

Life on Earth Pictures – GDPR analysis

Executive summary:

The GDPR is a piece of EU legislation that aims to strengthen individuals' right to their data, and to stop illegitimate abuse of data by companies and other agencies.

Photos and video count as pieces of data, meaning that there must be a legal basis for the production and storage of any photos or video.

Life on Earth Pictures, as all other photo agencies, are required to make sure there is a legal basis for the images it keeps.

As an agency providing organizations and media outlets with photos, video and written content, Life on Earth Pictures' material mainly falls under the legal basis of journalistic intent and public interest, as established in the GDPR.

There is no universal rule for all photographic material, however. Conscious decision-making must be made on a case-by-case basis to ensure GDPR compliance is achieved.

If a data owner (such as, for example, a photographic subject we hold a photograph of) requests that their data be removed from Life on Earth Pictures' databases, we will of course comply as required by the GDPR.

For circumstances where written consent is the only viable legal basis for photos to be taken and used, Life on Earth Pictures shall employ a GDPR-compliant consent form.

Preliminaries

- GDPR stands for General Data Protection Regulation
- It is EU legislation that came into effect in 2018
- Any organisation that handles the data of EU citizens must be compliant
- There have been few prosecutions on photography, so there are scarce precedents to give guidance

Our understanding is that the main purpose for the GDPR is to better protect the individual, and to help us all gain control over our personal data and how it's being processed. The GDPR also has bigger picture intentions in view of recent history, such as the legality of companies to acquire personal data from millions of social media users to help manipulate voting in elections. The intention of the GDPR legislation is not to curtail freedom of expression, journalism, or academic interests.

The legal basis for photography

The GDPR dictates that there must be a legal basis for processing personal data. Though not specified as such in the GDPR, photographs are to be understood as data themselves, and accompanying details such as a person's name are personal data too.

In GDPR, **Consent** and **Legitimate Interests** are established as possible legal bases for processing data.

Legitimate interests

Under GDPR, photographs and other data can be legally processed, stored and used on the basis of **legitimate interests**.

Legitimate interests relating to freedom of journalistic, academic, artistic and literary expression are set out in Article 85 of the GDPR.

As an agency producing and supplying journalistic content, Life on Earth Pictures relies in part on the legitimate interest protected through the **exemption for freedom of journalistic expression** in the GDPR.

The journalism exemption in the GDPR offers protection to the work of press and media organisations and their publications.

It should also offer protection to other organisations where the purpose of the work is journalism, is journalistic in nature, and when the photographer or organisation is acting with a view to publication. While the intention of the exemption is to protect freedom of expression, it doesn't give that protection automatically, and organisations should be able to justify why the exemption is a valid on a case-by-case basis in their own use of any personal data.

The extent to which non-media organisations can rely on this exemption is not explicit in the GDPR itself, and precedents have yet to be established for how the legislation should be interpreted.

However, The Information Commissioners Office, the ICO, in their document *Data protection and journalism: a guide for the media*, make the following analysis about how the journalism exemption can apply to non-media organisations:

"We also accept that non-media organisations may be able to invoke the [journalism] exemption. If their purpose in processing the specific information is to publish information, opinions or ideas for general public consumption, this will count as a journalistic purpose – even if they are not professional journalists and the publication forms part of a wider campaign to promote a particular cause or achieve a particular objective. However, the information must be used only for publication, and not for the organisation's other purposes."

What legitimate interest exemptions do not cover

The GDPR dictates that photographers and organisations cannot rely as freely on legitimate interests as the sole legal basis for processing data for photographs that relate to a person's religion, health, sex life, or the sexual orientation of the person photographed, because discrimination may result from such information being disclosed.

These sensitive data fall under special categories of personal data that are particularly worthy of protection, regulated under Article 9 of the GDPR, and strengthens the need for explicit consent.

However, these same restrictions *do not apply when data owners themselves publicly disclose* such data.

Journalism and the photography of children

As journalism is claimed as a legal basis for processing personal data, it is reasonable to argue that normal journalistic practice is acceptable. This is an important point when considering photography of children.

Life on Earth Pictures' understanding is that provision is made for photography of children within the industry codes of practice, whereby such photos do not require a parent to sign a written consent form, except in very specific instances.

One example of how journalistic industry standards are applied can be seen in the *IPSO Editors Code of Practice*.

Consent as a legal basis for processing photographs and associated data

Consent – explicit consent given, for example, through a signed consent form – is another legal basis for processing data. It can be applied when there is no other legal basis for collecting and keeping data.

While it may seem to be the most straightforward way to establish a legal basis, consent is not in itself uncomplicated, as using consent as a legal basis requires some detailed information of the data subject to be kept for the consent to be effective.

Typically, a consent form would include name, address, email address or telephone number, a signature, and – particularly in the case of minors – a date of birth. A collection of consent forms can be seen as a database of personal data in itself, for which routines are needed in order to keep and store data in compliance with the GDPR.

It is important to note that the sort of Model Release used by some photo agencies – which have existed for a long time before GDPR existed – are commercial contracts that are 'irrevocable and perpetual'. While these can form a legal basis for storage of data, they are not the same thing as the type of revocable consent that the GDPR describes for data storage in general.

Legitimate interest: exemption for academic interest

Legitimate interests relating to academic interests are set out in Article 85 of the GDPR. Academic interest is understood as relating to academic courses, institutions and curricula. This may also extend to more general purposes of education and information.

Legitimate interest: exemption for public interest

There is no standard test to determine when it is in the public interest to publish a photograph, but there are guidelines in industry codes. The excerpt below is from the *BBC Editorial Guidelines*, Section 7:

“Public interest includes, but is not confined to:

- exposing corruption or injustice*
- protecting people's health and safety*
- preventing people from being misled by some statement or action of an individual or organisation*
- disclosing information that assists people to better comprehend or make decisions on matters of public importance.*

When using the public interest to justify an intrusion, consideration should be given to proportionality; the greater the intrusion, the greater the public interest required to justify it.”

The ICO, in turn, emphasises that “any consideration of the public interest should ultimately aim to strike an appropriate balance between freedom of expression and privacy rights” and this balance should be evaluated on a case-by-case basis.

Much of Life on Earth Pictures' material serves both the public interest in e.g. humanitarian issues, climate change, development policy issues, just as it fits under the journalism exemption.