Public Comment to the Oversight Board - Policy Advisory Opinion No. 2021-1
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Introduction

In this public comment, we address three main topics. **First**, we show how different data protection laws deal with the processing of private data for journalistic and other related purposes. **Second**, we argue that the community standards should avoid an absolute ban on the disclosure of residential or location information and, instead, consider incorporating two yardsticks: the existence of public interest in the publication and an assessment of the risks involved. **Finally**, we show how human rights courts have dealt with similar questions before.

1. **Data Protection Laws, Journalism Exemption and Freedom of Expression**

With respect to how Facebook should develop a global policy that accounts for varying data protection laws, it is important to stress that many existing regulations already provide for a so-called **journalistic, academic, artistic or literary exemption**. The reason is to reconcile the rules and principles of data protection with freedom of expression and information, especially journalistic expression in democratic societies. The European Union's General Data Protection Regulation (GDPR), for example, calls upon Member States to consider the balance between data protection and freedom of expression:

> Article 85(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.

Following the guidance offered by the GDPR, the UK Data Protection Act (DPA) of 2018, for instance, states that the processing of personal data for the purposes of journalism is considered a "special purpose" and, under Schedule 2 (Part 5), some 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." However, for the exemption to be legally enforced, two cumulative conditions must be satisfied:

> Section 26(2), Schedule 2(5): (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.

It is important to note that Recital No. 153 of the GDPR dictates that "it is necessary to interpret notions relating to that freedom, such as journalism, broadly". Relatedly, in the Google Spain case, the Court of Justice of the European Union (CJEU) said that "the processing by the publisher of a web page consisting in the publication of information relating to an individual may [...] be carried out 'solely for journalistic purposes'" [1].

According to Natalija Bitiukova, the CJEU acknowledged that "essentially any publisher of a webpage with information about an individual could, depending on the purposes of the publication, legitimately fall within the scope" of the exemption [2]. Therefore, the focus should be on the purpose of the publication, not on the actor behind it, otherwise you risk alienating citizen reporters, bloggers, non-media organizations and others.

It is important to stress that this trend is not, by any means, restricted to Europe. A similar legal language can be found in the Global South. The Brazilian Data Protection Law, for example, also states in its Article 4(2) that the processing of personal data solely for the purposes of journalism, art or academic research is exempt from ordinary legal obligations and falls outside the law's remit. According to the UN Special Rapporteur on the right to privacy, this is a truly global phenomenon, where most legal systems recognize certain legitimate exceptions to reconcile the right to privacy with other fundamental rights [3].

Instead of relying exclusively on open-ended categories such as "private information that becomes publicly available", it is our understanding that Facebook's community standards can greatly benefit from a narrow exemption that allows the publication of private information when it falls within the scope of what we may call **journalistic, academic, artistic or literary purposes**. However, even when a publication can be said to further those purposes, the community standards must provide for an element of proportionality capable of balancing freedom of expression against privacy, data protection and other rights such as personal integrity that may be impacted.

2. Defining Public Interest and Assessing the Risks Involved in the Publication

In order to bring this element of proportionality into the community standards, Facebook should consider incorporating two yardsticks to guide the enforcement of the exemption described above. **First**, it should consider whether the publication is in the **public**

interest. **Second**, it should assess the **risks involved in the publication,** especially when it encompasses residential information or information that indicates the location where any given person can be found.

In its guidelines for the media on data protection and journalism, the UK Information Commissioner's Office (ICO) advises data controllers, when evaluating the prevalence of public interest in any given publication, to take four elements into account: (1) "the general public interest in freedom of expression", (2) "any specific public interest in the subject matter", (3) "the level of intrusion into an individual's private life, including whether the story could be pursued and published in a less intrusive manner", and (4) "the potential harm that could be caused to individuals" [4].

As one may expect, there is no one-size-fits-all approach when it comes to public interest, but some standards already exist. For example, the UK Data Protection Act mentions that, when determining whether a publication is in the public interest, the data controller should consider, among others, the BBC Editorial Guidelines. In its Section 7, the guidelines offer a number of examples of publications that are in the public interest, like exposing crime, corruption and injustice, disclosing negligence or incompetence, preventing people from being misled, and assisting people in making public decisions.

According to the Council of Europe's Guidelines on Safeguarding Privacy in the Media, to determine whether the publication is in the public interest, one should also consider the probability that the information will contribute to a public debate. On the other hand, "[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" [5].

However, some categories of data, due to the risk involved in their publication, will require a closer examination. This is the case of **residential information or location data in general**, which can be used to fuel doxing campaigns on social media. As the ICO rightly notes, "[if] the [...] details to be published are particularly intrusive or damaging to an individual, a stronger and more case-specific public interest argument will be required to justify that, over and above the general public interest in freedom of expression" [6].

In the context of Latin America, the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights underscored that the right to privacy, which encompasses freedom from arbitrary interference with one's home, should be considered a cornerstone of Internet regulation in the region. Quoting from a previous opinion by the Inter-American Court of Human Rights (IACtHR), the Rapporteur stressed that "the home is the proper [...] place for an individual's personal [...] development" [7].

Facebook's community standards should, as a rule, prevent users from sharing private residential information, but this cannot mean an absolute ban; there needs to be room for exceptions. To do that, the company can evaluate specific cases *vis-à-vis* the existence of public interest in the publication of the information and the risks involved. The International Press Institute, for instance, states that these risks fall within three general categories: risk of physical harm, risk of psychological harm, and risk of reputational harm [8].

Naturally, these categories of risk should be placed on a scale. For example, when, upon weighing all contextual factors, a doxing campaign is likely to promote an offline physical attack, the public interest in freedom of expression will be at its lowest ebb and the publication of private information will require a stronger and case-specific justification. This is also true for public individuals; one cannot "make a general assumption that the private life of a public figure is always the subject of sufficient public interest to justify publication" [9].

To be sure, the status of the individual who is impacted needs to be taken into account by Facebook. Currently, the community standards make no clear distinction between private and public figures. In that regard, special attention could be given to **politicians,** as they have a more lasting impact on public life in a democratic society. As noted by the Council of Europe, politicians have "the lowest expectation of privacy" amongst public figures and "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" [10].

Another group that deserves special attention (and protection) is **children**. A cautionary tale comes from Brazil, where a ten-year-old girl was set to undergo a medical procedure to terminate her pregnancy after she was repeatedly raped by a family member. A far-right activist, Sara Winter, posted the address of the facility where the young girl was hospitalized on her social media accounts, prompting religious groups to gather before the hospital to protest the abortion, exposing the child and putting the operation at risk [11].

3. Human Rights Case Law

Finally, when drafting its policy advisory opinion, this Board should also consider prior opinions by courts of human rights on similar issues. Probably the closest case to the question at hand is ***Alkaya v. Turkey*** [12], which was decided by the European Court of Human Rights (ECtHR) in 2012. The case concerned the publication of residential information of an actress, Ms Yasemin Alkaya, by the Turkish press after her apartment in Istanbul was robbed in 2002. The national courts in Turkey decided that her rights were not violated because she was a well-known celebrity in the country.

The ECtHR, on the other hand, pointed out that the right to respect for private life (Article 8 of the European Convention) also protects the right to respect for one's home. The Court then reasoned that, in this case, the publication of Ms. Alkaya's address did not contribute to a debate of general interest and, therefore, there was no motive to publish it other than satisfying the curiosity of the readership about her private life. The Turkish people have an interest in being informed about the burglary, but not in being informed about the actual address.

A second case was decided by the same ECtHR one year earlier, in 2011, and is known as ***MGN Limited v. The United Kingdom*** [13]. The case concerned the publication of a photograph of Ms Noami Campbell, a British model, outside the building where she was attending Narcotics Anonymous (NA) meetings in London back in 2001. The Court argued that, in this case, there was no "compelling need for the public to have this additional material [the address where her NA meetings were taking place], the public interest being already satisfied by the publication of the core facts of her addiction and treatment" [14].

The Campbell case is important for two reasons. First, just like the Alkaya case, it shows that even public figures must be protected against undue violations of their right to privacy and that any publication of private information must be shown to be in the public interest. In both cases the stories could have been published in a **less intrusive manner**, suppressing the information that revealed addresses.

Second, the Campbell case shows that not only residential information is protected by the right to respect for private life, but also **other addresses or locations** that are within the scope of one's personal autonomy and development - in this case, the building where Ms Campbell was attending NA meetings. Therefore, it is our understanding that Facebook's community standards should also take into account how the publication of other addresses, aside from residential information, can undermine the principle of privacy and data protection.

A third case that sheds some light on the question at hand is ***Fontevecchia and D'amico v. Argentina***, which was decided by the Inter-American Court of Human Rights (IACtHR) in 2011 [15]. The case concerned the publication of a photograph that showed former president of Argentina, Mr Carlos Menem, alongside a congresswoman and their son (whose face was blurred because he was a minor at the time). The Supreme Court of Argentina decided that the publication violated Mr Manem's right to privacy.

The IACtHR, on the other hand, decided that in this case the relationship between Mr Manem and the congresswoman was of public interest and, moreover, that the information

was already widely circulated on different media outlets in Argentina and abroad. According to the Court, it considered two relevant criteria to reach this conclusion. **First**, the **contribution made to a debate of public interest** on the president's extramarital affair with another public figure. **Second**, the different threshold of protection that must be afforded to **popularly elected officials**, who have a lower expectation of privacy.

Conclusion

All in all, we respectfully ask this Board to consider three points. **First**, how data protection laws have created exceptions to balance concurring fundamental rights. **Second**, the importance of assessing these exceptions in light of (1) the public interest and (2) the risks involved in the publication to one's personal development and integrity, evaluating, whenever possible, (a) if a public figure is implicated, (b) if the public figure is a politician, and (c) if the rights of children are duly protected. **Finally**, the international human rights case law on related issues, especially in regards to the need to look at location data more broadly and consider less intrusive means of publication.

[1] CJEU, *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, C-131/12, 13 May 2014, para. 85.
[2] Natalija Bitiukova, *Journalist Exemption under the European Data Protection Law*, Vilnius Institute for Policy Analysis (2020), p. 20. Available at <https://bit.ly/3r8zqal>.
[3] Joseph A. Cannataci *et al*, *Privacy, Free Expression and Transparency: Redefining their new boundaries in the digital age*, UNESCO Series on Internet Freedom (2016), pp. 43-4. Available at <https://bit.ly/3qUpPnj>.
[4] Information Commissioner's Office, *Data Protection and Journalism: A guide for the media* (2014), p. 33. Available at <https://bit.ly/3qUrFEL>.
[5] Council of Europe, *Guidelines on Safeguarding Privacy in the Media* (2018), p. 12. Available at <https://bit.ly/3hre3gV>.
[6] Information Commissioner's Office, *supra* note 4, p. 34.
[7] Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights, *Standards for a Free, Open and Inclusive Internet*, Inter-American Commission on Human Rights (2017), p. 74. Available at <https://bit.ly/3hMtC1T>.
[8] International Press Institute, *Protocol for Newsrooms to Support Journalists Targeted with Online Harassment*, IPI Ontheline Newsrooms (2020), pp. 03-04. Available at <https://bit.ly/3jX404V>.
[9] Information Commissioner's Office, *supra* note 4, p. 34.
[10] Council of Europe, *supra* note 5, p. 13.
[11] For a detailed description of the facts and the legal underpinnings of the case, *see* João Victor Archegas and Letícia Kreuz, *Abortion in Times of Disinformation*, Verfassungsblog (2020). Available at <https://verfassungsblog.de/abortion-in-times-of-disinformation/>.
[12] ECtHR, *Alkaya v Turkey*, Application No. 42.811/07, 9 October 2012.
[13] ECtHR, *MGN Limited v The United Kingdom*, Application No. 39.401/04, 18 January 2011.
[14] *Ibid*., para. 151.
[15] IACtHR, *Fontevecchia and D'amico v Argentina*, C-238, 29 November 2011.