

## **Moving Image video specialists' guide: GDPR**

This guide has been provided by Briffa Legal as an introductory guide to GDPR for branded video and corporate film producers.

### **General Data Protection Regulation and Video Content**

#### **The essentials**

- The GDPR comes into force on 25<sup>th</sup> May 2018.
- It is much stricter than current regulations.
- Video professionals need to review the consent forms with interviewees and others who appear on screen.
- An individual can withdraw their consent to appear in a film, even if they originally gave it.
- Video professionals may have a legitimate interest to use video of an individual even without their consent.
- It's important to be able to demonstrate you have considered the impact of a person appearing in your film.
- You should review your privacy policy and make sure it's available.

#### **What has GDPR got to do with publishing video?**

With a little less than six months to go before full implementation of the General Data Protection Regulation (GDPR) in May 2018, many are considering not only how the GDPR will affect the control and processing of personal data generally, but also the impact the GDPR is likely to have upon specific industries and sectors.

Overall, the main objective of the GDPR is to allow individuals (or "data subjects") to have more control over their personal data, as well as a more comprehensive understanding of how that personal data is used.

Businesses creating and using video content in their products and marketing materials are no less likely to be affected than others - but there are, perhaps, specific elements of the GDPR which hold more relevance than others for those operating in that sector.



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## What does GDPR relate to?

Before jumping straight into the finer details of the GDPR, let's consider the type of data to which it relates. The GDPR only applies to "personal data", which effectively means any information that can be used, directly or indirectly, to identify a living individual. The GDPR gives a non-exhaustive list of what may amount to personal data, including a name, an ID number, location data etc. However, as the definition is sufficiently broad so as to include "any information" which can be used to identify somebody, video footage containing imagery of clearly identifiable individuals is also likely to be caught.

This is nothing new, however. Such video footage would also fall within the definition of "personal data" under the existing legislative framework (the Data Protection Directive and the Data Protection Act 1998).

As such most video businesses should already have an awareness that there are existing obligations which should be observed when controlling and processing such data. That said, the obligations under the GDPR are much stricter and will require business to consider whether or not they will continue to be in compliance following its implementation in 2018.

## How do I comply with the GDPR?

Personal data can only be used (i.e. controlled or processed) if a business has lawful grounds to do so. Under the GDPR, it is arguably more difficult for those grounds to be lawfully engaged.

Perhaps the biggest change comes to the most often-cited ground for processing: consent. If businesses process personal data on this ground, they do so on the basis that the individual to which the personal data relates has agreed for the data to be processed and used in a specific way. In the context of video content, businesses may typically have individuals sign waivers or consent forms which are intended to allow individual's personal data to be controlled and processed.



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However, whether or not consent obtained under the existing framework would be considered to be validly obtained under the GDPR is another question. Under the existing framework, the lines have typically been blurred as to how and when consent will be validly obtained – typically in favour of the processor rather than the individual.

The GDPR seeks to address this. Consent must now be freely given, specific, informed and unambiguous. Such consent must also be given by the individual providing “clear affirmative action” that they consent to processing.

In other words, businesses can no longer “bundle” or “imply” consent from an individual.

For example, it may be that some businesses have traditionally been of the impress that, by the fact an individual has agreed to be filmed as part of a video project, that individual has consented to their image to be used in accordance with that project. However, attempting to demonstrate that valid consent has been obtained in this way is highly unlikely to comply with the requirements of the GDPR.

Instead, it is likely that businesses would need to expressly obtain active consent from an individual that the footage is to be used for each specific purpose. It would not be enough to state that, because an individual agreed to be filmed, that they also agreed for that footage to be used as part of a marketing campaign.

Further, at the time of obtaining consent, individuals should be made aware that they are able to withdraw consent at any time but also that this would not render processing on the basis of consent prior to withdrawal to be unlawful. This is an express requirement under the GDPR. Individuals must also be able to easily and freely withdraw consent at any time.

If consent is withdrawn, processing must stop.



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## “Legitimate interest” to the rescue

But how is this practical or fair to businesses? Organisations pay many thousands of pounds to have video content created which they intend to use as part of their marketing and branding for years to come. If that video content is created on the basis of individuals consenting for the business to use their imagery, but that consent can be withdrawn at any time, is there a risk that business will be required to stop using that footage if consent is withdrawn?

Not necessarily.

Consent is not the only ground for processing data under the GDPR – there are many more. This is also the case under the existing framework, but this fact is often overlooked.

Briffa’s opinion is that, after implementation of the GDPR, a second lawful ground for processing of a business having a “legitimate interest” will be relied upon much more by businesses. For most activities a business will be able to continue to use and process personal data even if an individual has withdrawn their consent for the business to do so, on the basis of the business having a “legitimate interest”.

The term “legitimate interest” is not well defined under the GDPR, and its scope is open to interpretation. This is arguably a good thing for businesses.

## So how do I know if I have a “legitimate interest”?

In brief, a business is likely to have a “legitimate interest” in continuing to process personal data where:

- i) there is a real business interest being pursued in continuing to process the personal data;
- ii) the processing is absolutely necessary in order for the business to pursue that interest (i.e. the interest cannot be pursued in another way which is proportionate); and
- iii) the processing is balanced against the impact such processing will have on the fundamental rights and freedoms of data subjects.



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As such, whether or not “legitimate interest” will be engaged is a matter of degree and individual circumstance.

For example, in considering whether or not it is proportionate and legitimate for a business to continue using video footage which contains imagery of an identifiable individual who has withdrawn their consent for that footage to be used, will depend on various factors. Where will the footage be used? Is the individual a main part of the footage? Does the footage indicate that the individual has links or associations with people or a particular ideology which he no longer does? What is the likely impact of continuing to use the footage on that individual? What is the impact on the business?

### What do I need to do?

One of the key requirements under the GDPR, we think, is that businesses show that they have considered the impact their control or processing will have on individuals, and that they have put preventative measures in place to limit such impact. We also recommend that businesses ensure that they are able to demonstrate that they have considered the grounds on which data will be processed.

If businesses can show that they have done this, the negative impact upon them in the event of a data breach is likely to be reduced. A good way that businesses can demonstrate this is by setting this information out in an up-to-date privacy policy, clearly setting out all the basic information a controller and processor must provide at the time of collecting and processing personal data under the GDPR. This information includes when, how and why data is processed, and the grounds for doing so. Having individuals agree that this information has been provided to them at the time of collecting data will assist in demonstrating compliance with the GDPR.

If you have any further questions on how the GDPR is likely to affect your activities, please contact Briffa Legal ([www.briffa.com](http://www.briffa.com)). Their data protection and GDPR experts will be glad to assist.

*Tom Broster, Lawyer at Briffa. December 2017*



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