

EDITORIAL POLICY GUIDANCE NOTE

INFORMED CONSENT IN FACTUAL PROGRAMMING AND CONTRIBUTOR CONSENT FORMS

This is a non-binding guidance note which should be read in conjunction with Editorial Guidelines Section 5: Fairness, Contributors and Consent.

Introduction

The BBC strives to be fair to all – fair to those we're making programmes about, fair to contributors, and fair to our audiences. When considering the requirements for consent, this means:

- We will be open, honest and straightforward in our dealings with contributors and audiences, unless there is a clear public interest or we need to consider important legal issues or issues of confidentiality.
- People will normally have consented to contribute to our output.

We obtain informed consent from our contributors in a variety of ways depending on the circumstances of their contribution. Wherever practicable we should obtain consent in a form capable of proof, preferably in writing or recorded.

In many cases contributors will give their consent by simply agreeing to be recorded for radio or television or to contribute online. This will usually apply to people who are interviewed at short notice for any of our services, including people in the news and people who take part in "vox pops".

Occasionally there may also be circumstances in which contributors give their verbal consent at the start of a project and their continued consent is implicit through their ongoing involvement in the making of the programme.

People recorded clearly committing an offence or behaving in an anti-social manner in a public place will not normally be asked for consent. We would also normally reveal their identity although there are circumstances when it is important not to do so. See Section 7 Crime and Anti-Social Behaviour - Disguising Identities.

What is Informed Consent?

The model of informed consent comes from a medical practice based on **freewill**, **capacity** and **knowledge**. The knowledge needs to be sufficient for the person to come to a decision to refuse or agree.

The term "contributor" covers a wide range of people taking part in programmes under very different circumstances and with very different needs. Therefore varying levels and types of knowledge will be required for an informed decision to be possible.

Our commitment to fairness is normally achieved by ensuring contributors know:

- why they are being asked to contribute to BBC output
- the context of the programme or website
- the nature of their involvement.

However, the more significant their contribution, the more detail we should provide. (See below, Categories of Contributor, and Editorial Guidelines Section 5: Fairness, Contributors and Consent – Fairness to Contributors.)

Changes to Programme Proposals

The Ofcom Code advises that contributors should normally “be made aware of any significant changes to the programme as it develops which might reasonably affect their original consent to participate, and which might cause material unfairness”. This is reflected in the Editorial Guidelines Section 5.

Ofcom’s guidance on the Code indicates that “significant changes” could include:

- changes to the programme title
- changes to when and where the programme is to be first broadcast (particularly if the timing and location of broadcast is particularly sensitive)
- changes to the other likely contributors
- a decision to edit a contribution where assurances had been given to the contrary.

Note-taking

The Ofcom guidance on Fairness makes specific reference to the importance of taking notes and maintaining records of conversations and information provided to contributors relevant to their consent.

The guidance says: “complaints about fairness may occur some time after the programme is transmitted and after relevant freelance staff have left or independent production teams have been disbanded. Therefore broadcasters may find it helpful to make and maintain written records of discussions with contributors before filming and/or broadcast and obtain informed consent in writing. It may also be helpful to the broadcaster to provide information on the areas of questioning, where practicable, in writing.”

Categories of contributor

In effect every consent needs to be tailor-made according to the individual circumstances of the contributor and contribution. However, to provide advice on approaching consent with contributors, it is useful to divide them into different categories.

Unrecruited Participants

Unrecruited Participants have not been invited to take part in our programmes; they are individuals caught up without warning in the programme making process, for example during observational documentary making.

The requirement for consent is a judgement that balances the individual's right to privacy with the need to report in the public interest. On the one hand, consent need not normally be sought if the material is gathered in a public place and an individual is illustrative and not-named. On the other hand, some situations evidently require informed consent for example when an identifiable member of the public is shown receiving medical treatment.

Between these situations lie a range of scenarios where the requirement for consent and the information that should be given will vary, depending on the nature of the action-taking place, the amount of attention paid to the contributor and where the material is gathered.

The following considerations can help when assessing the requirement for consent, whether it should be expressed or may be implied, and the level of information required.

- Is the behaviour essentially public and the recording or filming for broadcast apparent?
- Is the behaviour private although occurring in a public place? For example, receiving medical treatment.
- Is the person in a state of distress?
- Is the person becoming actively involved in the filming and interacting with the microphone or camera?
- Is the person acting in an anti-social or criminal way?
- Does the producer have enough information to represent that person's actions fairly in the finished programme?
- Is the person going to be ridiculed or humiliated?

(See also: Section 6: Privacy – Privacy Editorial Principles
Section 6: Privacy – Public and semi-public places
Section 6: Privacy – Doorstepping
Section 5: Fairness, Contributors and Consent – Right of Reply
Section 5: Fairness, Contributors and Consent – Deception)

Recruited Participants

Recruited Participants are those who have been invited to take part in our programmes in advance of making their contribution and who are not responsible for criminal or anti-social behaviour being revealed in the public interest. (See also Section 5: Fairness, Contributors and Consent – Deception)

1) The Straightforward Contributor.

This is someone whose contribution is not of a sensitive or controversial nature and is unlikely to have long-term impact on their lives. For example, someone bringing an antique for valuation on *Antiques Roadshow*, a minor interviewee in a non-sensitive

documentary or a contributor to *The Food Programme* on Radio Four. When inviting these contributors we should normally give a brief description of the programme or website, its title (if available) and when we anticipate it will be transmitted. We should also explain:

- the kind of contribution they are expected to make. If it is a discussion or debate we should tell them in advance about the range of views being represented and, wherever possible, the names of other contributors.
- whether their contribution will be live or recorded and/or edited. When recorded, we should not guarantee it will be broadcast.
- we can only give a broad outline of question areas because the direction the interview takes will be dependent on what is said.
- their contribution may be used by other BBC outlets or streamed online.
- we expect contributors to be honest, straightforward and truthful.

2) The Collaborative Contributor

This is someone who is more central to the programme and involved in a collaborative fashion. This includes, for example, contributors to some reality programmes such as *Little Angels* or *DIY SOS* and observational documentaries such as *Skint*. Gaining consent will often be a result of a dialogue over time, allowing a relationship to be built between programme maker and participant. It is useful and beneficial to keep a contemporaneous note of any discussions and follow up information or assurances provided verbally with a letter. In addition to giving the basic information outlined for "straightforward contributors", it may be appropriate to raise the following issues with collaborative contributors:

- the likely time commitment, impact on their daily lives and the production team's expectations of filming activities and access.
- the final content will be a fair and truthful representation of what they say and do.
- the need for the contributor to consider the consequences of taking part for themselves and their families.

We do not normally allow contributors a preview of BBC content. However, when a preview is offered to a collaborative contributor for editorial, ethical or legal reasons, we must be able to demonstrate the terms under which it was granted. It is best to do this in writing in advance. We should always make it clear that we are not surrendering editorial control and that any changes made as a result will generally only relate to the correction of agreed factual inaccuracies, concerns about the welfare of children, or for reasons of personal safety, or national security. See Section 5 Fairness - Access Agreements and Release of Untransmitted Material to Third Parties.

We may ask contributors to sign a contract which formalises the terms of their dealings with us, and includes a declaration of personal information which may bring

the BBC into disrepute, for example, criminal convictions, or which may involve possible conflicts of interest. See Section 3: Accuracy.

3) The Vulnerable Contributor

Some contributors may have special needs to take into consideration, for example children, older people, those with mental illness, learning disabilities or other cognitive impairment (such as sickness or other physical or emotional conditions impairing the ability to think clearly). Other contributors may become vulnerable by revealing distressing or intimate information. These contributors need all the information given to collaborative contributors but as part of the consent procedure it is also necessary to:

- Consider if the person has the capacity to give full consent.
(See also Section 9: Children – Children and Consent)
- Discuss potential consequences in detail, keeping a contemporaneous note of conversations.
- Assume more responsibility for the contributor's welfare; that may include offering help and reassurance up to the point of transmission and beyond.
- Consider including family or friends in the negotiations.
- Engage professional expert opinion, where appropriate

Some observational formats involve contributors displaying their personalities and emotions through their thoughts and actions. This may leave them open to local gossip or even the public scrutiny of their character and behaviour in the pages of national newspapers or on the Internet. Such contributors may be psychologically vulnerable. When recruiting these contributors it may be necessary to have them assessed to ensure they are sufficiently psychologically robust to cope with the experience.

Third Party Contributors

There may be occasions when people are discussed, referred to or appear in material provided by a contributor without their knowledge or consent. They may be public figures or private individuals and the material may include photographs, video and correspondence in which they feature. Where appropriate we should respect their privacy.

The following questions can help determine whether it is necessary to notify or seek consent from a third party, and whether material should be omitted or identity disguised.

- Is the material revealing private information about a third party?
- Does the programme involve a sensitive or controversial subject?
- What are the motives behind a participant's reference to a third party?

- Could the way in which the third party is presented damage their reputation or cause emotional distress to an innocent party? (Consider that, within relationships, there may be sharply contrasting viewpoints and you may be hearing only one side of the story.)
- Can the account about a third party be corroborated?
- Is the third party responsible for any wrongdoing?

Reuse and Reversioning

The expansion of digital channels, co-production deals, new media and new platforms using archive has increased the reuse and reversioning of material. The reuse of some material may give a contributor cause for concern, for example when it reveals a criminal or otherwise embarrassing past, or deals with psychologically traumatic events. In some rare cases it may be necessary to contact a contributor to discuss any further use of the material.

The Contributor's Consent Form assigns all rights in the contribution to the BBC, but we should still be alert to any issues raised by re-use. Due consideration should be given to discussing any such issues when gaining consent and making the contributor aware of how content may be used. For example, participants may not be prepared for their contribution to be shown numerous times on a digital channel, archived on the internet or available continuously on technologies that have not yet become commonplace.

(See also Section 5: Fairness, Contributors and Consent – Withdrawal of consent)

Using Standard Contributor Consent Forms

These forms have been drawn up for use when engaging a substantial contributor not covered by the standard contract procedure, regardless of the length of the contribution or fee.

There are four versions of the form:

- Standard contributor consent with fee payable
- Standard contributor consent where no fee is payable
- Version with amended moral rights clause and fee payable
- Version with amended moral rights clause and no fee payable

The standard form should be offered in the first instance. The maximum fee offered should be no more than £150. Above this limit contributors should receive a contract.

Once the form is signed, one copy should be given to the contributor and a second copy retained with programme records.

Form Guidance Notes

1. The programme details should be as currently known and reflect the primary use of the contribution. Consideration should be given to offering further information about re-use (see above). To ensure consistency when dealing with contributors, programmes may find it useful to produce a standard template letter, accompanying a release form, summarising the appropriate information about making a contribution (See earlier in this note and Section 5: Fairness, Contributors and Consent - Fairness to contributors)
2. The BBC needs a full assignment of Copyright to ensure that it is able to use the contributions in all existing and future media. To be valid, an assignment of Copyright has to be in writing. Without a written assignment, the BBC's rights position will be unclear and contributors may be able to change their minds after recording is complete. It will also be difficult to give third parties, who may be financing the programme or taking licences of it, warranties as to the rights they are being granted. Although there are statutory provisions relating to spoken word copyright which may enable broadcast use without formalities, these do not cover non-broadcast uses such as CD-ROM, showings to non-paying audiences and home video.

Contributors may be reassured to know that it is only copyright in the particular form of words used which is being assigned. They could, for instance, give further interviews on the same subject without infringing the Copyright they have assigned to the BBC. This paragraph also requires contributors not to use third party copyright material. This is unlikely to arise unless they read written material or show photographs, drawings etc in which case the production team may wish to ensure that the contributor, and not a third party, is the copyright owner.

3. The authors of literary copyright works, which can include spoken word contributions to programmes, have so-called "moral rights" in relation to their works. These rights are distinct from Copyright. Moral Rights are personal to the author / contributor and cannot be assigned or licensed. They can, however, be waived in a written document. The key moral rights, which are set out in the Copyright Designs and Patents Act 1988, are the right of paternity (i.e. to be identified as author) and the right of integrity (i.e. the right to object to derogatory treatment of the work).

It is BBC policy to obtain waivers of these rights wherever possible. It may in some circumstances be onerous to have to comply with the paternity right by crediting or otherwise identifying every contributor. The integrity right may enable a contributor to intervene in matters to do with editing the programme and possibly prevent its transmission. It may be possible to reassure contributors by giving non-contractual indications as to how the production team intends to act with regard to credits and editorial matters.

4. The limitations to this indemnity provision are to ensure that claims do not arise where there is no link between the BBC's conduct and the damage alleged, or in circumstances where the BBC has taken all reasonable steps to ensure damage does not occur.
5. This provision should reassure contributors that if they are inadvertently defamatory the BBC will not expect them to stand alone. Except where they may

have been negligent or malicious, the BBC would normally indemnify them should legal proceedings follow.

6. Usual fee rates apply (seek advice locally). The reason for the fee in the space provided. The maximum fee payable using the Consent form is £150.

Contributor Consent Forms can be found at:

http://edpol.gateway.bbc.co.uk/consent_forms.shtml [BBC internal Gateway]

<http://www.bbc.co.uk/guidelines/editorialguidelines/forms/> [bbc.co.uk]

**This Editorial Policy Guidance Note was first produced on 27 May 2005.
Updated 22 November 2005.**