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What is the potency of the DPA for:

(1) enforcing the right to be forgotten and

(2) correcting long-standing ‘accuracy’ issues on websites (for which a defamation claim is no longer available)?

February 2021

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UKGDPR Article 17 – Right to erasure (‘right to be forgotten’)

- (1) The data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay where one of the following grounds applies:
 - (a) the personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed;
 - (b) the data subject withdraws consent on which the processing is based according to point (a) of Article 6(1), or point (a) of Article 9(2), and where there is no other legal ground for the processing;
 - (c) the data subject objects to the processing pursuant to Article 21(1) and there are no overriding legitimate grounds for the processing, or the data subject objects to the processing pursuant to Article 21(2);
 - (d) the personal data have been unlawfully processed;
 - (e) the personal data have to be erased for compliance with a legal obligation under domestic law;
 - (f) the personal data have been collected in relation to the offer of information society services referred to in Article 8(1).

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Ancillary rights

- **Art 17(2):** Where data made public, erasing controller must take reasonable steps to inform other controllers who are linking to/reproducing the data;
- **Art 18:** Restriction of processing while rectification/erasure request considered;
- **Art 19:** Rectification/erasure to be notified to recipients (unless impossible/disproportionate effort)

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Some lines of defence

- In a condition (c) case: “*compelling legitimate grounds*” overriding DS interests/rights/freedoms
- Art 17(3)(a): “*...to the extent that processing is necessary for exercising the right of freedom of expression and information*”
- DPA 2018, Sch 2, para 26: “Special Purposes” exemption

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Special Purposes Exemption (DPA 2018 Sch 2, para 26)

[...]

- (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 any 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

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Special Purposes Exemption (cont)

[...]

- (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.
- (6) The codes of practice and guidelines are—
 - (a) BBC Editorial Guidelines;
 - (b) Ofcom Broadcasting Code;
 - (c) Editors' Code of Practice.

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Search engines and news websites compared

- **Search engines cannot rely on the special purposes exemption or their own freedom of expression rights**
- **Inclusion of links in search results represents a heightened interference with DS rights – search returns give structured and extensive profile of DS**
- **De-listing from search returns is a limited interference with the public's right to receive information *precisely because* the linked article will remain accessible at its original source**

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What's the point in old news?

The exemption for journalism can apply to the retention and publication of a full online news archive. Where possible, stories that are later shown to be inaccurate or unfair should be linked to subsequent corrections.

ICO

Data Protection and Journalism: A Guide for the Media (2014)

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What's the point in old news?

[90] In addition to this primary function [contemporaneous reporting], the press has a secondary but nonetheless valuable role in maintaining archives containing news which has previously been reported and making them available to the public. In that connection the Court stresses the substantial contribution made by Internet archives to preserving and making available news and information. Such archives constitute an important source for education and historical research, particularly as they are readily accessible to the public and are generally free [...]

**ML & WW v Germany ECtHR, 28.06.18
(Apps: 60798/10 & 65599/10, 28.06.18)**

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The view from elsewhere:

Hope for claimants; Trouble for defendants?

- *PH v OG* (Cour de Cassation, Belgium; 29.04.16)
 - Newspaper website required to anonymise archived report of claimant's historic drink-drive conviction;
- *A & B v Ediciones El Pais* (Constitutional Court, Spain; 04.06.18)
 - 1980's article naming convicted defendants in drugs case permitted to remain with names intact, but newspaper required to ensure that searches using appellants' names, via its own search function, would not link to the article;
- *Herr T* (Federal Constitutional Court, Germany, 06.11.19)
 - Convicted murderer complaining about continued availability, long after his release, of archived news articles naming him. Case remitted to lower court to consider further options, e.g. preventing search engines from locating articles in response to search for T's name.

Credit: Columbia Global Freedom of Expression

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Clarity on the way?

Biancardi v Italy

ECtHR app. 77419/16 (pending)

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UKGDPR Article 16 – Right to rectification

The data subject shall have the right to obtain from the controller without undue delay the rectification of inaccurate personal data concerning him or her. Taking into account the purposes of the processing, the data subject shall have the right to have incomplete personal data completed, including by means of providing a supplementary statement.

DPA 2018, s205

“inaccurate”, in relation to personal data, means incorrect or misleading as to any matter of fact

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Accuracy and Opinion

- **A29 WP Google Spain Guidance (14/EN WP 225)**

In general, 'accurate' means accurate as to a matter of fact. There is a difference between a search result that clearly relates to one person's opinion of another person and one that appears to contain factual information.

- **Distinguish fact and opinion as in libel: *Aven v Orbis* [2020] EWHC 1812 [150]-[151]**

- **ICO Guide to UKGDPR**

A record of an opinion is not necessarily inaccurate personal data just because the individual disagrees with it, or it is later proved to be wrong. Opinions are, by their very nature, subjective and not intended to record matters of fact.

However, in order to be accurate, your records must make clear that it is an opinion, and, where appropriate, whose opinion it is. If it becomes clear that an opinion was based on inaccurate data, you should also record this fact in order to ensure your records are not misleading.

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Data becoming inaccurate over time;
Data later shown to have been inaccurate all along

- **ICO Guide to UKGDPR**

just because personal data has changed doesn't mean that a historical record is inaccurate – but you must be clear that it is a historical record.

It is acceptable to keep records of mistakes, provided those records are not misleading about the facts. You may need to add a note to make clear that a mistake was made.

- **Data Protection and Journalism: A Guide for the Media (2014):**

Where possible, stories that are later shown to be inaccurate or unfair should be linked to subsequent corrections

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Inaccuracy: does the Special Purposes Exemption help?

- **IPSO Editors' Code**

- 1. Accuracy**

- i) The Press must take care not to publish inaccurate, misleading or distorted information or images, including headlines not supported by the text.*
 - ii) A significant inaccuracy, misleading statement or distortion must be corrected, promptly and with due prominence, and — where appropriate — an apology published. In cases involving IPSO, due prominence should be as required by the regulator.*
 - iii) A fair opportunity to reply to significant inaccuracies should be given, when reasonably called for.*

[...]

- ***Flood v Times Newspapers Ltd* [2010] EMLR 8**
 - Responsible journalism requires significant change of position to be flagged

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A lesson from a search engine case?

[78] ... the operator is in any event required, at the latest on the occasion of the request for de-referencing, to adjust the list of results in such a way that the overall picture it gives the internet user reflects the current legal position, which means in particular that links to web pages containing information on that point must appear in first place on the list.

GC v CNIL [2020] 1 WLR 1949 (CJEU)

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Some Tentative Conclusions

- **Right to be forgotten**
 - Public interest in maintaining a comprehensive news archive a formidable defence for some websites
 - Scope for arguing that measures are required to protect DS interests while original article remains accessible
- **Right to rectification**
 - Allows DS to insist on amendments etc to reflect major change of position, including after libel claim time-barred
 - Not a right to a “second bite” or to dictate ongoing coverage

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10 February 2021

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