[Produced as a template to be modified to meet specific customer needs}

Sample POPI Act compliant Transborder Agreement

[for outsourcing of Personal Information processing with cloud services based outside of SA]

|  |  |
| --- | --- |
|  |  |

by and between

[Company Name], [Address]

(hereinafter Responsible Party)

and

[Company Name], [Address]

(hereinafter Operator)

Contents

[1 Definitions 1](#_Toc29362666)

[2 Purpose 1](#_Toc29362667)

[3 Scope 1](#_Toc29362668)

[4 Definitions 2](#_Toc29362669)

[5 Obligations of the Responsible Party 2](#_Toc29362670)

[6 Obligations of the Operator 3](#_Toc29362671)

[7 Rights of Data Subjects 4](#_Toc29362672)

[8 Term and Termination 4](#_Toc29362673)

[9 Miscellaneous 5](#_Toc29362674)

[10 Annex 1 6](#_Toc29362675)

[11 Annex 2 7](#_Toc29362676)

[12 Annex 3 8](#_Toc29362677)

# Definitions

|  |  |
| --- | --- |
| Term used | Definition source |
| Operator | As defined in Section 1 of the Act |
| Personal information | As defined in Section 1 of the Act |
| Processing | As defined in Section 1 of the Act |
| Regulator or Information Regulator | As defined in Section 1 of the Act |
| Responsible Party | As defined in Section 1 of the Act |
| Security safeguards | As defined in Section 19 of the Act |
| Sub-operator | Sub-contractor working on behalf of the Operator |
| The Act | Protection of Personal Information Act, No.4 of 2013. |

# Purpose

This POPI Act compliant Transborder Agreement (the Agreement) is entered into by and between the Responsible Party and the Operator to provide adequate protection for Personal Information in situations in which such data is transferred from the Responsible Party established in South Africa to the Operator established in another country for the purposes of processing such data on behalf of the Responsible Party. [This Agreement, however, does not in any way oblige the Responsible Party to transfer Personal Information to the Operator.][[1]](#footnote-1)

The purposes of the transfer to, and processing by, the Operator are described in Annex 1 to this Agreement. Annex 1 forms an integral part of this Agreement and may be amended by the Responsible Party from time to time.

# Scope

This Agreement applies to all Personal Information relating to third parties that is

1. transferred (which shall include making it available for access) from the Responsible Party to the Operator; or
2. processed by the Operator on behalf of the Responsible Party.

The catalogue of the Personal Information to be transferred and/or processed is found in Section 1 of Annex 1 to this Agreement.

# Definitions

Unless defined otherwise herein, all terms shall have the same meaning as defined in the Protection of Personal Information (POPI) Act, No.4 of 2013 (POPI Act).

For the purposes of this Agreement:

1. ‘*Responsible Party*’ means the natural or legal person, public authority, agency or any other body established in South Africa which alone or jointly with others determines the purposes and means of the processing of Personal Information and which transfers such data to another country for the purposes of its processing on his behalf.
2. ‘*Operator’* means a natural or legal person, public authority, agency or any other body established in another country which agrees to receive Personal Information from the Responsible Party for the purposes of processing such data on behalf of the latter after the transfer in accordance with his instructions.
3. *‘Suboperator’* means any Operator engaged by the Operator (or by any other *Suboperator* of the Operator) who agrees to receive from the Operator (or from any other *Suboperator* of the Operator) Personal Information exclusively intended for processing on behalf of the Responsible Party after the transfer in accordance with his instructions and the terms of the written subcontract.

# Obligations of the Responsible Party

The Responsible Party warrants that the Personal Information to be transferred has been collected and processed in accordance with the requirements of the POPI Act. The Responsible Party further warrants that the transfer of the Personal Information and the processing of such data by the Operator as set forth in this Agreement is admissible under the POPI Act and the Responsible Party undertakes that the transfer is made in accordance with the POPI Act. [Particularly the Responsible Party warrants that

1. prior to any transfer of Personal Information, it has informed the Data Subjects and has complied with any notification and/or registration obligations set forth by the POPI Act;
2. the intended purposes of the transfer and processing have been communicated to the Data Subjects upon the collection of the Personal Information;
3. the transfer to, and processing by, the Operator pursuant to this Agreement is not prohibited by a statutory or contractual duty of confidentiality; and
4. it will not require the Operator to undertake a processing of Personal Information that the Responsible Party would not be permitted to carry out itself.]

The Responsible Party shall verify that the technical and organizational measures, as required by the POPI Act are undertaken by the Operator as set forth in Annex 2 to this Agreement, are sufficient to protect the transferred Personal Information from any unauthorized processing. [The Responsible Party warrants that the technical and organizational measures set forth in Annex 2 to this Agreement are sufficient in this regard.] Annex 2 forms an integral part of this Agreement and may be amended by the Responsible Party from time to time.

# Obligations of the Operator

The Operator undertakes and warrants that it will process any and all Personal Information received from or made available by the Responsible Party or derived from such information

1. solely on behalf and solely for the purposes of the Responsible Party as set forth in Section 2 of Annex 1 or as otherwise expressly provided for by the Responsible Party or agreed with the Responsible Party;
2. in accordance with the instructions of the Responsible Party [(which may be given by any means, including e-mail)]; and
3. in compliance with Chapter 9 of the POPI Act
4. in compliance with this Agreement.

The Operator undertakes, prior to any processing, appropriate technical and organizational measures as defined by the POPI Act and as set forth in Annex 2 to this Agreement to protect the transferred Personal Information from unauthorized processing, including any processing not expressly authorized by this Agreement and including accidental loss or destruction of, or damage to, such Personal Information. In addition, the Operator will provide evidence to the satisfaction of the Responsible Party in Annex 3 to this Agreement to meet the requirements of Section 72 of the POPI Act.

The Operator will promptly inform, and cooperate with, the Responsible Party:

1. if it believes that it may no longer be able, or no longer is able, to comply with this Agreement, particularly in case it receives or must reasonably expect to receive a request or order of a competent authority requiring it to disclose, or refrain from further processing, some or all Personal Information to which this Agreement applies; or
2. if any accidental or unauthorized access or security compromise has occurred.

The Operator shall not subcontract any of its processing operations performed on behalf of the Responsible Party under this Agreement without the prior written consent of the Responsible Party. [No consent shall be given if (i) Personal Information or the processing of such Personal Information is to be transferred to an operation in a third country or to a third party (including an affiliate) which is not subject to substantially similar obligations as the Operator under this Agreement, or (ii) the enforcement of the present Agreement by the Responsible Party cannot be reasonably ensured.]

In the event of sub-processing, the Operator undertakes that:

1. it has previously informed the Responsible Party and obtained its prior written consent;
2. the subcontracting of the processing of Personal Information may only consist of the processing operations agreed in this Agreement;
3. Operator and Suboperator shall sign an agreement which will impose the same obligations on the Suboperator as those imposed on the Operator under this Agreement[[2]](#footnote-2);
4. it will promptly send a copy of any Suboperator agreement it concludes under this Agreement to the Responsible Party.

Where the Suboperator fails to fulfil its data protection obligations under such written agreement, the Operator shall remain fully liable to the Responsible Party for the performance of the Suboperator’s obligations under such agreement.

[The Responsible Party has the right to, at any time, in any reasonable manner and with the Operator's full cooperation, audit the Operator's (and any Suboperator's) compliance with the Agreement or to have such audit performed by a qualified third party bound by a duty of confidentiality. The costs will be borne by the Operator; if any non-compliance is revealed which may be of significance for Data Subjects or the Responsible Party, the Operator shall bear the costs.]

# Rights of Data Subjects

The Responsible Party is responsible that the Data Subjects are provided with their right of information (right of access), correction, restriction, suppression or deletion, as available under the POPI Act. The Operator (and any Suboperator) will fully and without delay cooperate with the Responsible Party in, and provide to the Responsible Party the necessary services for, fulfilling such requests or inquiries of Data Subjects. [The Operator (and any Suboperator) will immediately forward to the Responsible Party any requests or inquiries it directly receives without responding to them on the merits.]

# Term and Termination

This Agreement shall be binding between the parties upon execution by both parties and shall remain in place for an indefinite period of time. [It shall terminate automatically upon the termination of the services provided by the Operator and for which this Agreement was entered into.] Each party may [also] terminate this Agreement at any time with immediate effect by providing a written notice. The Responsible Party may also suspend the transfer of Personal Information and/or its processing at any time.

Upon termination of this Agreement for whatever reason, the Operator (and any Suboperator) shall,

1. immediately return any Personal Information and copies thereof to which this Agreement applies, including the Personal Information transferred by the Responsible Party; and, to the extent this is not possible,
2. destroy such Personal Information and copies thereof, and certify to the Responsible Party in writing that it has done so;

unless legislation imposed upon the Operator prevents it from returning or destroying all or parts of the Personal Information to which this Agreement applies, in which case the Operator informs the Responsible Party and undertakes to keep such Personal Information confidential and not actively process it anymore.

Upon termination of this Agreement, any other contract signed by the Operator and the Suboperator for the purposes of processing and transferring Personal Information under this Agreement shall be terminated automatically. This, however, does not concern any other contract signed by the Responsible Party and Operator for other purposes.

# Miscellaneous

Each party will provide to the Information Regulator, and the Responsible Party will provide any Data Subject, a copy or the content of this Agreement upon its request or if required by law. [Annex 2 to this Agreement shall be summarized to the extent admissible by law and necessary for security reasons.] [In case of a production request by a Data Subject, the Responsible Party may summarize any part of this Agreement (including its Annexes) to the extent necessary for confidentiality and data protection reasons.]

The rights and obligations of each party to this Agreement are without prejudice and notwithstanding to any other rights and obligations the parties may or may not have under other agreements. This Agreement does not regulate the consequences that the execution of a right and performance of an obligation under this Agreement may have under another relationship among the parties.

[Each party will indemnify the other party in case of claims of third-parties or other damages which result from first-mentioned party's negligent or intentional failure to comply with this Agreement.]

Data Subjects may raise damages and other claims pursuant to the POPI Act relating to the transfer and/or processing of their Personal Information under this Agreement against either party.

This Agreement may only be modified in writing. The parties shall not assign this Agreement or any rights or obligations hereunder to any third party without the prior written consent of the other party.

This Agreement (and any agreement signed by the Operator and any Suboperator for the purposes of processing and transferring Personal Information under this Agreement) shall be governed by and construed in accordance with the substantive laws of South Africa. Any dispute arising out of or in connection with this Agreement (or any Suboperator agreement signed by the Operator and any Suboperator for the purposes of processing and transferring Personal Information under this Agreement) or breach thereof, shall be exclusively settled by the ordinary courts at the seat of the Responsible Party in South Africa. [In addition, each party shall be entitled to request any other competent court to order interim or provisional measures of any kind.]

Place, Date:

For the Responsible Party: For the Operator

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

[Name], [Function] [Name], [Function]

[Company] [Company]

Source note:

This agreement has been based on two documents and modified for use in compliance with the POPI Act by Dr Peter Tobin:

* European Commission Commission Decision C(2010)593 Standard Contractual Clauses <http://ec.europa.eu/justice/data-protection/international-transfers/transfer/>
* Swiss Federal Data Protection and Information Commissioner Transborder Dataflow Agreement <http://www.edoeb.admin.ch/datenschutz/00626/00743/00858/00859/index.html?lang=en>

# Annex 1

Description of the Transfer and Processing

1. Catalogue [and classification if Special Personal Information] of Personal Information to be transferred and processed:
2. Purpose(s) of the transfer and processing:
3. Persons who may access or receive the Personal Information:
4. Additional useful information:
5. Contact Information for Data Protection Inquiries:

# Annex 2

Technical and Organizational Measures implemented by the Operator

[operator to explain how the requirements of Condition 7 of the POPI Act will be met]

# Annex 3

Evidence that Section 72 of the POPI Act is complied with.

[e.g. proof that the processing in a non-South African jurisdiction (foreign country as envisaged in Section 72 of the POPI Act) meets the test of being covered by protection substantially similar to the POPI Act]

[e.g. contractual agreement (this document and other related documents) is in place to provide protection substantially similar to the POPI Act in a non-South African jurisdiction (foreign country as envisaged in Section 72 of the POPI Act)]

1. Words or sentences in square brackets are optional. [↑](#footnote-ref-1)
2. This requirement may be satisfied by the Suboperator co-signing this Agreement. [↑](#footnote-ref-2)