

Legitimate Interest and Data Processing

What is it?

Legitimate interests is the most flexible of the six lawful bases for processing data under the *General Data Protection Regulation* (GDPR). It is not focused on a particular purpose and therefore gives you more scope to potentially rely on it in many different circumstances. According to the Information Commissioner's Office (ICO) detailed guidance *Lawful basis for processing: Legitimate Interests* it may be the most appropriate basis when:

- the processing is not required by law but is of a clear benefit to you or others;
- there's a limited privacy impact on the individual;
- the individual should reasonably expect you to use their data in that way; and
- you cannot, or do not want to, give the individual full upfront control (i.e. consent) or bother them with disruptive consent requests when they are unlikely to object to the processing.

Note: Public authorities can only rely on legitimate interests if they are processing for a legitimate reason other than performing their tasks as a public authority.

How does legitimate interest work?

It is not sufficient for you to simply decide that it's in your legitimate interests and start processing the data. You must be able to satisfy all of the following prior to commencing your processing (the three-part test):

1. **Purpose test** – is there a legitimate interest behind the processing?
2. **Necessity test** – is the processing necessary for that purpose?
3. **Balancing test** – is the legitimate interest overridden by the individual's interests, rights or freedoms?

You (or a third party) must have some clear and specific benefit or outcome in mind. It is not enough to rely on vague or generic business interests. You must think about specifically what you are trying to achieve with the particular processing operation.

The interests, rights and freedoms of individuals in this context is a broad concept which includes data protection and privacy rights, but also other fundamental rights as well as more general interests. This includes physical, financial or any other impact, such as:

- inability to exercise rights (including data protection rights);
- loss of control over the use of personal data; or
- any social or economic disadvantage.

Accountability and transparency

As the application of legitimate interests is not always self-evident, documenting your assessment of legitimate interests is particularly important in helping you to demonstrate compliance under the data protection accountability principle set out in the GDPR.

Under transparency requirements you must inform individuals upfront which lawful basis you are relying on. If you are relying on legitimate interests as your basis, you must also tell individuals what these legitimate interests are.

The practical steps for deciding if a legitimate interest can apply

You need to assess in accordance with the three-part test, and document the outcome so that you can demonstrate that legitimate interests applies. The ICO refer to this as a 'legitimate interests assessment' or LIA.

First you need to identify your purpose and decide whether it counts as a legitimate interest. Be as specific as possible, as this helps you when it comes to the necessity and balancing tests. You should ask:

- Why do you want to process the data?
- What benefit do you expect to get from the processing?
- Do any third parties benefit from the processing?
- 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?
- What is the intended outcome for individuals?
- Are you complying with other relevant laws?
- Are you complying with industry guidelines or codes of practice?
- Are there any ethical issues with the processing?

Next you need to look at your purpose:

- Will the processing actually help you achieve your purpose?
- Is the processing proportionate to that purpose, or could it be seen as using a sledgehammer to crack a nut?
- Can you achieve your purpose without processing the data, or by processing less data?
- Can you achieve your purpose by processing the data in another more obvious or less intrusive way?

Be honest in your consideration of whether the processing is necessary. If on the face of it there are potentially other less intrusive alternatives you need to be clear in your LIA why these are not reasonable alternatives.

Finally, you need to balance against the interests, rights and freedoms of the individual. There is no exhaustive list of what you should take into account when conducting the balancing test. However you should as a minimum consider:

- the nature of the personal data you want to process (e.g. special category, children's data etc.);
- the reasonable expectations of the individual (including your relationship with the data subject, how you have processed their data before, whether your intended purpose is obvious or widely understood etc.); and
- the likely impact of the processing on the individual and whether any safeguards can be put in place to mitigate negative impacts.

Frequently Asked Questions

Can we use legitimate interests for our business to business contacts?

Yes, it is likely that much of this type of processing will be lawful on the basis of legitimate interests, but there is no absolute rule here and you need to apply the three-part test. So you need to identify your specific interest and ensure that the processing is actually necessary for that purpose. You also need to consider the balancing test. You may find it is straightforward as business contacts are more likely to reasonably expect the processing of their personal data in a business context.

Can we use legitimate interests to process children's personal data?

If you choose to rely on legitimate interests for processing children's personal data you have a responsibility to protect them from risks that they may not fully appreciate, and from consequences that they may not envisage. You must ensure their interests are adequately protected and that there are appropriate safeguards.

What about special category data?

You can use legitimate interest as your lawful basis, but in most cases the sensitive nature of this data means there are greater risks to the interests and rights or freedoms of the individual. To comply with GDPR you will also need a special category condition in order to process such data.

Can we use legitimate interest as a lawful basis for direct marketing?

Direct marketing can be a legitimate interest, but because of the *Privacy in Electronic Communications Regulations 2003* (PECR), it only applies to certain forms of direct marketing. Specifically, it can be used for postal or live telephone marketing, but not for email, text or automated telephone messages. The PECR states that the only lawful basis for email, text or automated telephone marketing is through consent (see Green Pepper's briefing, *Consent in data processing*).