

Data Protection and Street Photography

Both the right to privacy and freedom of expression are fundamental human rights enshrined in the European Convention on Human Rights. No right is absolute and, where two rights might potentially lead to a level of conflict, competent authorities have to ensure that a fair and equitable balance is reached

In the case of street photography, the Office of the Information and Data Protection Commissioner recognises the artistic attributes which certainly drive photographers to capture un-posed and un-staged images, predominantly when such images identify natural persons who happen to be in public places.

Article 5 of the Data Protection Act stipulates that the Act shall not apply when the processing of personal data is undertaken by a natural person in the course of a purely personal activity. This means that, if a photographer snaps a picture which identifies a natural person, as long as such image is kept by the photographer for a purely personal activity, the law will not apply.

Any other processing falling outside the parameters of this provision will effectively make the law applicable.

The law is applicable to the processing of personal data, where the term 'processing' refers to any operation which is performed with the information (e.g. collection, recording, storing, etc.) whereas 'personal data' is defined as any data which relates to an identified or an identifiable natural person. Therefore if a photographer takes a photograph of an identifiable natural person in a public space and the same photograph is published, the law and its underlying principles will apply. Different data protection considerations will be made in cases where a photograph is exposed in an exhibition as opposed to the case where a photograph is published on a publication or online.

Although, as a general rule, each case should be evaluated on its own merits, in the process of establishing whether a photograph fulfils the legitimate data protection principles and criteria, this Office makes the following considerations prior to reaching a final decision:

1. whether the photo was taken in a public place;
2. whether the individual is a public person;
3. whether the publication was in the public interest; and
4. whether the photograph was taken during a public event.

It might be argued that the circumstances surrounding the elements of street photography might be seen different and contrasting to those of photojournalism. However, in terms of the law, the main data protection principles apply in an equal manner. One of the fundamental principles is the purpose limitation principle. This principle dictates that, apart from satisfying the requirements of providing adequate information to the data subject and seeking his consent when processing personal data, the information should only be processed for the explicit purpose for which it was collected and not in a way which is incompatible with the original purpose.

This Office is set to be pro-active and provide the necessary information so that people practising in this field, being professionals or amateurs, adopt the right procedures and carry out their activities with full respect of the law. This Office cannot advocate a complaints-driven approach where, if a data subject does not complain about a violation of his privacy rights, it is taken as given that the photographer might have not breached the provisions of the Act. Photographers should always employ good practice measures and ensure that, when in doubt about a particular circumstance, they should seek this Office's advice.

Our culture must change into one which accepts that all individuals enjoy a reasonable expectation of privacy. What might constitute a good candid picture for a street photographer might, on the other hand, adversely affect the privacy rights of the individual captured on the photograph, particularly where such person might be facing difficult situations or extraordinary life circumstances.

Therefore, this Office strongly recommends that when the photographer intends to publish or commercially use a photograph clearly identifying a data subject, the provisions of article 9(a) of the Data Protection Act must be satisfied. This shall mean that no processing shall be allowed without the informed consent of the data subject. Although the law does not specify that consent has to be in writing, this Office actively promotes the model that a valid consent should involve a positive action indicating that the data subject has effectively signified agreement to such processing. The most practical and secure manner how to implement this concept is by seeking a written consent.

If, due to the restricted circumstances of the shot, the photographer is not in a realistic position to obtain the consent and would still like to use the photograph for purposes falling outside the household exemption, this Office recommends the blurring of the face as a possible approach to render the individual unidentifiable.

Where the photographer fails to obtain the consent and forges ahead with the publication, the same photographer may be subject to action (depending on the nature of the case) by this Office if a complaint is lodged or may even face a civil claim for compensation from the individual(s) concerned.

The law also entitles individuals to withdraw their lawfully granted consent on compelling legitimate grounds. In the case of online publications, given that the removal of an image would be possible after its publication, if an individual submits similar request to the photographer, such image shall be removed.

It is also imperative to distinguish between data protection and privacy. Although the two terms are, at times, used interchangeably, they are not entirely equivalent. Privacy is certainly broader than data protection, in that, the latter is a tool to protect the former. Therefore, what might be deemed to be an activity which does not constitute a breach of data protection, might on the other hand be considered as invading the privacy of the individual. However, this Office's remit only extends to enforcing the data protection rules and investigate any case by closely following such rules to ensure that the data subjects' right to privacy is safeguarded.