



THE PROTECTION OF PERSONAL INFORMATION ACT 4 OF 2013 (POPI)



INTRODUCTION

The right to privacy has always been entrenched in South African common law and was later codified in section 14 of the Constitution of the Republic of South Africa, 1996. There was no legislation however, that dealt exclusively with data protection, hence POPI was enacted in November 2013. It establishes the rights and duties to safeguard personal data. This Act provides for the balancing of the legitimate needs of entities to collect and use personal data for business and other purposes with the right of individuals to have their right to privacy. POPI was also enacted in to order to ensure the country in line with existing data protection laws around the world. If there is conflict between POPI and another law, POPI prevails, unless the other law gives greater protection to personal information.

POPI will come into force on a date to be determined by the President by proclamation in the Gazette, this date is yet to be determined. Some of the provisions relating to the establishment of the Information Regulator and the making of Regulations under POPI have however come into force on 11 April 2014. The regulator was appointed on 01 December 2016 and the final Regulations were published on 14 December 2018.

WHAT IS THE PURPOSE OF POPI?

The purpose of this Act is to:

- (a) give effect to the constitutional right to privacy, by safeguarding personal information when processed by a responsible party, subject to justifiable limitations that are aimed at-
 - (i) balancing the right to privacy against other rights, particularly the right of access to information; and
 - (ii) protecting important interests, including the free flow of information within the Republic and across international borders;
- (b) 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;
- (c) provide persons with rights and remedies to protect their personal information from processing that is not in accordance with this Act.

WHAT IS PERSONAL INFORMATION?

Personal information is defined as information relating to an identifiable, living, natural person, and (where applicable), an identifiable, existing juristic person, including the name, race, gender, marital status, address



and identifying number of a person, symbol, email address, physical address, telephone number, location information, online identifier or other particular assignment to the person.

- ✓ Also note that POPI applies to clients, suppliers, employees and business partners.

SPECIAL PERSONAL INFORMATION

This is personal information relating to the religious or philosophical beliefs, race or ethnic origin, trade union membership, political persuasion, health or sex life or biometric information of a data subject, or the criminal behavior of a data subject of any offence, or any proceedings in respect of any offence allegedly committed by a data subject or the disposal of such proceedings. Stricter conditions apply when processing special personal information.

Special personal information may not be processed unless, among other things:

- ✓ The Regulator has authorised such processing;
- ✓ Processing is carried out with the consent of a data subject;
- ✓ Processing is necessary for the establishment, exercise or defence of a right or obligation in law;
- ✓ Processing is necessary to comply with an obligation of international public law;
- ✓ Processing for historical, statistical or research purposes to the extent that the purpose serves a public interest and the processing is necessary for the purpose concerned, or it appears to be impossible or would involve a disproportionate effort to ask for consent, and sufficient guarantees are provided for to ensure that the processing does not adversely affect the individual privacy of the data subject to a disproportionate extent; or
- ✓ Information has deliberately been made public by the data subject.

EXCLUSIONS

POPI **does not** apply where the processing of information:

- ✓ Is done in the course of a purely personal or household activity;
- ✓ That has been de-identified to the extent that it cannot be re-identified again;
- ✓ By or on behalf of a public body which involves national security, defence or public safety or for the prevention, investigation or proof of offences, the prosecution or the execution of sentences;
- ✓ For purposes of purely journalistic reasons if subject to a code of conduct.

WHAT IS PROCESSING?

Processing means any operation or activity or any set of operations, whether or not by automatic means,



concerning personal information, including the collection, receipt, recording, organisation, collation, storage, updating or modification, retrieval, alteration, consultation or use; the dissemination by means of transmission, distribution or making available in any other form; or the merging, linking, as well as restriction, degradation, erasure or destruction of information.

THE PROCESSIONS CONDITIONS

These are conditions which must be complied with when processing personal information.

- 1. Accountability:** Responsible party must comply with these 8 principles
- 2. Processing limitation:** Personal information should be obtained by limited and lawful processing that does not infringe on a person's privacy
- 3. Purpose specification:** The purpose for which personal information is collected must be specific, explicitly defined and lawful
- 4. Further processing limitation:** Further processing must be compatible with the purpose for which the personal information was collected
- 5. Information quality:** Reasonably practicable steps must be taken to ensure that personal information is complete, accurate, updated and is not misleading
- 6. Openness:** Maintain documentation of all processing operations under its responsibility
- 7. Security safeguards:** The integrity and confidentiality of the personal information must be secured
- 8. Data subject participation:** the data subject has certain access rights including the right to request its deletion.

TRANS BORDER FLOW OF INFORMATION

A responsible party may not transfer personal information about a data subject to a 3rd party in a foreign country unless certain requirements are met.

HOW DOES IT APPLY TO YOU?

If you collect or hold information about an identifiable individual or if you use, disclose, retain or destroy that information, you are likely processing personal information and are therefore subject to POPI.

HOW TO BECOME POPI COMPLIANT

The important questions you should be addressing in terms of POPI are what information do you currently retain? How are you using this information? Are you collecting it, storing it, or processing it for business requirements? Who has access to the data? Are you transferring any data across the border to countries with no privacy laws?



You may consider implementing the following¹:

- ✓ Do an assessment of the data processing activities that your organisation engages in;
 - Ensure that the 8 processing conditions are complied with, e.g. POPI consent clauses are inserted in application forms or other appropriate documents. It must be noted that particular consent has to be obtained from the data subject for any direct marketing purposes.
- ✓ Appropriate written contracts with parties for whom personal information is processed, or to whom the processing of personal information is outsourced – (note: this includes contracts with clients, employees, business partners and suppliers);
- ✓ Review the security measures you have in place to secure personal data;
- ✓ The terms under which intra-group transfers of personal information occurs;
- ✓ Have internal procedures in place to ensure compliance with POPI;
- ✓ Provide staff with training on POPI;
- ✓ Have policies in place relating to data protection such as a Clean Desk Policy, Data Protection Policy (Privacy Policy), Data Retention and Destruction Policy, Website Privacy Policy and Social Media Policy.

¹ These are only recommendations.

NB the information contained in this article is provided for information purposes only and should not be construed as legal advice. PPS is an authorised FSP.