

EDITORIAL POLICY GUIDANCE NOTE INFORMED CONSENT

(last updated: October 2010)

EDITORIAL GUIDELINES ISSUES

This guidance note should be considered in conjunction with the following Editorial Guidelines:

- Fairness and Consent
See Editorial Guidelines Section 6 Fairness: Contributors and Informed Consent
- Privacy
See Editorial Guidelines Section 7 Privacy. In particular 7.1 Introduction: Legitimate Expectations of Privacy
- Re-use and Reversioning
See Editorial Guidelines Section 13 Re-use and Reversioning

SUMMARY OF MAIN POINTS

- Achieving Informed consent requires a potential contributor to be in possession of sufficient knowledge about our plans for a reasoned decision to take part in our content.
- We should aim to obtain consent in a form that is provable. It is important to take notes and maintain records of conversations and other information given to contributors, relevant to their consent.
- Standard contributor consent forms can formalise the consent process and prove copyright in a contribution. However, informed consent will often require providing more detailed information to a contributor.
- Consent needs to be tailor-made according to the individual circumstances of the contributor and the contribution. There are different considerations for unrecruited contributors, recruited contributors, those who are working

collaboratively on our output, contributors who are vulnerable and third party contributions.

- Generally, no contributor who has given properly informed consent has the right to withdraw it. However, we should give due consideration to any requests to withdraw consent and, on the rare occasions where such a request is granted, we should be clear of the specific and distinct circumstances that have made withdrawal appropriate.

GUIDANCE IN FULL

- What is Informed Consent?
- How We Obtain Informed Consent
- Who Gives Informed Consent?
- Withdrawal of Informed Consent

What is Informed Consent?

The model of informed consent comes from medical practice. It encompasses freewill, capacity and knowledge. The individual concerned needs to have the capacity to come to a freely made decision, based on sufficient knowledge for them to come to a properly informed decision to agree or refuse. For the BBC therefore, achieving informed consent requires a potential contributor to be in possession of sufficient knowledge about our plans for a reasoned decision to take part in our content.

The term 'contributor' covers a wide range of people taking part in content under very different circumstances. Therefore they have very different needs. Varying levels and types of knowledge will be required for an informed decision to be possible.

Before they participate, contributors should normally know:

- Why they are being asked to contribute to BBC content and where it will first appear

- The context of the content
- The nature of their involvement.

The more significant their contribution, the more detail we should provide.

(See Editorial Guidelines Section 6 Fairness, Contributors and Consent 6.4.1)

How we obtain Informed Consent

We obtain informed consent from our contributors in a variety of ways depending on the circumstances of their contribution.

(See Guidance: User Contributions and Guidance; Guidance: Working with Children and Guidance: Filming Medical Emergencies)

We should aim to obtain consent in a form that is provable. Wherever practicable, it is advisable for consent to be in writing (by letter, email or contributor consent form) or recorded on film or tape, demonstrating the information given to the contributor and their agreement to participate.

However, in many cases contributors will indicate their consent tacitly, simply by taking part in our content. This usually applies to people interviewed at short notice, including people in the news and those who take part in 'vox pops'. It is clearly impractical to obtain written consent for time sensitive and most 'on the day' contributions, including those to local radio, continuous news and other news outlets.

On occasion, we may be able to demonstrate consent by virtue of continued participation. For example, a contributor may give verbal consent at the start of a project and their ongoing involvement in the making of a programme (for example, through further filming or recording) will imply their continued consent.

Nevertheless, even when consent is implied, we will need to be clear that the contributor had sufficient understanding of the nature of the output.

Significant Changes after Consent has been Obtained

Remember that we should normally make contributors aware of significant changes to a programme or other content as it develops and prior to transmission, if such changes might reasonably be considered to have affected their original decision to participate, had it been known at the time. If the contributor seeks to withdraw consent as a consequence of these changes it is advisable to consult with Editorial Policy.

(See also Editorial Guidelines Section 6 Fairness 6.4.4)

Note Taking

A good contemporaneous note of conversations with potential contributors can be important to proving consent was properly informed.

Ofcom's guidance on Fairness makes specific reference to the importance of taking notes and maintaining records of conversations and other information given 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 it will usually be 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."

Use of standard Contributor Consent forms

Do I need to use this form?

Standard contributor consent 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.

These are primarily a legal matter, rather than a fulfilment of the Editorial Guidelines. Whilst they formalise consent and are often required to prove copyright before programmes can be resold (see below) they do not necessarily demonstrate that there has been properly *informed* consent. The forms are clear about the programme makers rights to use and re-use a contribution but contain

only basic information about the programme and the nature of the contribution. Informed consent will often require more detailed information for the contributor. The forms are also legalistic in tone, when a more informal approach may be more useful. For example, when dealing with a long and involved project, (particularly if the contributors are vulnerable) it can be advisable to lay out details of the programme, its editorial intent, the expectations placed on the contributor, how the contribution will be used and any other relevant information relating to participation – including support for the contributor and any viewing rights. This information may be laid out in a letter, email, conversation which is noted contemporaneously, etc. Such a conversation may be in addition to, or instead of, using the standard contributor consent form (remembering that a consent form may be required to demonstrate that the BBC has a full assignment of Copyright in the contribution before a programme can be resold).

Form Guidance Notes

1. There are four versions of the standard form:

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

When a form is used, one of the standard editions should be offered in the first instance.

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

3. 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 below).

4. The BBC seeks a full assignment of Copyright to be certain it can use the contributions in all existing and future media. To ensure it is valid, an

assignment of Copyright should be in writing. Without a written assignment, the BBC's rights position may be unclear. It may 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 the Copyright in the particular form of words used which is being assigned in the contributor consent forms. 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.

5. 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 part of the informed consent process, as to how the production team intends to act with regard to credits and editorial matters.

6. 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.

7. 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.

Re-use and Reversioning

The expansion of digital channels, co-production deals, syndication on third party websites and new platforms using archive has increased the re-use and reversioning of material. The re-use of some material may give a contributor cause for concern, for example when it reveals a criminal or otherwise embarrassing past, or deals with traumatic events. When it was not implicit at the time they gave consent, and so far as is reasonably practicable, we should inform contributors of our intention to re-use material.

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

In some rare cases it may be necessary to contact a contributor to discuss any further re-use of material.

(See Editorial Guidelines Section 13 Re-use and Reversioning: Fairness, Consent and Privacy Issues)

Who gives Informed Consent?

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 (who is required to give consent, how much information they should be given and the form it should take) it is useful to divide them into the following categories:

- unrecruited participants
- recruited participants
- third parties.

Unrecruited Participants

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

The requirement for consent is a judgement that balances the individual's legitimate expectation of privacy (See Section 6 Privacy: Introduction) 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 merely incidental or illustrative and not-named. On the other hand, some situations are more likely to require fully informed consent, for example when an identifiable member of the public is shown receiving medical treatment.

(See Guidance: Filming in Medical Emergencies)

Between these extremes lies a range of scenarios where the requirement for consent and the information that should be given will vary, depending on the significance of the contributor, the nature of the action taking place and the degree to which the location is public or private.

Note that people recorded committing an offence or admitting to an offence, or behaving or admitting to behaving in an anti-social manner 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.

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?

(See Editorial Guidelines Section 7 Privacy: Secret Recording)

- 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?

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 which we are exposing in the public interest.

(See also Editorial Guidelines Section 5: Fairness, Contributors and Consent: Deception)

It is helpful to consider Recruited Participants in three categories:

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 documentary on a non-sensitive subject 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.

Also, we should normally be sure the contributor is clear about the following:

- the kind of contribution they are expected to make. They should be aware in advance about the range of views being represented in the specific content to which they are contributing and, wherever possible, the names of other likely 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
- the final content will be a fair and truthful representation of what they say and do
- their contribution may be used by other BBC outlets including reproduction and archiving online
- we do not normally allow a preview of BBC content
- their contractual rights and obligations and those of the BBC in relation to their contribution. For example, we expect contributors to be honest, straightforward and truthful.

2. The Collaborative Contributor

This is someone who is central to the programme and involved in a collaborative fashion. This includes, for example, contributors to some constructed reality programmes, makeover programmes and observational documentaries. Gaining consent will often be the result of a dialogue over time, allowing a relationship to be built between programme maker and participant. It is advisable to keep a contemporaneous note of any discussions and to follow up verbal information or assurances with a letter, email etc.

Even though the relationship may evolve, properly informed consent still needs to be gained; if significant information is not made available to the contributor before they begin participating, they may have grounds to withdraw their consent at a later stage in the production process and after significant costs have been incurred.

(See below: Withdrawal of Informed Consent)

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 need for the contributor to consider the consequences of taking part, post transmission, for themselves and, if relevant, their families.

We do not normally allow contributors a preview of BBC content, however it is sometimes appropriate to do so with an exceptional collaborative contribution – for editorial, ethical or legal reasons. When a preview is offered, we must be able to demonstrate the terms under which it was granted. It is normally best to do this in writing in advance. We should 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 or for reasonable concerns about the welfare of children, personal safety, or national security.

We may ask collaborative 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.

Alternatively, if the contributor is providing significant access, they may require the production team to enter into an access agreement. The terms of an access agreement must not compromise the BBC’s editorial control or otherwise undermine our editorial integrity. Any access, filming or recording agreement must be referred to a senior editorial figure, or for independents to the commissioning editor, who may also consult Editorial Policy particularly when the proposed wording compromises the BBC’s editorial independence or has the potential to cede editorial control to a contributor or contributing organisation.

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 that render the individual unable to think clearly, either temporarily or permanently).

(See Guidance: Working with Vulnerable People and Guidance: Filming in Medical Emergencies)

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 properly informed consent.

(See Editorial Guidelines Section 9: Children – Children and Consent)

- Discuss potential consequences in detail (including the possibility of greater media interest or other public scrutiny following the broadcast), keeping a contemporaneous note of conversations.
- Assume more responsibility for the contributor's welfare, to the extent that it might be affected by taking part; 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 vulnerabilities, personalities and emotions through their thoughts and actions. This may leave them open to local gossip or even, occasionally, the public scrutiny of their character and behaviour in the pages of national newspapers or on Internet message boards and blogs. 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 Parties

Third Parties are individuals who are not contributors to a programme but are nevertheless being discussed, referred to or otherwise appearing in material. We should be fair and accurate in our portrayal of these people and, where appropriate, respect their legitimate expectations of privacy. The following

questions can help determine whether it is necessary to notify or seek their consent.

- Is the material revealing private information about a third party?
- Does the content 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?

Withdrawal of Informed Consent

Generally, no contributor who has given properly informed consent has the right to withdraw it.

However, that does not mean we should simply disregard requests to withdraw from our output. Just because we have the right to use a contribution does not always mean that it is appropriate to do so – particularly when we are dealing with contributors already known to be vulnerable. We should normally invite the contributor to explain their concerns and then give them due consideration, taking account of the likely consequences. We should also consider whether there has been a significant change in the circumstances of the programme or the contributor which would have affected their decision to participate had it been known at the time.

Nevertheless, where informed consent has been properly obtained, we should protect our rights to use the material. Our ability to make programmes and other content depend on a clear and binding consent process. On the rare occasions when a contributor's request to withdraw consent is granted, we should be clear of the specific and distinct circumstances that have made withdrawal appropriate.