



PoPIA applies to images or photographs when it constitutes personal information as defined in PoPIA. The starting point would be to establish whether the image/photograph is subject to PoPIA by taking a closer look at the definition of personal information.

Personal information means information relating to an identifiable, living, natural person, and where applicable, an identifiable, existing juristic person.

The first aspect would therefore be to determine whether the image/photograph appears with an identifier such as a name and is focused on the individual(s) face. In these circumstances the image would be clearly identifiable as that of a particular individual and the image/photograph can be classed as personal information.

It is less clear whether the image/photograph constitute personal information when there are no identifiers. The Information Commissioner's Office (ICO) guidance is useful and states that one should assume that one is not just looking at a means reasonably likely to be used by an ordinary person, but also by a determined person with a specific reason to want to identify individuals. So one must consider the fact that people can do Google image searches and look on other platforms like LinkedIn for example.

Thus, unnamed images of people will constitute personal information if there is other contextual information that would enable individuals to be identified.

It is recommended therefore that if the image is not clearly identifiable (the person is looking down or away from the camera or the image is out of focus and there are no other identifiers attached to the image) then it arguably does not constitute personal information – however if an individual objects to the use of the his/her image it is recommended that the image be taken down.

If the face is in focus (identifiable) but there are no other identifiers, it is recommended that you rather err on the side of caution and treat the image as personal information.

Another consideration is whether the image/photograph may be special personal information:

- + religious beliefs
- + philosophical beliefs
- + race
- + ethnic origin
- + trade union membership
- + political persuasion
- + health
- + sex life
- + biometric information
- + the criminal behaviour of a data subject to the extent that such information relates to the alleged commission by a data subject of any offence; or any proceedings in respect of any offence allegedly committed by a data subject or the disposal of such proceedings

An identifiable (in focus) image can convey information of ethnicity and biometric data. As far as ethnicity is concerned the ICO guidance provide that the depiction of someone's skin colour is not a clear indication of ethnicity and should not on its own be regarded as sensitive personal data. As to what constitutes a biometric image/photo the answer is unclear. Whether the image/photo constitute special information in terms of PoPIA is important because the processing of this type of information is generally prohibited.

Once it is established that the image/photograph constitute personal information then compliance with the **eight condition in PoPIA** must be ensured.



RP = Responsible Party - DS = Data subject - PI = Personal Information

There must be a **legal basis for processing** the image/photograph. There are six legal basis, consent is one of them:



If you can show that any one of the other basis applies you do not need to rely on consent. The images may be that of a model who has entered into a contract that regulates the use of the image - the contract (depending on the terms thereof) could then be a legal basis for processing the image. Where you rely on consent you should be mindful that it can be withdrawn at any stage at which point the processing must stop.



Q Is the publishing of all images, even those taken before the implementation of PoPIA, subject to consent?

A While PoPIA does not operate retrospectively, the fact that you are processing (using/keeping/publishing, etc) personal information (PI) brings that particular PI within the scope of PoPIA and you must comply with its provisions. Remember consent is not the only legal basis you can rely on for the processing – if you can show any of the other basis apply, you can rely on those (eg contract, legal obligation, public law duty etc)

Q We have an archive of photos that we use on awareness materials: Are we allowed to use them as we do not have the consent of the people in the photos?

A If you want to use the photos, and it constitutes PI, you must comply with PoPIA and have a legal basis for using it – if you rely on consent you will need to obtain the individuals (if a child, a competent persons) consent.

Q We have a number of photos taken over the past 12 months for our annual report, can it be used as we do not have the peoples consent?

A You must comply with PoPIA if the images constitute personal information. You must therefore have a legal basis for the processing. You must determine which legal basis would apply – if you rely on consent you will need to obtain same.

Q We take photos of scenes rather than specific people. For example, a photo of people protesting, would we need consent of the people in the photo even though its not a posed photo?

A If the photos constitute personal information (the individuals are identifiable) PoPIA will apply and you need to comply with all the conditions including having a legal basis for the processing. If you rely on consent it will be required. Otherwise you will need to block out the images of identifiable (persons in focus looking into the camera) individuals. If you can make out a person's face, you must get their consent.

Q Existing awareness materials that we currently have or reprint, must that have the consent of the person in it? Would the same extend to awareness banners that have been designed and used?

A You must comply with PoPIA if the images constitute personal information. You must therefore have a legal basis for the processing. You must determine which legal basis would apply – if you rely on consent you will need to obtain same.

Q With regards to taking photos of learners, if the school has the consent of a parent to take photos of their child, does this consent extend to a third party visiting the school to take a photo during an awareness campaign? Must we still get consent from the parent to take and use a photo?

A The consent must be specific and voluntary so the parent consent of the school may not extend or include your specific use and purpose for collecting the PI (taking the photos) – it is recommended that you rather obtain specific consent for your purposes from the parents.

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