



The Spektrix GDPR Toolkit for the Performing Arts

# Boldly Compliant: A Guide to GDPR for Performing Arts Marketers & Fundraisers

By Liv Nilssen & Michael Nabarro

Contrary to popular belief, it's possible to be GDPR compliant while continuing respectful communication with audiences and maintaining your ability to market and fundraise. In this guide, we outline a business and audience-friendly approach that won't be a long, expensive or drawn-out process for your organisation.

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## About this document

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This guide is part of the [Spektrix GDPR Toolkit for the Performing Arts](#). Here's more information about how you can use these resources to prepare for GDPR.

### Guides

#### [Boldly Compliant: A Guide to GDPR for Performing Arts Marketers & Fundraisers \(this document\)](#)

An overview of GDPR that explains why we recommend a Legitimate Interest-based approach.

#### [How to Implement your GDPR Approach in the Spektrix System](#)

This outlines the practical steps to take so you can gain and maintain permission to contact your customers.

### Tools

#### [1. GDPR Compliance Checklist](#)

When you're ready to take action, these checklists contain recommended steps.

#### [2. Sample Data Processes Audit](#)

Carry out your own data processes audit to determine which legal bases you're using for each data processing activity.

#### [3. Sample Legitimate Interest Assessment](#)

Use this to create and document your Legitimate Interest assessments for the data processes that you're taking a Legitimate Interest approach to.

#### [4. Sample Privacy Policy](#)

Provides copy to guide your own privacy policy.

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## Disclaimer

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We're here to help you prepare for GDPR as much as possible, but we can't offer legal advice and none of the information in the following document should be taken as such. We strongly recommend taking your own legal advice before committing to any decision regarding GDPR. As the data controller, it is your responsibility to design an appropriate approach to data privacy. Neither Spektrix nor any other data processor can make you GDPR compliant without your own processes in place.

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## Introduction

Data protection regulations will change on 25th May 2018 when the General Data Protection Regulation (GDPR) comes into force. This new EU regulation impacts all organisations which use the personally identifiable data of EU residents and will remain in effect in the UK regardless of Brexit. Though it will impact a range of activities in the performing arts sector, perhaps its most obvious effect is the regulation of data processes required for marketing and fundraising communications.

There has been conflicting information, confusion and fear about these changes and their impact on our sector's ability to keep engaging in respectful communications with audiences. But it's vital that performing arts organisations preserve their ability to communicate respectfully with their customers and donors, maintain relationships with them and continue effective marketing and fundraising. The aim of this guide is to demystify GDPR compliance with a pragmatic, business-friendly and audience-centric approach.

Complying with GDPR doesn't have to be difficult. It's possible to approach the regulation in a way that is practical, business-friendly and process-based. This is in line with the approach that the Information Commissioner's Office (ICO) which will enforce GDPR is advocating. Elizabeth Dunham, [the Information Commissioner has said](#):

*"...if you can demonstrate that you have the appropriate systems and thinking in place you will find the ICO to be a proactive and pragmatic regulator aware of business needs and the real world."*

To implement the Commissioner's approach, we suggest a three-step process for compliance:

1. Assess your current data processes.
2. Determine a legal basis for continuing these processes.
3. Document that you have done this work and ensure your data processing is transparent.

To make our suggestions practical and actionable, we have also created a set of tools as part of the [Spektrix GDPR Toolkit for the Performing Arts](#) alongside this guide to bring you concrete examples, worksheets and sample templates to help you make your organisation compliant.

Our focus is on helping performing arts organisations maintain the ability to respectfully contact their audiences. For that reason, we'll focus on discussing how

you can use Legitimate Interest as a legal basis for processing data, rather than the current industry preference for Consent-based processing. In our opinion, this is the most appropriate legal basis for most processes because it enables performing arts organisations to continue marketing and fundraising effectively and respectfully. It's also less difficult to comply with than Consent.

In the following pages, and in the rest of the Spektrix GDPR Toolkit, we outline what an approach based on Legitimate Interest might look like, explore its strengths and offer detailed suggestions on how to use a Legitimate Interest-based approach as part of a business and audience-friendly compliance strategy.

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## About the data protection regulations

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There are two data protection regulations that will impact marketing and fundraising activity in the performing arts. For an effective approach to compliance, you should take both into consideration.

### GDPR

The General Data Protection Regulation (GDPR) coming into effect on 25th May is an update of the Data Protection Act of 1998 (DPA). It is an EU regulation, however it is currently being brought into UK law and will continue to be in force regardless of Brexit. This regulation affects the personally identifiable data held on individuals resident in the EU by any legal entity and the processing of that data. In this guide, we focus on the implications of this regulation on communicating respectfully with audiences in the arts.

### PECR

The Personal Electronic Communications Regulation (PECR) also brings additional requirements for email, text messages and telephone communications. These requirements will likely apply differently to marketing and fundraising, a complication for email fundraising that we'll address in detail later on.

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## The key changes ahead

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With GDPR coming into effect, there will be new requirements for keeping and processing individuals' data. These include assessing data processes, documenting policies and activities and adhering to more explicit rights for individuals. This may mean you'll be required to carry out additional administrative and governance work in order to comply. However, this work doesn't need to be a burden and it doesn't

necessarily require you to make major operational changes.

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## Increased accountability for assessment & documentation

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Under both GDPR and DPA, you must assess how necessary each data processing activity is, decide the legal basis for carrying it out and take the rights of individuals into account. But for the most part, the regulation does not explicitly allow or restrict specific activities. Instead it asks an organisation to be accountable for its data processing activities, by demonstrating that it has assessed whether an activity adheres to the principles of the regulation. Under GDPR, this must now also be documented. We aim to help you through this process of documentation and assessment and as a starting point, we've produced a [Sample Data Processes Audit](#). For more detail on the regulation we also recommend the [ICO's Guide to GDPR](#).

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## Individual rights are more explicit

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The rights of individuals over how you use their data are now more explicit. Individuals have the right to know what data is being held and why, and how it is being processed. This information has to be clear and easily accessible. In addition, as long as requests are reasonable, individuals have the right to access their data, restrict its processing and in limited cases, have their data erased.

We believe an easily accessible, up-to-date and accurate privacy policy is the tool to meet these transparency requirements. We have included a [Sample Privacy Policy](#) for a typical performing arts organisation in the [Spektrix GDPR Toolkit](#).

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## The definition of Consent is changing

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The changing definition of Consent may be the most drastic change in the new regulation from the perspective of performing arts marketers and fundraisers. As a sector, we've historically relied on Consent-based processing and have used very few other legal bases for processing personal information.

Whether or not Consent was the best basis for marketing communications under DPA, in the context of the changing requirements under GDPR, in our opinion it's unlikely to be the best basis going forward.

This is because GDPR raises the bar for what constitutes legal consent. To be valid, Consent must now be granular, affirmative and demonstrable. This means it must explicitly address every single data process, be opt-in only and be recorded in an

auditable way. This new definition is being applied retroactively and if previous consent was not gathered in a way that is GDPR compliant, you will no longer be able to use it from May 25th onwards.

The implications are stark. Put bluntly, it's likely that many performing arts organisations will no longer have the right to contact many of their current customers and donors using Consent-based processing under the new definition. This is despite the strong, long-standing relationships organisations have with individual audience members and all indications that these individuals wish to hear from them. The resulting risks to revenue and audience relationships are clear and alarming.

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## Suggested solution: a pragmatic & process-based approach

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The good news is that despite the changing definition of Consent we believe it's possible to continue effectively marketing and fundraising to your audiences. This requires giving up a Consent-only approach and taking a pragmatic, audience-focused and process-based approach to GDPR.

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### Consent is not the only answer

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Consent is just one of six legal bases for processing under GDPR. The ICO [is clear in its guidance](#) that it is every organisation's job to choose the best basis amongst them for each data process:

*"You must not adopt a one-size-fits-all approach. No one basis should be seen as always better, safer or more important than the others, and there is no hierarchy in the order of the list in the GDPR."*

Of the six, three are most likely to apply to typical performing arts communication practices:

- The In the Performance of a Contract basis (referred to as Contract basis from here onwards) allows for processing in the service of fulfilling a contract between an organisation and its customer, for example, an order confirmation or a show cancellation notice.
- The Consent basis which we have previously discussed. Even under the new requirements, it has its place; we believe it has been and remains useful when you can't clearly make the case for processing data under Legitimate Interest or when an individual would have no way to expect that their data would be processed

in certain ways. For example, tele-matching which finds telephone numbers for individuals who have not given them willingly and unexpected third-party data sharing are both activities where you might want to use Consent.

- The Legitimate Interest basis asks an organisation to weigh up the necessity of a data processing activity for the organisation's legitimate business interests against the negative impact to the individual. You can do this by carrying out a 'Legitimate Interest assessment.' The organisation must also be transparent about the activity which you can often achieve via a privacy policy with very clear instructions explaining how the individual can object to data processing at any time.

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## Legitimate Interest is likely to be more appropriate

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In our opinion, Legitimate Interest is likely the most appropriate basis to use for segmenting data, donor profiling, direct marketing messages (including fundraising messages) and most other processing activities carried out by performing arts organisations. In addition to [Article 47 of the GDPR](#) which explicitly mentions direct marketing as a permitted activity under Legitimate Interest, [the ICO has advised that:](#)

*"It [Legitimate Interest] is likely to be most appropriate where you use people's data in ways they would reasonably expect and which have a minimal privacy impact, or where there is a compelling justification for the processing."*

This advice is a departure from the current industry standard as our sector has historically taken a Consent-based approach to data protection. However, a Legitimate Interest-based approach has long been available as a basis for direct marketing and other types of processing. It is used in many other sectors and is arguably the most customer-friendly and flexible approach to marketing. Whatever the reasons for using Consent in the past, we don't believe that it's the best option for most common data processing activities in the performing arts sector under GDPR.

Of course, we have to carefully assess all data processing activities under Legitimate Interest. However it's likely that most, if not all, typical processing activities carried out by performing arts organisations would be reasonably expected by our audiences and have a minimal privacy impact on them.

To illustrate these differences between Consent and Legitimate Interest, we've included a risk analysis comparison of the two bases on the next page. We haven't included the Contract basis because it's generally quite obvious when you should use it.

## Risk analysis comparison

Risk	Consent	Legitimate Interest
Falling foul of the regulation.	Consent isn't black and white; you either have it exactly right, or you don't.	It will be hard for the ICO to argue with a carefully thought through, well-reasoned and customer-focused Legitimate Interest assessment. In addition, direct marketing is expressly allowed under Article 47 of GDPR (see page 5).
Harming audience relationships.	A granular, Consent-based approach risks overwhelming and disappointing your audience.	A respectful, customer-first approach to how you process data will likely be welcomed by most.
Unmanageable administrative burden.	Maintenance of a Consent-based approach will be a lot of work e.g. gathering consent for new forms of processing, restructuring processing activities when needed.	Some upfront work will initially be needed on policies and assessment but it will be much easier to maintain on an ongoing basis.
Loss of revenue.	The transition to a Consent-based GDPR approach could cause marketing lists to shrink. A granular Consent-based approach also risks low opt-in rates and therefore reduced ability to market and fundraise.	By allowing continued respectful communication and data processing, there doesn't need to be any adverse impact on revenue.

In our view, Legitimate Interest isn't just a way to get around the tightened requirements of Consent. In fact, the risk analysis comparison highlights that Legitimate Interest could be a better option in its own right. For practical examples of using the Legitimate

Interest basis, see the [Sample Legitimate Interest Assessment](#) and the [Sample Privacy Policy](#).

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## Additional requirements for email, text messaging & phone

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While Legitimate Interest is probably the appropriate basis for most marketing and fundraising data processes in the performing arts, PECR brings additional requirements for unsolicited electronic communications, such as marketing or fundraising communications. Email confirmations or other solicited communications are not covered. For unsolicited electronic communications, you have to first find a legal basis for the activity under GDPR and then find a PECR compliance strategy.

To carry out outgoing telemarketing and telefundraising, you should either use Consent or Legitimate Interest under GDPR and check the Telephone Preference Service before ringing under PECR. Calling a customer to notify them of a cancelled show would be considered as “solicited” and would therefore fall outside of PECR.

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### Using PECR’s Soft Opt-In rule for email & text messaging

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For email and text message marketing you have two choices for compliance:

- obtaining GDPR-compliant Consent from the individual that is granular, affirmative and demonstrable;

or

- using the ‘Soft Opt-In’ rule under PECR. Soft Opt-In is a rule that says that if an individual is an existing customer who bought (or negotiated to buy) a similar product or service from you in the past, and you gave them a simple way to opt out both when you first collected their details and in every message you have sent, then you may be able to email or text the individual.

Taking an approach based on PECR Soft Opt-In is helpful because it maintains your right to email your customers with their ongoing approval, but without Consent as defined under GDPR. For more details, [visit the ICO’s Guide to PECR](#).

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## Using Legitimate Interest & PECR's Soft Opt-In rule

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We believe it's reasonable to expect that a customer with pre-GDPR compliant Consent who has regularly been receiving your emails without opting-out wishes to continue receiving them. In the words of the ICO's [Guide to PECR](#):

*"The idea is that if an individual bought something from you recently, gave you their details, and did not opt out of marketing messages, they are probably happy to receive marketing from you about similar products or services even if they haven't specifically consented."*

In the interests of maintaining the right to email your audiences, we suggest an approach which uses Legitimate Interest to allow marketing communications (including post, email and any other reasonable process) to meet GDPR requirements. As a reminder, the ICO has said this is likely best for low-impact, expected activities and direct marketing is expressly allowed under Legitimate Interest in the regulation itself. To meet PECR requirements to email, we suggest using the Soft Opt-In rule.

Compared to a Consent-only approach, where the right to continue contacting customers beyond 25th May is at risk, this approach is less likely to disrupt your ability to continue respectfully communicating with your customers.

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## Limitations of Legitimate Interest & PECR's Soft Opt-In rule

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The PECR Soft Opt-in rule only applies to individuals you have already engaged as customers. Under the current ICO reading of PECR which says that donations are not products, this approach probably can't be used for sending fundraising emails. In addition, partner companies (e.g. a touring company which doesn't have a direct contractual relationship with the individual buying a ticket) probably can't use the PECR Soft Opt-In rule. For customers signing up directly to your email list (e.g. through your website) it can be argued that this is in itself a positive, unambiguous indication of their consent.

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## A suggested approach to fundraising under GDPR

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Because under the current ICO reading of PECR, the Soft Opt-In rule doesn't apply to fundraising emails, you may need to use Consent instead. With this limitation in mind, we have suggestions to make fundraising as effective and manageable as possible.

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## Think creatively about Consent

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It may be time to adopt a more donor-friendly approach to asking for email consent. Finding the right time is crucial. If you ask an individual too soon (i.e. before their relationship with your organisation as a ticket-buyer has had time to develop), they will likely turn you down. If you ask an individual too late, the opportunity might be lost.

At Spektrix, we're looking at building features which will allow performing arts organisations to ask for consent for fundraising emails at the right moment in the online purchase path (rather than asking only when they initially create their account). You can also train your box office team to regularly ask customers for consent to email about fundraising, warmly and creatively. As always, the key is wording the consent request in an inspiring rather than transactional way. For example:

*"We would love to contact you to tell you about the amazing difference your donation makes, benefits available to you as a donor and with the occasional appeal for vital financial support for our educational, artistic and community programs. Please tick if you're happy for us to email you for this purpose. You can unsubscribe at any time."*

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## Think beyond email

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Developing strategies to communicate outside of email may also be helpful. Legitimate Interest is available as an option to contact donors and prospects by post, something many of them might appreciate. You can also contact a donor or prospect by telephone by using Legitimate Interest and checking the Telephone Preference Service. The great advantage of performing arts organisations is that individuals regularly come to the venue, so consider a face-to-face visit in the stalls to communicate with major prospects rather than relying on email. Finally, don't forget that the Contract basis is available for confirming donations and saying thank you.

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## Donor profiling & wealth screening

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There has been considerable debate about donor profiling and wealth screening activities under data protection regulations. Despite reports, no charity has been fined by the ICO for donor profiling or wealth screening. Instead, fines have been levied for failing to disclose these activities. We believe it is likely that charities have a Legitimate Interest to carry out this activity if they are transparent about it in their privacy policy. The Information Commissioner, [Elizabeth Dunham agrees](#):

*“Profiling individuals for a fundraising campaign is not against the law, but failing to clearly tell people that you’re going to do it is.”*

## Don’t panic, keep communicating

Organisations in the performing arts are working hard to be compliant and use audience data respectfully and lawfully. In contrast, here are some recent ICO enforcements in the charity and business sector, which vary considerably from the common activities we see in the performing arts sector:

- The RSPCA [used wealth screening without transparency and engaged in data sharing with other organisations.](#)
- Battersea Dogs and Cats Home and the RSPCA [engaged in undisclosed and unexpected third-party sharing schemes.](#)
- The British Heart Foundation [ignored customer preferences and opt-outs.](#)
- Carphone Warehouse [experienced a massive data breach through extreme negligence](#) and then failed to notify those affected.

Of these enforcements, only Carphone Warehouse were fined close to the the maximum amount. Elizabeth Denham, ICO Commissioner [explains the ICO’s approach to fines](#):

*“It’s scaremongering to suggest that we’ll be making early examples of organisations for minor infringements or that maximum fines will become the norm...Issuing fines has always been and will continue to be, a last resort.”*

## Moving forward with compliance

We think the key to business and audience-friendly compliance with GDPR is a pragmatic approach that focuses on Legitimate Interest as a basis for the most common data processing activities in the performing arts.

We’re hearing suggestions from the sector that organisations will have to go out to their entire audience base and ask them to give new consent to remain on the database. This lacks nuance and will be detrimental to the relationships performing arts organisations have with their audiences. This also suggests that the GDPR and the ICO are looking to dictate how you run your business, but this isn’t the case. The aim of the new regulation is simply to make sure that as you run your business, you are carefully considering the interests of your customers as you process their data.

We strongly believe that taking a blanket, Consent-only approach ignores the interests of the customer entirely and isn't something that they want or expect you to do. It's also likely to have a negative impact on your ability to deliver on your organisation's mission. We advise thinking extremely carefully if you are considering a Consent-only approach.

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## Summary

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This is our suggested approach to complying with GDPR and PECR:

- As suggested by the Information Commissioner's Office, Legitimate Interest is likely the most appropriate basis for most of your processing given your audiences are likely to reasonably expect it.
- Remember that the key to getting a Legitimate Interest-based approach right is a clear privacy policy explaining your processing activities and providing individuals with a way to object.
- You can continue to use the PECR Soft Opt-In rule for marketing emails, but you probably can't use it for fundraising emails. You will likely need to use Consent compliant with GDPR here.
- Accountability is a key new requirement. The Spektrix GDPR Toolkit provides you with a head start with much of this.

It is possible to be GDPR compliant while continuing respectful communication with audiences and maintaining the ability to market and fundraise. By taking a pragmatic, business and audience-friendly approach, compliance won't be a long, expensive or drawn-out process for your organisation. In fact, this is a great opportunity to remember the exciting work that our sector is producing and how vitally important it is to be able to share that with both new and existing audiences.

Explore the Spektrix GDPR Toolkit for the Performing Arts

This document is part of the [Spektrix GDPR Toolkit for the Performing Arts](#) which provides guidance to help your arts organisation comply with GDPR before 25th May.



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## Recommended further reading

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- [Guide to the General Data Protection Regulation \(GDPR\)](#) – Information Commissioner’s Office
- [Guide to Privacy & Electronic Communications Regulation \(PECR\)](#) – Information Commissioner’s Office.
- [Guidance on the use of Legitimate Interests under the EU General Data Protection Regulation](#) – Data Protection Network

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## About the authors

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Liv provides advice and devises strategies to support clients in meeting their strategic objectives using Spektrix as well as ensuring that Spektrix is meeting the needs of our clients. Liv’s work is a continuation of her 15 years of arts management and fundraising in the performing arts sector. Having worked at the Royal Court in London, the American Conservatory Theater and Yale School of Drama, Liv is an experienced performing arts management professional passionate about achieving her life-long goal of helping arts organisations to thrive.

### **Michael Nabarro, co-founder & CEO, Spektrix**

Michael co-founded Spektrix over ten years ago while working in a Cambridge theatre. As CEO, Michael leads the vision and sets the strategy for Spektrix with a focus on the product, evolving our roadmap to meet the changing needs of the arts sector. Michael is passionate about helping the arts sector thrive through technology.

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## About Spektrix

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Spektrix is the leading provider of cloud-based ticketing, marketing and fundraising software for the arts. Founded in London, we now work with over 320 arts organisations in the UK, Ireland and North America. For the last ten years, we’ve worked with our clients to help them build better customer relationships and grow revenue through effective data management and data-driven marketing and fundraising.

Visit [www.spektrix.com](http://www.spektrix.com)

