

How to use legitimate interests as the lawful basis for your processing

Introduction

Under Article 6 of the General Data Protection Regulations (GDPR), which came into force on 25th May 2018, organisations must have a valid lawful basis in order to process personal data.

There are six available lawful bases for processing:

- **Consent**
- **Contract**
- **Legal obligation**
- **Vital interests**
- **Public task**
- **Legitimate interests**

No single basis is 'better' or more important than the others, and which basis is most appropriate to use will depend on your purpose and relationship with the individual.

This briefing concerns the last basis: legitimate interests. For more information about all of the lawful bases for processing personal data, visit: ico.org.uk/for-organisations/guide-to-the-general-data-protection-regulation-gdpr/lawful-basis-for-processing/.

For legitimate interests to apply, the processing must be necessary for your own legitimate interests or the legitimate interests of a third party unless there is a good reason to protect the individual's personal data that overrides those legitimate interests, (although, if you are a public

authority processing data to perform your official tasks this cannot apply).

What are legitimate interests?

'Legitimate interests' refers to the stakes that an organisation processing personal data have in that processing. These stakes may imply benefits inherent in the processing for that organisation itself and/or perhaps for the wider society, which is particularly relevant to voluntary and community sector organisations.

This is the most flexible lawful basis for processing, but don't assume it will always be the most appropriate for the processing you are carrying out without careful consideration.

If the processing is of a clear benefit to you or others, if there's a limited privacy impact on the individual, or the individual would reasonably expect their data to be used in that way, and you cannot (or do not want to) give them full upfront control or bother them with disruptive consent requests when they are unlikely to object to the processing, then this is likely to be the most appropriate lawful basis to use.

There may also be occasions when you have a compelling justification for the processing which can warrant a more intrusive impact on the individual. In such cases it is vital to ensure that you can clearly demonstrate any impact to be justified.

When you can use legitimate interests

Certain purposes 'constitute' or 'should be regarded as' a legitimate interest:

- Fraud prevention
- Network and information security
- Indicating criminal acts or threats to public security

Legitimate interests are likely (although not automatically) to apply to some processing activities:

- Processing employee or client data
- Direct marketing
- Intra-group administrative transfers

It may be possible to use legitimate interests in other circumstances too:

- Processing business to business contacts
- Processing children's personal data
- Disclosing data to third parties
- Processing special category data (although you also need your processing to comply with at least one of the special category conditions under Article 9 of the GDPR)

For more information on when you may use legitimate interests for each of these purposes, visit: ico.org.uk/for-organisations/guide-to-the-general-data-protection-regulation-gdpr/legitimate-interests/when-can-we-rely-on-legitimate-interests/.

When not to use this basis

The ICO advises that you should avoid choosing legitimate interests if:

- You are a public authority and the processing is to perform your tasks as a public authority
- Your processing does not comply with broader legal, ethical or industry standards
- You don't have a clear purpose and are keeping the data 'just in case' (in this case

your processing is not compliant on any basis)

- You could achieve your end result without using personal data
- You don't want to take full responsibility for protecting the interests of the individual, or would prefer to put the onus onto the individual
- You intend to use the personal data in ways people are not aware of and do not expect (unless you have a more compelling reason that justifies the unexpected nature of the processing)
- There's a risk of significant harm (unless you have a more compelling reason that justifies the impact)
- You're not confident on the outcome of the balancing test
- You would be embarrassed by any negative publicity about how you intend to use the data
- Another lawful basis more obviously applies to a particular purpose. Although in theory more than one lawful basis may apply to your processing, in practice legitimate interests is unlikely to be appropriate for any processing purpose where another basis objectively applies.

Find out more at: ico.org.uk/for-organisations/guide-to-the-general-data-protection-regulation-gdpr/legitimate-interests/when-can-we-rely-on-legitimate-interests/

Benefits of using legitimate interests

Flexibility: Since it is not purpose-specific, 'legitimate interests' is a particularly flexible lawful basis to use, and may be applicable in a wide range of different situations.

Control: It can also give you more ongoing control and security over your long-term processing than consent, where an individual could withdraw their consent at any time. But remember that you must still consider objections.

Risk Assessment: The need to consider the impact of your processing on individuals helps you to identify risks and take appropriate safeguards, which can also support your obligation to ensure 'data protection by design', and help you identify when you might need to do a data protection impact assessment (DPIA).

Minimal disruption for individuals: For processing that would be expected and has a low privacy impact, using this basis can help you avoid bombarding people with unnecessary consent requests and can help avoid 'consent fatigue'.

Protecting interests: If done properly, this basis can be an effective way of protecting the individual's interests, especially when combined with clear privacy information and an upfront opportunity to opt out.

Drawbacks of using legitimate interests

More work: The fact you need to not only justify the application of legitimate interests but also demonstrate that your interests are balanced with the individual means there is a lot more work to do compared to using other lawful bases. This basis also requires more work to clearly explain in your privacy policy what the legitimate interests of the processing are in order to ensure transparency

Scope for disagreement: It may be harder to demonstrate compliance as there is more scope for disagreement over the outcome of the balancing test. You need to be able to clearly justify your decision that the balance actually favours you processing the data.

More responsibility: You need to be absolutely confident that you can effectively protect the interests of the individual if you choose to use this basis. If it is more appropriate to put the onus on individuals to take responsibility for the use of their data, then consent would be a more appropriate lawful basis.

Whose legitimate interests?

The legitimate interests you consider need not only be those of your own organisation but can also be those of third parties and can include commercial interests, individual interests or broader societal benefits.

This is particularly relevant for voluntary and community organisations, which by their very nature have a social mission. This means that any forms of processing that chime with their mission, and overarching aims and objectives stand a good chance of being able to pass a legitimate interest assessment.

Legitimate interest assessment

An LIA is a type of light-touch risk assessment based on the specific context and circumstances of the processing. There is no obligation in the GDPR to do an LIA, but it is best practice to conduct one and it is difficult to ensure accountability without it. There are three parts:

- **The purpose test:** Are you pursuing a legitimate interest?
- **The necessity test:** Is the processing necessary to achieve it
- **The balancing test:** Do the individual's interests override the legitimate interest?

Other things to consider

Accountability: You must document your legitimate interest assessment and ensure that you can justify your decision if necessary to help you to demonstrate compliance under the accountability principle.

Transparency: In your privacy information you must state that you are relying on legitimate interests as your lawful basis, your purpose for processing personal data and give a summary of the relevant legitimate interests. You must actively communicate this information to the individuals.

How to carry out a Legitimate Interest Assessment

Firstly, identify the legitimate interest/s

Consider the following:

- Why do you want to process the data – what are you trying to achieve?
- Who benefits from the processing? In what way?
- Are there any wider public benefits to the processing?
- How important are those benefits?
- What would the impact be if you couldn't go ahead?
- Would your use of the data be unethical or unlawful in any way?

Secondly, you need to apply the necessity test

Consider the following:

- Does this processing actually help to further that interest?
- Is it a reasonable way to go about it?
- Is there another less intrusive way to achieve the same result?

Lastly, you need to do a balancing test.

This is where you need to consider the impact of your processing on the individual/s concerned and whether this overrides the interest you have identified. Consider the following:

- What is the nature of your relationship with the individual?
- Is any of the data particularly sensitive or private?
- Would people expect you to use their data in this way?
- Are you happy to explain it to them?
- Are some people likely to object or find it intrusive?
- What is the possible impact on the individual?
- How big an impact might it have on them?
- Are you processing children's data?
- Are any of the individuals vulnerable in any other way?
- Can you adopt any safeguards to minimise the impact?
- Can you offer an opt-out?

Download a Sample LIA Template from: <https://ico.org.uk/for-organisations/guide-to-the-general-data-protection-regulation-gdpr/legitimate-interests/how-do-we-apply-legitimate-interests-in-practice/>.

Do you need more support with legitimate interests or with Data Protection in general?

- Email: enquire@northumberlandcva.org.uk
- Call: 01670 858688