

## **INTRODUCTION TO THE PROTECTION OF PERSONAL INFORMATION ACT (POPI ACT)**

### **BACKGROUND**

South Africa (SA) became a democracy in 1994. This development led to the new Constitution and the Bill of Rights which expressly provides for the protection of the right to privacy of individuals. In terms of the common law the right to privacy is limited by the rights of others and the public interest. The recognition and protection of the right to privacy as a fundamental human right in the Constitution provides an indication of its importance. The POPI Act follows the principles which are established in the European Union Data Privacy Directive of 1995 and the OECD (Organisation for Economic Co-operation and Development) Guidelines. Many European countries have incorporated these principles in their legislation, and South Africa will now be able to offer similar and adequate legislation which deals with the protection of personal information.

### **PURPOSE OF THE POPI ACT**

The purpose of the POPI Act is the following:

- To give effect to the constitutional right to privacy by safeguarding personal information when processed by a responsible party.
- To regulate the manner in which personal information may be processed, by establishing conditions, in harmony with international standards that prescribe the minimum threshold requirements for the lawful processing of personal information.
- To provide persons with rights and remedies to protect their personal information from processing that is not in accordance with the Act; and
- To establish voluntary and compulsory measures, including the establishment of an Information Regulator, to ensure respect for and to promote, enforce and fulfil the rights protected by the Act.

### **WHAT IS MEANT BY “PERSONAL INFORMATION”?**

“Personal information” means information relating to an identifiable, living, natural person, and where it is applicable, an identifiable, existing juristic person, and may include the following:

- information relating to the race, gender, sex, pregnancy, marital status, national, ethnic or social origin, colour, sexual orientation, age, physical or mental health, well-being, disability, religion, conscience, belief, culture, language and birth of the person
- information relating to the education or the medical, financial, criminal or employment history of the person
- any identifying number, symbol, e-mail address, physical address, telephone number, location information, online identifier or other particular assignment to the person
- the biometric information of the person

(Biometric information includes a technique of personal identification that is based on physical, physiological or behavioural characterisation including blood typing, fingerprinting, DNA analysis, retinal scanning and voice recognition.)

- the personal opinions, views or preferences of the person
- correspondence sent by the person that is implicitly or explicitly of a private or confidential nature or further correspondence that would reveal the contents of the original correspondence
- the views or opinions of another individual about the person
- the name of the person if it appears with other personal information relating to the person or if the disclosure of the name itself would reveal information about the person

Both individuals and companies are included in the ambit of “personal information”.

### **WHAT IS MEANT BY “PROCESSING”?**

Processing is any operation or activity or any set of operations, whether or not by automatic means, concerning personal information. Processing is therefore the automated or non-automated activity of collecting, recording, organising, storing, updating, distributing and even the act of deleting personal information.

### **WHAT IS MEANT BY “RESPONSIBLE PARTY”?**

The “responsible party” is the company or entity that decides what to do with personal information and how to process the information.

### **WHAT IS MEANT BY “RECORD”?**

Record means any information that is recorded in any format that is in the possession or under control of a responsible party, regardless of who made the record and when the record came into existence. Records may include:

- writing on any material
- book, map, plan, graph or drawing
- information produced, recorded or stored by means of any tape-recorder, computer equipment, whether hardware or software or both, or other device.

The POPI Act applies to the processing of personal information where:

- a responsible party enters the information in a record using automated or non-automated methods. If the recorded information is processed by non-automated means it must be part of a filing system or intended to be part of a filing system.
- a responsible party is domiciled in the RSA or if a responsible party is not domiciled in the RSA, BUT uses automated or non-automated methods in the RSA - except if these methods are only used to forward personal information through the RSA in the course of purely household or personal activity
- where the information has been sufficiently de-identified and cannot be re-identified again and
- some state functions including criminal prosecutions, national security etc.

The POPI Act does not apply to the processing of personal information

- in the course of purely household or personal activity
- where the information has been sufficiently de-identified and cannot be re-identified again and
- some state functions including criminal prosecutions, national security etc.

Certain journalistic, literary and artistic purposes are also excluded from the ambit of the Act.

## **TRANSBORDER FLOW OF PERSONAL INFORMATION**

A responsible party in the Republic may not transfer personal information about a data subject to a third party who is in a foreign country unless certain conditions are met.

## **THE CONDITIONS FOR LAWFUL PROCESSING OF PERSONAL INFORMATION**

The POPI Act sets conditions that any person who processes personal information must comply with and aims to protect the personal information of people. The Act does not aim to stop the free flow of information but creates a balance. The POPI Act includes eight information protection conditions and the Conditions are subject to exclusions and processing of information is prohibited in certain instances. The conditions are:

- Accountability
- Processing limitation
- Purpose specification
- Further processing limitation
- Information quality
- Openness
- Security safeguards
- Data subject participation

## **ACCOUNTABILITY**

Responsible parties must comply with all the conditions

- when deciding the purpose of processing personal information
- when deciding how the processing will be done
- and while the information is being processed

## **PROCESSING LIMITATION**

Personal information of a data subject must be processed lawfully and in a reasonable manner that does not infringe the privacy of the data subject. In addition to being lawful, only information that is necessary for the purpose of the collection, must be processed. The information that is collected must be adequate and relevant for the purpose, and not more than (excessive) what is required for the purpose. If a data subject has objected to the processing of personal information; the responsible party may no longer process the personal information and consent may be withdrawn at any time.

Personal information must be collected directly from the data subject except in certain circumstances, for instance where the information is already available in a public records or where there is consent to collect the information from another source.

## **PURPOSE SPECIFICATION**

Personal information must be collected for a specific, explicitly defined and lawful purpose related to a function or activity of the responsible party and the data subject must be made aware of the fact that personal information is being collected. Records of personal information must not be retained any longer than is necessary for achieving the purpose for which the information was collected or subsequently processed. There are exceptions for non-compliance with this condition.

## **FURTHER PROCESSING LIMITATION**

Further processing of personal information must be compatible with the purpose for which it was collected in the first place.

## **INFORMATION QUALITY**

The responsible party must take reasonable practicable steps to ensure that personal information is complete, accurate, not misleading and updated where necessary. This must be done while the responsible party keeps the purpose for which the information was collected or further processed, in mind.

## **OPENNESS**

There are a number of requirements which a responsible party must meet when personal information is collected from a data subject and there are also reasons for non-compliance with this condition. This includes that the responsible party must take reasonably practicable steps to ensure that the data subject is aware of the fact that the information is being collected and where the information is not collected from the data subject, the source from which it is collected.

## **SECURITY SAFEGUARDS**

The responsible party is responsible to secure the integrity and confidentiality of personal information in its possession or under its control. This is done by taking appropriate, reasonable technical and organisational measures to prevent loss of, damage to or unauthorised destruction of personal information; and unlawful access to or processing of personal information.

## **DATA SUBJECT PARTICIPATION**

A data subject has the right to request a responsible party to confirm, free of charge, whether or not the responsible party holds personal information about the data subject – proof of identity must be provided to the responsible party. A record or description of the personal information about the data subject held by the responsible party, including information about

the identity of all third parties, or categories of third parties, who have, or have had, access to the information must also be provided to the data subject. Data subjects may also request that personal information be corrected.

## **EXEMPTIONS**

There is provision for exceptions to the information protection conditions, especially in specific sectors in applicable circumstances. Examples of such exemptions are:

- where banks are required to supply the Department of Trade and Industry with statistics in relation to their lending patterns
- where the data processor has some legitimate interest in processing data.

The Information Regulator may also grant exemptions from the conditions for processing personal information.

## **RIGHTS OF DATA SUBJECTS AND SPECIAL PERSONAL INFORMATION**

The POPI Act sets out specific rights of data subjects. The rights that data subjects (you and me) have are the following:

- the right to have personal information processed in accordance with the conditions discussed
- the right to be notified that personal information is collected and that it has been accessed by unauthorised persons (for instance where bank accounts have been hacked into)
- the right to establish if a responsible party holds personal information of a data subject and to request access to the information
- the right to request correction, destruction or deletion of personal information
- the right to object to the processing of personal information
- the right not to have personal information processed for purposes of direct marketing by means of unsolicited electronic communications
- the right not to be subject, under certain circumstances, to a decision which is based solely on the basis of the automated processing personal information intended to provide a profile of such persons
- the right to submit a complaint to the Regulator regarding the alleged interference with the protection of the personal information of any data subject or to submit a complaint to the Regulator in respect of a determination of an adjudicator
- the right to institute civil proceedings regarding the alleged interference with the protection of his, her or its personal information.

These rights are all subject to certain conditions and in most instances certain procedures must be followed in exercising these rights.

## **DIRECT MARKETING**

The POPI Act changed the manner in which consent was regarded for direct marketing purposes and regulates the sending of unsolicited commercial communications with an "opt-

in" mechanism for consumers. This means that processing of the personal information of a data subject for the purposes of direct marketing by means of any form of electronic communication is prohibited, unless the data subject has specifically consented to the processing; or is a customer of the responsible party doing the marketing.

A responsible party may approach a data subject (who has not previously withheld consent) only once to request consent for processing the data subject's personal information for direct marketing purposes. The data subject's consent must be obtained in the prescribed manner and form.

## **THE INFORMATION REGULATOR**

The POPI Act established a new regulatory body called the Information Regulator. The Information Regulator is, among other things, required to undertake educational programmes for the purpose of promoting the protection of personal information, monitor and enforce compliance by public and private bodies with the provisions of the Act, receive and handle complaints about alleged violations of the protection of personal information of data subjects.

## **CODES OF CONDUCT**

The POPI Act makes provision for Codes of Conduct to be issued by the Regulator. These Codes may be industry specific and must meet specific requirements which include:

- meeting all the conditions for the lawful processing of personal information or set out obligations that provide a functional equivalent of all the obligations in those conditions; and
- prescribing how the conditions for the lawful processing of personal information are to be applied, or are to be complied with, given the particular features of the sector or sectors of society in which the relevant responsible parties are operating.

*Source: <http://www.banking.org.za/what-we-do/market-conduct/regulatory-framework/popia>*