

The POPI Act (POPIA) and “Opt-in and Opt-out” considerations

Introduction: before POPIA

Previous legislation and regulations prior to the arrival of the Protection of Personal Information Act (POPIA) required organisations undertaking electronic direct marketing in South Africa to provide the opportunity for recipients to unsubscribe from further communications (commonly referred to as opt-out). “This was true under section 45 of the Electronic Communications and Transactions Act (ECTA, #25 of 2002), but this will be repealed by section 69 of the POPIA once it is in force [expected to start with a transition period that comes into effect late in 2017].Section 11 of the Consumer Protection Act (CPA, #68 of 2008) follows in the footsteps of the ECTA by providing that you may refuse to accept, request the discontinuation of (opt-out) or pre-emptively block direct marketing communications, and that any opt-out or pre-emptive block must be respected by marketers, have their receipt confirmed in writing and that the exercise of these right must be performed free of charge (source: <http://ispa.org.za/spam/south-african-law/>).

The POPI Act and consent

“Section 69 of the POPIA [Direct marketing by means of unsolicited electronic communications] places significant limitations on the circumstances in which a party may engage in direct marketing by means of unsolicited communications by requiring individuals to have either consented to the use of their personal information (opt-in) or for there to be an existing relationship between the parties. An existing relationship between the parties is itself subject to additional limitations and does not result in a freedom to make repeated advances” (source: <http://ispa.org.za/spam/south-african-law/>).

A request for consent may only be submitted to the data subject once (section 69(2)(a)(ii). Section 69 is repeated in full below. However it is not clear whether this “one time opportunity” applies where the data subject moves to a new or different organisation and therefore could be deemed to have a different set of marketing needs. If this is interpreted as one-time-ever then a unique identifier would be required to ensure compliance.

It is not sufficient to ask for general consent for marketing. Section 13 requires that “personal information must be collected for a specific, explicitly defined and lawful purpose”.

Records of consent and withdrawal of consent

Section 11 of POPIA makes it clear that the Responsible Party must keep adequate records to prove informed consent has been voluntarily given. Records should also be maintained where consent has been denied or is later withdrawn.

Consent may be obtained via verbal or written means. The interpretation of voluntary consent in other countries suggests poor practice is to pre-tick or pre-select opt-in choices. Rather the data subject should be presented with a open option to provide consent (e.g. an empty not pre-ticked box).

Section 69 of the Protection of Personal Information Act

RIGHTS OF DATA SUBJECTS REGARDING DIRECT MARKETING BY MEANS OF UNSOLICITED ELECTRONIC COMMUNICATIONS, DIRECTORIES AND AUTOMATED DECISION MAKING 10

Direct marketing by means of unsolicited electronic communications

69. (1) The processing of personal information of a data subject for the purpose of direct marketing by means of any form of electronic communication, including automatic calling machines, facsimile machines, SMSs or e-mail is prohibited unless the data subject— 15

- (a) has given his, her or its consent to the processing; or
- (b) is, subject to subsection (3), a customer of the responsible party.

(2) (a) A responsible party may approach a data subject— 20

- (i) whose consent is required in terms of subsection (1)(a); and
- (ii) who has not previously withheld such consent,

only once in order to request the consent of that data subject.

(b) The data subject's consent must be requested in the prescribed manner and form.

(3) A responsible party may only process the personal information of a data subject who is a customer of the responsible party in terms of subsection (1)(b)— 25

- (a) if the responsible party has obtained the contact details of the data subject in the context of the sale of a product or service;
- (b) for the purpose of direct marketing of the responsible party's own similar products or services; and
- (c) if the data subject has been given a reasonable opportunity to object, free of charge and in a manner free of unnecessary formality, to such use of his, her or its electronic details— 30
 - (i) at the time when the information was collected; and
 - (ii) on the occasion of each communication with the data subject for the purpose of marketing if the data subject has not initially refused such use. 35

(4) Any communication for the purpose of direct marketing must contain—

- (a) details of the identity of the sender or the person on whose behalf the communication has been sent; and
- (b) an address or other contact details to which the recipient may send a request that such communications cease. 40

(5) "Automatic calling machine", for purposes of subsection (1), means a machine that is able to do automated calls without human intervention.

Role of the Direct Marketing Association South Africa (DMASA)

For any organisation that is engaged in direct marketing activities in South Africa it is recommended that consideration is given to adhering to the DMASA Code of Ethics and Standards of Practice. The DMASA is also known to be developing a Code of Conduct under the POPIA.

The DMASA also manages the National Opt Out Database (<https://www.nationaloptout.co.za/>). Registering on this database will mean that individuals will not be contacted by members of the DMASA.

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Note: this document does not constitute legal advice but is based on a practical interpretation of the requirements of the POPI Act.