions of public figures cannot be regarded as private on account of their potential impact, viewed from the perspective of the role played by those figures in political or social spheres, and of the public's resulting interest in being informed thereof. For example, an arrest of a well-known television actor (who might be considered as a role model for young people) for possession and use of illegal drugs is likely to be considered a matter of public interest worth reporting. Journalists should respect the legitimate expectations of public figures to privacy when they engage in purely private activities such as participating in sports, walking, leaving a restaurant or when on holiday or in intimate relationships (marital problems, extramarital affairs), if the reporting does not contribute to a matter of public interest.

### **3.3.2 Private individuals**

Private individuals, who have not entered the public domain, in principle enjoy greater protection of their right to privacy. However, their actions may take them into the public sphere, which is why journalists do not have an absolute ban on reporting about them, even without their consent.

In certain cases, journalists may report on and even name private individuals. In *Standard Verlags GmbH v. Austria (no. 3)*, a newspaper reported on speculation losses incurred by a bank and the ensuing criminal investigation. In its reporting, the newspaper named the banker under investigation. The Court found that while the banker could not be considered to be a public figure as a senior employee of the

bank and son of a politician, the journalist was nevertheless justified to publish his name because he had headed the bank's treasury at the time when the losses were incurred.

Private individuals voluntarily involved in controversial undertakings cannot expect absolute privacy. For example, journalists would be allowed to name persons doing business with prostitutes (there are on-going discussions in many countries as to whether strip clubs should have more stringent regulations or be banned altogether). In this regard, by choosing to engage in a highly controversial business, these private individuals have entered the public domain and thus opened themselves to scrutiny from journalists.

Journalists should pay particular attention to the wider implications that the publication of personal information may entail, such as possible exclusion from the local community. In *Armonienė v. Lithuania* (elaborated further below) the Court addressed the matter of an entire family's suffering of severe moral and psychological trauma which drove them to move from their village, after a journalist disclosed that a member of that family was infected with HIV.

### **3.4 Framework for balancing the rights to privacy and freedom of expression**

#### **3.4.1 Contribution to a debate of general interest**

The primary aspect that a journalist must consider in deciding whether to disclose information about one's private life is whether the news report can contribute to a debate of general interest. This concept is not distinct in any meaningful way from the concept of public interest; thus, a contribution to a debate in the general interest defines the objective of "public interest".

A few examples from the Court's case law:

- In *Couderc and Hachette Filipacchi Associés v. France*, a French magazine reported about the child fathered out of wedlock by Prince Albert II of Monaco. Publishing this information served the public interest to be informed about the rules of succession, which might prevent children born out of wedlock from succeeding to the throne. In addition, family members of the monarchy are also part of contemporary history; hence there is public interest in their lives.
- In *White v. Sweden*, two newspapers published a series of articles in which various criminal offences were ascribed to Anthony White by a number of sources, including the murder of the former Swedish Prime Minister Olof Palme in 1986. The Court considered that the unsolved murder of Olof Palme and the avenue of investigation were matters of serious public interest and concern.
- In the case of *Selistö v. Finland*, a journalist was convicted and fined for having defamed a surgeon by writing two articles alleging that a patient had died as a result of the surgeon's alcohol consumption during the night

preceding the operation. The Court found that recounting the personal experiences of the surviving widower as well as matters of patient safety, concerned an important aspect of health care and as such raised serious issues affecting the public interest.

- In *Guseva v. Bulgaria*, a representative of an association working on animal rights protection obtained three final court orders requiring a mayor to provide her with information relating to the treatment of stray animals found on the streets of the town over which he officiated. The treatment of animals was considered to be matter of general interest and to contribute to public debate.
- In the case of *Schweizerische Radio- und Fernsehgesellschaft SRG v. Switzerland* the prison refused to allow a television station to carry out a televised interview inside a prison with a prisoner serving a sentence for murder. The media outlet had intended to broadcast the interview in one of the longest-running programmes on Swiss television. The Court stated that there is no doubt that a report about a convicted murderer who had always protested her innocence, attracted public interest and contributed on the discussion about proper functioning of the justice system.
- However, pictures and information of a purely personal nature are not considered to contribute to a debate of general interest. In *Von Hannover v. Germany*, publishing pictures of Princess von Hannover participating in sports without her consent resulted in a violation of her right to privacy.

#### **3.4.2 The role of the person concerned and the subject of the report**

As already stated, a private individual unknown to the public may claim particular protection of his or her right to private life, though the same is not true for public figures, particularly where politicians are concerned.

In *Renaud v. France*, the applicant was convicted in criminal proceedings of defaming and publicly insulting a citizen discharging a public mandate, on account of remarks published on the website of an association of which he was president and webmaster. The Court was of the opinion that when a debate relates to an emotive subject, such as the daily life of the local residents and their housing facilities, politicians must show a special tolerance towards criticism.

In *Feldek v. Slovakia*, a research worker in the field of literature published an autobiography where he described, *inter alia*, his conviction by a Soviet military tribunal on the ground that he had been ordered to spy on the Soviet army. He later became Minister for Culture and Education of the Slovak Republic and the press covered parts of the book. The Court considered that he inevitably and knowingly lays himself open to close scrutiny of his words and deeds by journalists and the public at large, and he must consequently display a greater degree of tolerance.



The same does not apply to civil servants because they do not knowingly lay themselves open to close scrutiny of their every word and deed to the extent to which politicians do. Therefore, media and journalists should not treat them equally as they treat politicians when it comes to the criticism of their actions.

Also, journalists must exercise special care when reporting on vulnerable groups or groups which have specific needs. For example, children and young people should be protected because of the inherent vulnerability that their age implies, which applies also in the context of media coverage.

Special consideration should be given to the maturity of a child when quoting his/her comments. The child may not be sufficiently aware of the impact of his/her words, and media have an ethical responsibility not to cause damage to a child.

Furthermore, in cases where parents or legal representatives issue negative, sensitive or other inappropriate comments about children under their care, journalists should pay particular attention to the best interest of the child. They should only publish such information when there is an overriding public interest, but avoid mentioning the name of the child, unless necessary, in order to avoid a lifelong association with negative or embarrassing comments.

In such cases, where the name of the child is not mentioned and face not shown, journalists should also avoid publishing information indirectly identifying the child (such as photographs of the parents or the precise location of the family, etc.).

When conducting research among people requiring protection, restraint is called for, especially with regard to persons who are not in full possession of their mental or physical capacities or who have been exposed to an extremely emotional situation. Journalists should avoid exploiting the vulnerability of these persons to gain information.

### **3.4.3 Prior conduct of the person concerned**

Having given interviews to journalists in the past, being present in the media in another form, and even having cooperated with the press on previous occasions cannot serve as an argument for depriving the person concerned from the right to privacy.

A public figure's voluntary disclosure of information might nevertheless weaken the degree of protection to which that person is entitled. In *Hachette Filipacchi Associés ("Ici Paris") v. France*, a journalist wrote an article on a famous singer (accompanied by photographs) referring to the singer's extravagant financial difficulties and exorbitant tastes. The singer claimed violation of privacy, but without success, since he had already disclosed information about the lavish way he managed and spent his money in his autobiography, from which the journalist drew information.

In the case of internationally known model and celebrity Naomi Campbell (elaborated below), given her prior public denials of drug use, the core facts of her

drug addiction and the fact that she was in treatment were legitimately a matter of public interest and capable of being published.

In another case involving publication of wedding pictures, again elaborated below, the Court took account of the fact that one of the applicants, who was himself a journalist and a television presenter, had already revealed aspects of himself to the public to a certain degree. For this and other reasons, publishing the pictures was justified although he asked the press beforehand not to report on the wedding and took precautions to prevent press coverage.

#### **3.4.4 Method of obtaining information and its veracity**

Journalists are bound to act in good faith and their responsibilities include providing accurate facts and reliable and precise information in accordance with the ethics of journalism. For example, in cases of traumatic deaths the grief felt by the victim's family should lead the journalists to show prudence and caution.

Journalists should use fair means to obtain information and show respect for the person involved. In *Von Hannover v. Germany*, using long lens cameras to secretly take pictures of the princess while she was on holiday was not considered a 'fair way' to obtain information. However, publishing photographs of a singer derived from advertising material in *Hachette Filipacchi Associés ("Ici Paris") v. France* was found to be acceptable.

Journalists should beware that an article written and truncated as to mislead the reader is less likely to contribute to a debate of public interest. Accuracy of the disseminated information is a fundamental principle for the protection of the right to privacy.

#### **3.4.5 Content, form and consequences of publications**

It is important for journalists to consider the medium of the publication and the manner in which the person concerned is represented therein. For example, artistic expression in a poem has a much more limited impact than mass media.

As regards content, particular care should be taken when public figures are presented in a negative way, since it is more likely to result in a violation of privacy. However, the notion of freedom of expression protects not only the content, but also the form and style of expression. For example, satirical descriptions, which inherently include a degree of exaggeration and distortion of reality, are assessed differently than factual statements.

Likewise, the way in which the publication is disseminated – on national or local media with large or limited circulation – is also an important factor. For example, audio-visual and online media have often a much more immediate and powerful effect than printed media.

When publishing personal information, journalists should pay attention to the potential impact of the information on people's life before dissemination. The

impact could be so negative as to force an entire family to move from their village, as mentioned in the HIV case above, or to lead to a revocation of adoption (the case of *Ageyev v. Russia*). It must be taken into account that in some countries opposition to the government can mean danger to life or other forms of threats, which calls for a careful consideration of whether to disclose the identity of any personal information of individuals who face persecution as a result of publication.

## 4 SPECIFIC ISSUES OF PRIVATE LIFE

### 4.1 Family, home, property

Family members, relatives and friends of public figures, not being public figures themselves, enjoy a higher degree of privacy, though there are cases in which journalists are allowed to report about them. In *Flinkkilä and Others v. Finland*, publishing the name, age, picture, workplace and family relationship details of the partner of a public figure was not considered to be in violation of privacy because she was involved in a domestic incident which had resulted in public disorder charges (both being criminally charged, fined and convicted).

Articles about children of public figures regularly appear in newspapers. If such publications are made only to trigger gossip, journalists do not enjoy strong protection of their right to freedom of expression. In *Zvagulis v. Lithuania*, a newspaper reporting that a prominent pop star had a child born out of wedlock violated his right to privacy, since the newspaper was unable to link this information to the pop star's professional activity. The Court considered that the child's existence did not go beyond the private sphere and that publication was stressful for the public figure and harmful for the psychological integrity of the child.

The right to privacy includes not only the right to an actual physical area but also the quiet enjoyment of that area. A person's home address is personal data; hence it is protected and in principle should not be made available to the public by journalists. In *Alkaya v. Turkey*, a journalist reporting on the burglary of the home of a famous actress violated her right to privacy by disclosing her home address. The Court found that even when assuming public interest in reporting that she was burgled, there was no such interest in publishing the exact details of her home address. Location of other places related to private spheres of life may be problematic such as the case of the treatment centre frequented by N. Campbell.

### 4.2 Physical and moral integrity

#### *Medical information*

Journalists should pay particular attention to medical information because it is of fundamental importance to a person's enjoyment of his or her right to respect for privacy. It is crucial to not only respect the sense of privacy of a patient but also preserve his or her confidence in the medical profession and health services in general. Otherwise, the impact could be so negative that those in need of medical assistance may hesitate to disclose such information to receive the appropriate treatment.

In *Fürst-Pfeifer v. Austria*, an article about a registered psychological expert for court proceedings was published in December 2008 on a regional news website. The article stated in particular that the psychological expert suffered from psychological problems such as mood swings and panic attacks but had been working as a court-appointed expert for many years. According to the Court, a serious debate on the mental health status of a psychological expert, evoked by reasoned suspicions, has

to be seen as a debate of general interest, as an expert in court proceedings is required to meet standards of physical and psychological fitness.

In *Armonienė v. Lithuania*, the largest national daily newspaper published details about the medical condition of a private person who was suffering from HIV. After the person concerned died, his wife continued legal proceedings. The Court found that publicly disclosing the husband's state of health and indicating his full name, surname and residence was not in the public interest. By confirming information on the husband's illness, the employees at the AIDS centre could have negatively affected the willingness of others to be voluntarily screened for HIV.

In *Mitkus v. Latvia*, the newspaper violated a prisoner's privacy when it reported that he was infected with HIV. The article included a picture, although the national judicial authorities had prohibited its publication. The Court found that since the prisoner's features were clearly visible (his first name and the first letter of his surname, details of his criminal record and place of imprisonment were mentioned), it was perfectly possible that his fellow prisoners and other persons could identify him and behave differently to him based on this state of health.

#### ***Moral integrity***

In principle, it will be difficult for a journalist to justify reporting about private, especially intimate relationships of public figures if they do not contribute to a debate of general interest. In *Standard Verlags GmbH v. Austria (No.2)*, a newspaper violated the privacy of the persons concerned when it published an article commenting on rumours that the wife of the then Austrian President sought to divorce him and was maintaining close contacts with another politician. According to the Court, journalists can report information concerning politicians' state of health, which might prevent them from exercising their duties, but the same freedom does not apply to pointless gossip about their marriages.

### **4.3 The right to one's image**

A person's image constitutes one of the principal attributes of his or her personality, as it reveals the person's unique characteristics and distinguishes the person from others. It is an essential component of personal development and everyone has the right to control the use of his or her own image. In this light, the publication of a photograph in general constitutes a more substantial interference with the right to privacy than the mere communication of a person's name.

Individuals have the right to refuse publication of their image and to object to the recording, conservation and reproduction of the image by another person.

Journalists should, in principle, secure the consent of the person concerned at the time the picture is taken and not simply if and when it is published. Otherwise an essential attribute of personality (the image) is dependent on third parties and the person concerned has no control over it.

As already mentioned in sections above, images taken without consent of the persons concerned or secretly without their knowledge will result in a violation of the right to privacy, unless they are considered to contribute to a debate of public interest.

In *Mgn Limited v. the United Kingdom*, a newspaper published an article about the supermodel Naomi Campbell. The title on its front page read “*Naomi: I am a drug addict*” and a longer article inside the newspaper elaborated on Campbell’s addiction treatment. The articles were accompanied by photos taken secretly near the Narcotics Anonymous centre she was attending at the time. National courts concluded that that the publication of the information was justified as a matter of public interest, given that Campbell had previously publicly denied drug use and the articles disclosed that she was being treated for drug addiction. However, although the publication of that information was justified, the Court found that the additional publication of photographs was offensive and distressing for her, and infringed on her right to respect for private life.

In *Müller v. Germany*, the applicants were first informed about their son’s presumed (and later confirmed) suicide from a newspaper article featuring their son’s photograph. While the publication of the photograph without their consent was considered a violation of the applicants’ privacy, the accompanying article was accurate and in no way defamatory, and the photograph itself bore no particularities. In addition, the applicants could have sought injunction to prevent further publication of unconfirmed information. The combined effect of those factors lessened the gravity of the violation of privacy, so the applicants were not awarded any damages.

#### **4.3.1 Specific cases of photographing and filming**

##### ***Images of violent or traumatic events***

As part of their responsibilities, journalists should be sensitive when publishing information concerning people who are affected by tragedy or grief, since publication of such information might result in a violation of the right to privacy of those affected. In *Hachette Filipacchi Associés v. France*, a weekly magazine published an article illustrated by a photograph of a murdered high official’s body lying on the road, facing the camera. Family members successfully sued the magazine for violation of privacy.

##### ***CCTV***

Journalists should refrain from publishing footage taken by closed-circuit television (CCTV) featuring private persons without masking the pictures, unless that information contributes to a debate of general interest. In *Peck v. United Kingdom*, a private individual (who was suffering from depression yet was not accused of any criminal offence) was recorded while walking in the street with a kitchen knife in his hand and subsequently attempted to slit his wrists. Publication of this footage by the local council and the media was considered to be in violation of his right to privacy.

### *Hidden cameras*

Investigative journalists are allowed to use hidden cameras to record interviews with non-public figures only under certain conditions. Using hidden cameras is allowed when a) the matter contributes to the public debate, b) the reporting does not focus on the person personally but on one of his or her professional aspects, c) the person's face and voice is disguised and d) the interview is not conducted at usual business premises.

In *Haldimann and Others v. Switzerland*, four journalists were involved in recording and broadcasting a documentary on the sale of life insurance products against a background of public discontent with the practices used by insurance brokers. The documentary contained sequences of an interview recorded by hidden camera to highlight an insurance broker's malpractice. The Court held that interference in the private life of the broker, who had decided against expressing an opinion on the interview, had not been serious enough to override the public interest in receiving information on the alleged malpractice in the field of insurance brokerage.

However, an individual's celebrity or functions cannot under any circumstances justify hounding by the media or the publication of photographs [or information] secured through fraudulent or clandestine operations, or disclosures portraying details of an individual's private life and representing an intrusion into their intimacy.

### *Taking pictures at the weddings of well-known figures*

Reporting about weddings of well-known figures and publishing pictures of the ceremonies are in principle allowed because they have a public side, under certain conditions, also without consent.

In *Sihler-Jauch and Jauch v. Germany*, a weekly magazine published an article illustrated by several photographs about the wedding of a well-known TV presenter. It was decided that the journalist did not violate the right to privacy of the couple because the presenter was well known and had a strong influence in shaping public opinion. Furthermore, the list of guests had prominent names, including the mayor of Berlin and the couple was not portrayed in a negative light.

Likewise, in *Lillo-Stenberg and Saether v. Norway*, a well-known musician and actress complained about the press invading their privacy during their wedding party. A magazine published a two-page article about the wedding accompanied by six photographs without the couple's consent. The Court deemed that their privacy was not violated because the event was held in an open and accessible place, they were not portrayed in a negative light, and their wedding party was a less private affair than a marriage ceremony would have been.

## *Children*

Journalists should avoid publishing pictures of the children of public figures if such information does not contribute to a debate of public interest. In *Kahn v. Germany*, pictures of two children of Oliver Kahn, a former goalkeeper of the German national football team, and his wife were featured in a magazine. The journalists were fined because they had violated the family's right to privacy. All the photos showed the children in the company of their parents or on holiday, though the subject of the reports had not been the children themselves, but rather their parents' relationship and Oliver Kahn's career.

In *Reklos and Davourlis v. Greece*, taking pictures of a new-born baby without the consent of his parents (in the intensive unit to which only hospital staff should have had access) was considered to be a violation of the right to privacy even though the pictures were not published.

### **4.4 Correspondence**

In *Leempoel & S.A. ED. Ciné Revue v. Belgium*, a judge was giving evidence in a parliamentary inquiry about the handling of a certain case. She was asked to hand over the file she had brought with her in preparation. The file included personal notes about her defence and recommendations from her lawyer as to how to communicate and conduct herself before the commission. A magazine published an article containing lengthy extracts from the preparatory file. The Court deemed that her privacy was violated because the article contained criticism of the judge's character and included a copy of correspondence that was private, in the strictest sense, and which could not be regarded as contributing in any way to a debate of general interest to society.





## 5 CRIME REPORTING

When reporting about crimes, journalists should pay particular attention to whether the person concerned is known to the public. The mere fact that a person is subject to criminal investigation, even for a very serious offence, does not justify treating him or her in the same manner as a public figure who is more exposed to publicity.

### 5.1 General principles

The public has a legitimate interest in being informed about crimes, investigation proceedings and trials. While the aim of crime reporting is to inform the public, journalist should nevertheless report in good faith by refraining from publishing groundless and unverified accusations.

In particular, journalists should not present a person as guilty until a conviction has been pronounced by a court. A clear distinction should be made between suspicion and conviction. As a matter of good practice, media could specify whether a person has pleaded guilty or not, taking into consideration that a confession of guilt should not be presented as a proven guilt.

### 5.2 The right of victims (minor) to protect their identity

In *Krone Verlag GmbH & Co KG and Krone Multimedia GmbH & Co KG v. Austria*, a newspaper revealed the identity of a minor victim of sexual abuse by publishing her photograph on its website. Although the issue was a matter of public concern, given that neither the offenders nor the victim were public figures or had previously entered the public sphere, the knowledge of their identity was not necessary to understand the particulars of the case. The child was not a public figure and it was not considered by the Court that she has entered the public scene by becoming the victim of a criminal offence which attracted considerable public attention.

### 5.3 The right to privacy of a presumed paedophile

In *Y v. Switzerland*, a journalist was found to violate the right to privacy of a person prosecuted for paedophilia, who was eventually released. The article contained a considerable amount of detailed information and extracts from the complainant's statements to the police, which was deemed to be in violation of his right to privacy and did not contribute to a public debate.

### 5.4 Revealing the identity of an investigated police officer

In *Wirtschafts-Trend Zeitschriften-Verlagsgesellschaft v. Austria*, a news magazine published an article with excerpts of the minutes of preliminary investigations in criminal proceedings against three foreign police officers who were on a deportation flight. The deportee they were escorting had died under unclear circumstances. The Court ruled that the disclosure of the identity of one officer by the news magazine had negatively affected his private and social life and particular care had to be taken to protect him against a condemnation by the media.

## 5.5 Suspected persons

Journalists are in principle allowed to publish pictures of public figures under investigation, e.g. on the suspicion of large-scale tax evasion. In *Verlagsgruppe News GmbH v. Austria (no.2)*, the newspaper published an article about pending investigations on suspicion of large scale tax evasion against the managing director of a well-known pistol manufacturer. Such reporting was not considered to violate the right to privacy of the managing director.

Journalist should be much more careful when lesser known persons are in question. In the case of *Khuzhin and Others v. Russia*, publishing (during a talk show) pictures of passports of persons charged with kidnaping and torturing a few days before their trial resulted in a violation of their right to privacy.

## 5.6 Publishing banal aspects of accused persons

In *Bedat v. Switzerland*, a journalist was considered to have violated the right to privacy of a private person accused of three deaths in connection to a car accident. The Court deemed that publishing records of interviews, statements made by the accused's wife and doctor, and letters sent by the accused to the investigating judge concerning banal aspects of his everyday life in detention did not contribute to a public debate. In addition, the Court stated that the journalist had painted a highly negative picture of the accused person, adopting a quasi-mocking tone, with large close-up photographs of the accused accompanying the text as proof that the journalist sought to create a sensationalist article.

## 5.7 Persons in custody

In *Toma v. Romania*, after the police had taken a person in custody for possession of drugs, some police officers contacted journalists and invited them to record pictures of the person concerned at the police headquarters. The Court found that this person's right to privacy had been violated.

In another case, *Khmel v. Russia*, the police had invited journalists to the police station to film a member of the regional legislature who was arrested on suspicion of drunk driving and unruly conduct. Some of the footage was broadcasted on television and was considered to be in violation of his right to privacy.

## 5.8 Convicted persons in emotional situations

In *Egeland and Hanseid v. Norway*, two newspapers had published, albeit without consent, photographs of an individual about to be taken away to serve a long prison term to which she had just been sentenced. Although the photographs had concerned a public event and had been taken in a public place at a time when her identity was already well known to the public, the Court found that the newspapers' portrayal of her had been particularly intrusive as she was in tears and in great distress. She had just been arrested inside a courthouse after having been notified of a verdict convicting her of triple murder entailing the most severe sentence.

## 5.9 Convicted persons released on parole

It is often the case that public authorities, especially law enforcement bodies, release pictures of wanted, arrested or released-on-parole persons. In principle, journalists are allowed to republish such pictures. In *Österreichischer Rundfunk v. Austria*, it was acceptable to broadcast the picture of the head of a neo-Nazi organisation, who had been released on parole. According to the Court, his interest not to have his physical appearance disclosed was not more important than the fact that he was a notorious person who had committed crimes of a political nature.



## **6 CODES OF CONDUCT AND SELF-REGULATORY TOOLS**

Codes of conduct and self-regulatory bodies or mechanisms comprising publishers, journalists, media users' associations, experts from the academic world and judges are crucial elements contributing to a balanced and ethical practice of journalism.

Generally, journalists are encouraged to adhere to these self-regulatory tools.

A large collection of codes of conduct can be found on the Accountable Journalism site, a collaborative project that provides a wide range of resources for journalists, explaining global press ethics and regulation systems and providing advice on ethical reporting (<https://accountablejournalism.org/ethics-codes/international>).



## 7 DATA PROTECTION PRINCIPLES

### 7.1 The rights of individuals

*a.*

Media outlets will need to comply with their obligations, under the Constitution and under the Convention, to ensure the privacy of individuals.

Moreover, under Article 9 of Convention 108, derogations from basic data protection principles may be allowed, for instance to ensure the freedom of expression, only when such derogations are provided for by the law of the Party to the Convention, and constitute necessary measures in a democratic society in the interests of protecting the data subject or the rights and freedoms of others.

Journalists will then need to assess, on a case by case basis, if they are allowed to derogate to the basic data protection principles in specific circumstances.

As a result, data protection key principles may to some extent apply also to media processing personal data for their journalistic activities.

Concerning the rights of the individual, under Article 8 of Convention 108, individuals have the right (where no derogations under Article 9 apply) to:

- establish the existence of an automated personal data file, its main purposes, as well as the identity and usual residence or principal place of business of the controller of the file;
- obtain at reasonable intervals and without excessive delay or expense confirmation of whether personal data relating to him are stored in the automated data file as well as communication to him/her of such data in an intelligible form;
- obtain, as the case may be, rectification or erasure of such data if these have been processed contrary to the provisions of domestic law giving effect to the basic data protection principles;
- have a remedy if a request for confirmation or, as the case may be, communication, rectification or erasure is not complied with.

Under the new European Union's legislative framework, with the General Data Protection Regulation, the rights of the individuals will even be strengthened and individuals will receive more comprehensive information at the time of the collection and will have, for instance, the right to have information erased ("right to be forgotten"), the right to the portability of their personal data, etc.



Derogations to these rights are allowed only if they are provided for by the law of the Party and constitute a necessary measure in a democratic society in the interests of protecting the data subject or the rights and freedoms of others.

*b.*

In general, and subject to the requirements of national law, individuals have the right to obtain information about the data stored by the responsible media outlet.

Such request may be declined if the disclosure of the information would impair the journalistic activities (revelation of the sources, of an undergoing investigation, etc.), would infringe the rights of third parties or would affect in a disproportionate manner the freedom of expression.

Procedures to handle access request should be adopted by media outlets. In case of refusal to comply with a request, the media outlets should record the reasons of this decision and communicate them to the person concerned.

*c.*

Published news or assertions, which subsequently turn out to be incorrect, should be promptly rectified in an appropriate manner by the editor.

The correction publishing the true facts should refer to the incorrect article. The true facts should be published even if the error has been admitted in another form. In the case of online publication, the rectification should be linked to the original content. If the publication is made within the original publication itself, it should be marked as such.

The correction, retraction or refutation should be stored together with the original publication and for the same period of time.

Media should have procedures to ensure the exercise of the right to reply and the right to obtain rectification of false information after publication, which are even more crucial in cases where the rights of access and to rectification have been limited prior to the publication (Cf. Article 29 Working Party, Recommendation 1/97, "*Data protection law and the media*", 25 February 1997).

*d.*

Personal data gathered in violation of the rights of the persons concerned should be blocked in the first place and eventually deleted by the editor.

*e.*

Every person should be entitled to bring a complaint and to have an effective remedy in case of violation of their right to data protection, having been informed about their rights so that remedies are efficient in practice and do not remain purely theoretical.

The persons concerned should be able to address their complaints directly to the reporting media, to a self-regulatory body and eventually to the data protection authority or the courts.

They should also be entitled to a proper compensation proportionate to the violation and its consequences.

In *Avram and others v. Moldova* the applicants, five women, complained about the broadcasting on national television on 10 May 2003 of intimate video footage of them in a sauna with five men, four of whom were police officers. The footage was used in a programme about corruption in journalism, and notably in the newspaper *Accente*. The Court noted that the interference with the applicant's right to privacy was not in dispute. It had been acknowledged by the national courts and the applicants awarded compensation.

In its ruling, the Court considered that the amounts awarded at national level had been too low to be proportionate to such a serious interference with the applicants' right to respect for their private life as was a broadcast of intimate video footage of them on national television. The Court took into account the dramatic effect on the applicants' private, family and social lives and awarded an additional compensation.

## **7.2 Security measures**

Appropriate security measures shall be taken for the protection of personal data stored in automated data files against accidental or unauthorised destruction or accidental loss, as well as against unauthorised access, alteration or dissemination.

Media outlets should take appropriate and reasonable steps to store personal data securely and prevent them from being purposely or by negligence stolen, lost or misused. They should protect the technical devices (strong password policy, log-on controls, encryption, suitable back-up, antivirus and firewall, etc.) used inside and outside the organisation (USB, smartphones, laptops, etc.).

Media should at the same time adopt physical security measures and policies (locks, alarms, limited access to the facilities, etc.). Management and organisational measures should be adopted, for instance to regulate the relations with processors and subcontractors, to define a limited number of persons who will be able to access personal data or to organise a strict separation of journalistic and non-editorial activities.

## **7.3 Processing of non-editorial content**

### ***a.***

The scope of the data protection legislation is extremely wide and media should keep in mind that data protection principles are fully applicable concerning the non-editorial content.

The “media exemption” is necessary but is strictly limited to the editorial and journalistic content. This exemption does not apply to the other activities of media outlets, for instance when they process personal data for commercial or administrative purposes.

In the latter case, media outlets should be considered as “traditional” data controllers and fully comply with data protection requirements.

For instance, media should fully apply data protection principles when they process personal data about their subscribers (for instance for advertising purposes) or about their employees.

When processing personal data, the press should thus establish a clear distinction between editorial and commercial or administrative purposes.

*b.*

Personal data collected for non-editorial purposes shall be only processed if there is a legal ground for the processing. Principles of data protection shall be respected at any time.

The existence of legal ground for data processing is a precondition for the legitimacy of the processing itself.

Along with the existence of legal ground for data processing, media outlets shall take into account the following data processing principles:

- data must be processed fairly and lawfully, without impinging on the dignity of a data subject;
- data may be processed only for specific, clearly defined and legitimate purposes. Further processing of data for purposes that are incompatible with the original purpose shall be inadmissible;
- data may be processed only to the extent necessary to achieve the respective legitimate purpose. The data must be adequate and proportionate to the purpose for which it is processed;
- data must be valid, accurate, and kept up to date, if necessary. Data collected without legal ground and irrelevant to the processing purpose must be blocked, deleted or destroyed;
- data may be kept only for the period necessary to achieve the purpose of data processing. After achievement of purpose it must be blocked, deleted or destroyed, or stored in a form that excludes identification of a person, unless otherwise determined by Law.

All data protection principles shall be considered simultaneously.

#### 7.4 Best practices to ensure and demonstrate compliance

As a matter of good practice, media outlets should take all the necessary measures to ensure compliance with data protection requirements and demonstrate this compliance.

One may mention for instance the usefulness of the following “accountability” tools:

- appointment of a data protection officer;
- establishment of a register of data protection processing activities;
- elaboration of a privacy policy;
- internal procedures to consider the data protection implications at key stages of a journalistic activity and to adopt swift decisions in cases of ethical difficulties;
- internal procedures to draft information notices, to handle complaints of individuals, to alert the management of the organisation, to contact the data protection authority, to deal with cases of security breaches, etc.;
- elaboration of a privacy impact assessment in case of risks for the individuals;
- regular audits to verify and ensure compliance;
- review the contracts and relations with processors and subcontractors;
- basic data protection and privacy training for journalists and for the staff members;
- awareness raising activities (clear information for the individuals, dedicated data protection and privacy page on the website or on the intranet; etc.).

The relevant “accountability tools” may be adapted to the size and resources of the media outlets.

## 8 References

### CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

#### Article 8 - Right to respect for private and family life

1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*

2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

#### Article 10 - Freedom of expression

1. *Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*

2. *The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*

#### Documents of the Council of Europe

Convention for the protection of individuals with regard to the processing of personal data

Recommendation CM/Rec(2018)1 of the Committee of Ministers to member States on media pluralism and transparency of media ownership

Recommendation CM/Rec(2016)4 of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors

Recommendation CM/Rec(2011)7 of the Committee of Ministers to member states on a new notion of media

Declaration by the Committee of Ministers on the protection and promotion of investigative journalism (26 September 2007)

Resolution 2066 (2015), Media responsibility and ethics in a changing media environment, Parliamentary Assembly

Resolution 1843 (2011), The protection of privacy and personal data on the Internet and online media, Parliamentary Assembly

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