

How to Data Protection: Photos, Video & Audio



PHOTOS, VIDEO & AUDIO – WHAT NEEDS TO BE CONSIDERED?

When dealing with photos and videos, the composition is crucial: what is in the foreground, are people recognizable? This is not only significant with regard to the meaningfulness of the recordings, as it also has a direct influence on the legal basis and the approach to publication. Photos/videos in which people are recognizable are subject to data protection law. It should be noted that pixelating a person's face in order to anonymize a photo is not always sufficient. Depending on the photo, a person's identity can also be inferred from their build. Audio recordings (e.g. podcasts) are subject to even stricter regulations.

Please note:

- The following statements apply equally to videos. Audio recordings are addressed separately.

Important:

- This does not refer to video surveillance, but to the taking of pictures/videos for internal or external public relations purposes.
- Photos as part of research projects: If photos are taken in the context of research projects that will be published, please note the information under Human research on the Data Protection page: [here](#).

PICTURES OF EMPLOYEES

- 1. Legal basis:** Depending on the type of image composition, the production/publication of an image can be based on two legal grounds:
 - The balancing of interests pursuant to Art. 6 para 1 (f) GDPR or
 - The provision of consent pursuant to Art. 6 para 1 (a) GDPR in connection with Section 26 para 2 BDSG.
- 2. The most common scenarios:**
 - **Images from events open to the public (e.g. open days, public conferences)**
 - Publication on the Intranet:
 - Group photos with the recognizable characteristics of a group (participants) → balancing of interests
 - Individual recordings/pictures without the characteristics of a group (e.g. individual people from the audience, conversation at the bar table during the break, moderators) → consent
 - Recording of an online event via a VC tool → consent of all participants
 - Publication on the Internet/in social media:
 - Group photos with the recognizable characteristics of a group → balancing of interests
 - Individual recordings without the characteristics of a group → consent
 - Recording of an online event via a VC tool → consent of all participants
 - **Pictures of events not open to the general public (e.g. corporate party, corporate day out, internal training/meetings/conferences)**
 - Publication on the Intranet:
 - Group photos with the recognizable characteristics of a group (participants) → balancing of interests
 - Individual recordings without the characteristics of a group → consent
 - Recording of an online event via a VC tool → consent of all participants
 - Publication on the Internet/in social media:
 - Group photos with recognizable characteristics of a group → consent of all participants
 - Individual recordings/pictures without the characteristics of a group → consent
 - Recording of an online event via a VC tool → consent of all participants





▪ Individual/portrait pictures:

- Publication on the Intranet → consent
 - If the employees can upload their picture themselves and voluntarily, then the following sentence must be included at a suitable place in the respective tool: "*By uploading the photo, you give your consent for your photo to be visible [to all employees of the Institute / use of the group / etc. -> please specify]. If you no longer wish to do this in the future, please remove your photo from the application.*"
- Publication on the Internet/on social media → consent
- Publication in internal/external publications → consent
- Images of employees on notice boards/notices → consent
- Pictures of the Institute's management/Nobel Prize laureates/famous visitors → see "Images of contemporary history".

▪ Pictures of former employees:

- If the employment relationship has been terminated, the person's photo must be deleted from the respective digital media or notices. Use beyond this point requires renewed consent.

NOTICE:

These rules also apply if the photos/videos were originally created privately and are then used for Institute purposes.

IMAGES OF CONTEMPORARY HISTORY

1. **Legal basis:** In exceptional cases, no consent is required for photographs of people from the field of contemporary history, such as Institute Management or prominent visitors, as the public's interest in photo coverage outweighs this. The circumstance of contemporary history is included in the balancing of interests according to Art. 6 para 1 (f) GDPR.
2. **Publication:** The person is portrayed in their capacity as a "person of contemporary history"; this capacity stems from exceptional behaviour or an outstanding position in society. This exception is not absolute: all people of contemporary history also have a private life, so consideration on a case-by-case basis is always necessary.

PICTURES OF BUILDINGS/PLACES/LANDSCAPES

1. **Legal basis:** For photographs in which buildings/places/landscapes are in the focus and foreground and people are only 'coincidentally' in the photo, the balancing of interests can be used as an exception. The fact the people are not the subject of the photo falls under the balancing of interests pursuant to Art. 6 para 1 (f) GDPR.
2. **Publication:** When taking photographs of Institute buildings, care should always be taken to ensure that no uninvolved passers-by are photographed.

IMAGES OF MINORS AND PERSONS INCAPABLE OF GRANTING CONSENT

Legal basis: In the case of minors under the age of 16 and vulnerable people who do not have the necessary capacity to consent, the consent of legal representatives must always be obtained for publication in accordance with Art. 6 para 1 (a) GDPR. As an exception, the supervisory authorities allow the publication of minors on the basis of the balancing of interests, e.g. in the case of events that are also aimed at minors. However, special attention must be paid to the interests of minors with regard to the composition of the photos.

AUDIO RECORDINGS

- 1. Legal basis:** Audio recordings represent the strongest encroachment on general personal rights. Thus, the confidentiality of the non-publicly spoken word is protected as a criminal offence: According to section 201 of the German Penal Code, anyone who, without **authorization**, records the non-public spoken word of another person on a sound recording or uses a recording made in this way or makes it accessible to a third party is liable to prosecution. What is required, therefore, is always the **authority** obtained via the consent of the data subjects
- 2. Publication:** Even before making a recording (for example, of a podcast), clear information must be given about the way in which the audio recording will be used.

NOTES ON THE APPLICATION OF CONSENT

Pictures of employees

- If employee photos will be used on the basis of consent, it should be noted that this must always be granted in writing or electronically (employer's duty to provide evidence) and that, due to a dependency existing in the employment relationship, the circumstances of the granting of consent must also be taken into account with regard to the voluntary nature.

Pictures from accessible events

- Consent may also be implied if the data subject enters the venue after being informed that photographs will be taken and how they will be used. However, voluntary consent can only be assumed if the data subject also has the possibility to attend the event without being photographed. In the case of employees, implied consent should only be used in exceptional cases due to the existing duty to provide evidence.



Additional information

- Voluntary nature: Consent requires active action. The data subject must positively mark the declaration of consent by signing (consent by email is also sufficient) or by ticking a box provided for this purpose (opt-in procedure). Verbal or implied consent is also permissible, but a detailed record should be made.

- Duties to provide evidence: It must be possible to prove that effective consent was given; this requires appropriate documentation in all cases.

- Duties to provide information:
 - Part of the declaration of consent is the duty to provide information about the use of the recordings and the publication media. Reference must be made that revocation can be carried out at any time.
 - This is also accompanied by the obligation to provide a privacy notice to Art. 13 GDPR. Templates for consent forms are available in the OHB, [Chapter XVII.04](#) available.

- Right of withdrawal: The withdrawal of consent is effective for the future. In the event of a consent withdrawal, the recordings must be removed and deleted immediately.
 - Internet: In the case of recordings published on the Internet, in addition to removal from our platforms, a request for removal of content from search results must be submitted to three operators of popular search engines ([Google](#), [Bing](#) and [Yahoo](#)). This can be done via the operators' respective pages.
 - Brochures, flyers: If the images have been published in brochures that have already been printed, the further use of the already printed copies is considered justifiable; although the interests of the parties involved must be weighed at this point. However, the images may no longer be used in a subsequent production.

NOTES ON THE APPLICATION OF THE BALANCING OF INTERESTS

- Right to object: The data subject may object to the generation or publication on grounds relating to their particular situation. The objection stemming from the balancing of interests becomes effective for the future. In the event of an objection, the law requires the new circumstances to be taken into account in a new balancing of interests. However, our recommendation is to remove and delete the images.

- Duties to provide evidence: The performed balancing of interests must be documented.



- Duties to provide information:
Even if the balancing of interests is applied, privacy information must be provided in accordance with Article 13 GDPR.

Public events:

Invitation, flyer or notice must contain the basic information:

- Contact details,
- Purposes for which the images are to be used (internet, brochure, submission to the local press),
- Legal basis of the data processing and
- Information for the data subjects that they have certain rights with regard to the handling of their images.

Further information will then be made available on the website, for example:

- Duration of storage,
- If the processing is the outcome of a balancing of interests, indication of the interests in the processing of the images
- If applicable; the recipients of the images, if these will be shared
- Possibility to withdraw consent or object via a balancing of interests
- Existence of a right to appeal to a data protection supervisory authority

Sample text for providing the information is available on the Data Protection pages in Max ([link: see Info Events open to public](#)).

Internal events:

A separate privacy notice is not required in this case. Employees have already been informed of this through the "Data Protection Information for Employees of the Max Planck Society".

Templates for the balancing of interests are available on the Data Protection pages in Max ([Link](#)).

COPYRIGHTS

Photos/videos are additionally subject to copyright law. In any case, it must be clarified with the authors for which purposes and under which conditions the photos/videos may be used. In case of doubt, the Administrative Headquarters' Law and Compliance Department will assist in this regard.

THE COPYRIGHT IN WORKS OF ART ACT – DOES IT STILL AFFECT US?

The Federal Court of Justice ruled in favour of the continued validity of the Copyrights in Works of Art Act (Kunsturheberrechtsgesetz, KUG) with regard to the publication of images of people in the journalistic field. According to the Court, this should be regarded as a law filling in the opening clause of Art. 85 GDPR with regard to the assessment of the permissibility of image publications in the journalistic field. A publication pursues journalistic purposes only if it has an opinion-forming effect on the general public.

The data protection supervisory authorities apply the GDPR exclusively to the non-journalistic sector. The exceptions to the consent requirement under the KUG are included in the balancing of interests pursuant to Art. 6 para 1 (f) GDPR. After all, the exceptions according to KUG merely represent a balancing that has already been carried out by the legislator.

