**Generic draft contract wording to be used**

**for acquiring personal information from commercial suppliers**

**in compliance with the POPI Act**

**Advice complied by Dr Peter Tobin, 8 October 2018**

Here is the suggested draft wording to use. Supporting information from the guidance from the UK regulator (Information commissioner’s Office [www.ico.org.uk](http://www.ico.org.uk) is shown below plus extracts from the POPI Act).

**Contract wording starts**

“As a supplier of personal information as defined in terms of the Protection of Personal Information (POPI) Act (No. 4 of 2013), [insert supplier company name] confirms that in terms of the consent and purpose requirements for lawful processing (sections 11 to 13 of the POPI Act)

***{select which option applies for each data subject record}***

Option 1: Direct collection from the data subject

1. The personal information was collected directly from the data subject, and a record of that collection exists  
   *and that*
2. Explicit consent to sell the personal information of the data subject has been obtained, and that a record of that consent exists  
   *and that*
3. The specific purpose for obtaining that information – direct marketing - has been made clear to the data subject and that a record of that consent exists

Option 2: Collection from a public record

1. The personal information was collected from a public record   
   *and that*
2. The public record is available for inspection or the source can be verified

Option 3: Deliberately made public by the data subject

1. The personal information was deliberately made public by the data subject   
   *and that*
2. The source of the personal information disclosure can be verified

[insert customer company name] reserves the right to carry out periodic audits to verify the undertaking given by [insert supplier company name] has been met and should [insert customer company name] not be entirely satisfied this will be sufficient grounds for immediate cancellation of the supplier contract without any penalty whatsoever.

Option 4: Personal information not collected directly from the data subject

1. The personal information was sourced from a service provider who can produce proof that the personal information was obtained with permission for re-use for marketing purposes  
   *and that*
2. The source of the personal information disclosure can be verified

**Contract wording ends**

*Dr Tobin’s advice: if the supplier of the personal information cannot comply with at least one of the three options above, then the Responsible Party (customer) buying the personal information may be complicit in illegal processing of personal information as defined in the POPI Act and subject to relevant enforcement action which could be taken by the Information Regulator.*

**Note 1: this advice below applies to the UK Data Protection Act (DPA), not to the POPI Act. However, as the UK DPA and the POPI Act are broadly similar this advice has value in terms of POPI Act compliance.**

Extracts from ICO publication “Buying and selling customer databases” (2014)

**Can databases be sold?**

Yes. If an organisation first obtains information from individuals with the intention of selling the database as a commercial asset, individuals should be informed how their information is going to be used, including that it will be sold.

Normally personal information in a database should not be sold if the individuals have not been told originally that their information could be passed on to other organisations.

**What can a buyer use the personal information for?**

When personal information covered by the Act is collected from individuals it should be clear to them what it will be used for. When a database is sold, the seller must make sure that the buyer understands that they can only use the information for the purposes for which it was collected. Any use of this personal information should be within the reasonable expectations of the individuals concerned. So, when a database is sold, its use should stay the same or similar. For example, if the database contains information obtained for insurance, the database should only be sold to another insurance-based business providing similar insurance products.

Selling it to a business for a different use is likely to be incompatible with the original purpose and likely to go beyond the expectations of the individuals. The buyer of any database should be aware that they can only use the personal information on it in line with the purposes for which it was originally collected. They need to know what these purposes were when they buy the database. If the buyer wants to use the personal information for a new purpose, they will have to get consent for this from the individuals concerned. As the original collector of the information, the seller has a responsibility to ensure that the personal information is used properly. This can be achieved by making it clear to the buyer what the information can or cannot be used for.

**Note 2: the POPI Act provisions for direct marketing apply specifically to Electronic Direct Marketing in Section 69. Direct marketing by other means is covered in Chapter 3. See extracts from the POPI Act below.**









