

Lawful Justification for Processing Personal Information: Is consent really the fairest of them all?



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In order for personal information to be processed lawfully and in a reasonable manner that does not infringe the privacy of the data subject, too often responsible parties are relying on consent of the data subject, which is only one of the six lawful justifications contemplated in POPIA.



It has become increasingly common to merely obtain the consent of the data subject, before processing personal information, in an effort to comply with the requirement in the Protection of Personal Information Act 4 of 2013 (“**POPIA**”) that there must be an established lawful justification for processing of personal information. However, it is clear from the wording in POPIA that it was never intended that consent be relied upon as the primary lawful justification, but that it be considered as one of several grounds for the processing of personal information.

As POPIA explicitly states that personal information may only be processed if there is a lawful justification for such processing, the responsible party, being the party who determines the purpose of and means for processing personal information, must be able to base the processing of personal information on at least one of the grounds of lawful justification set out in section 11(1) of POPIA. Failure to do so may result in non-compliance with the provisions of POPIA.

The other grounds of lawful justification contemplated in section 11(1)(b) to (f) of POPIA include instances where the processing of personal information is necessary for the conclusion or performance of a contract; to comply with an obligation imposed by law; to protect the legitimate interests of the data subject; for the proper performance of a public law duty by a public body; or to pursue the legitimate interests of the responsible party. These lawful justifications may be preferred over consent, under the specific purposes of the processing of personal information.

The order of appearance of these grounds of lawful justification in POPIA is not indicative of the existence of any hierarchy. Determining the most appropriate lawful justification will depend on the purpose for processing the personal information. Although consent is often at the heart of data privacy and protection compliance, is it not always the most appropriate ground of lawful justification.

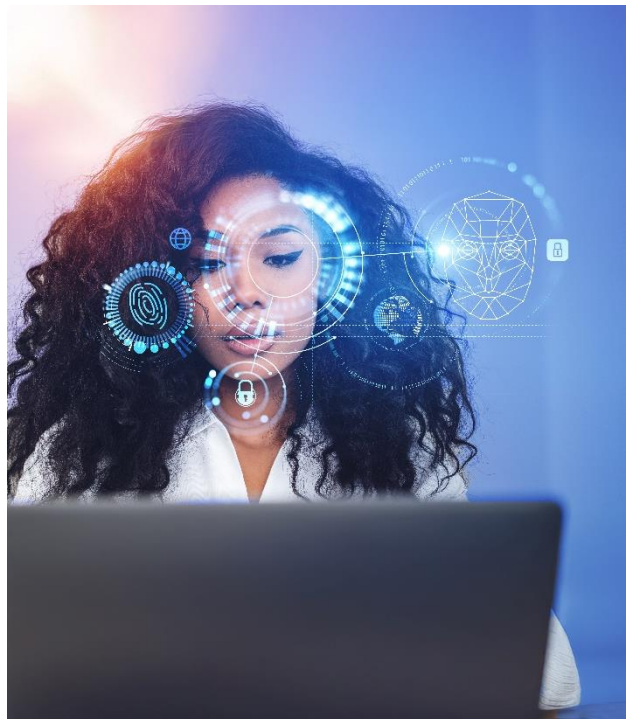
The reliance on consent

The lawful justification for processing of personal information should be clearly linked to the purpose of such processing. Only in instances where consent is, in fact, the most appropriate ground of lawful justification for the purpose that the personal information is being processed, consent must be obtained voluntarily, and it must be a specific and informed expression of will in terms of which the data subject gives permission for the processing of personal information. The practice of bundling consent clauses, for the processing of personal information for any and all purposes, with other provisions in a contract should be avoided. There should not be a catch-all lawful justification for all processing activities. The most appropriate ground of lawful justification should be specific to the purpose.

In all instances where consent is relied on for the processing of personal information, section 11(2)(b) of POPIA provides that the data subject has the right to withdraw consent at any time. The responsible party must immediately cease such processing activities if consent is withdrawn. If the data subject would be prejudiced by the withdrawal of such consent, in that the ceasing of such processing activities would negatively impact on an ongoing arrangement between the data subject and the responsible party, this would clearly indicate that consent was not the most appropriate lawful justification to have relied upon. For example, where a company relies on consent only as a lawful justification for processing personal information of an employee, if that employee then withdraws the consent, it will negatively impact on the ongoing employment of that employee. Similarly, where an insurer, for example, relies on consent only as a lawful justification for processing personal information in respect to an insurance contract, if the insured withdraws that consent, it will prove difficult for the insurer to continue with that insurance contract without being able to process the personal information of the insured, consequently prejudicing the insured.

Where there is more than one purpose for processing personal information

In instances where the processing of personal information is required for more than one purpose, each purpose must have a lawful justification. In the example of a service contract, the grounds of lawful justification may include processing personal information for the conclusion or performance of a contract (section 11(1)(b) of POPIA); obtaining consent to process personal information for the purposes of direct marketing (section 11(1)(a) of POPIA); and processing personal information to comply with an obligation imposed by law to report a customer to the authorities if there is suspicion of fraud or any other criminal activities (section 11(1)(c) of POPIA). In terms of section 11(2)(b) if a customer withdraws consent to receiving direct marketing for example, the processing activities that are based on other grounds of lawful justification will not be affected by such withdrawal, meaning that the services rendered to the customer in terms of the service contract will not be impacted by the withdrawal of consent.



A silver bullet that may backfire

Responsible parties are cautioned not to rely on more than one lawful justification for the same purpose when processing personal information. Consent should not be viewed as an alternative ground of lawful justification to legitimise the processing of personal information when it is not appropriate in the circumstances.

Meta, which owns both Facebook and Instagram, was fined €390 million in terms of the European Union's General Data Protection Regulation (GDPR) when the Irish Data Protection Commission found that Meta was relying on the lawful justification of "contractual necessity" to force users to consent to the processing of personal information for personalised advertising by accepting Meta's terms and conditions. If users did not accept the terms and conditions, they were unable to use Facebook or Instagram. Meta was not clear on how processing personal information for the purposes of personalised advertising was necessary for the performance of these platforms.

It follows that if a data subject withholds consent, or subsequently withdraws consent, to the processing of personal information, a responsible party must not clamber for another ground of lawful justification to rely on to process the personal information against the wishes of the data subject.

Conclusion

Personal information must be processed lawfully and in a reasonable manner that does not infringe the privacy of the data subject. Determining the most appropriate ground of lawful justification for the processing of personal information in terms of POPIA is complex and it may be that consent is not always the best answer. As we have seen, responsible parties may find themselves on the wrong side of the law should it consider consent to be a simple solution to a complicated issue. Obtaining consent may be more trouble than its worth when it is not the most appropriate ground of lawful justification for the processing of personal information. It is incumbent on the responsible party to ensure that it is lawful and justifiable to process personal information in order to be compliant with POPIA, and in instances where a data subject withdraws consent, the responsible party must ensure that it is not prejudicial to the data subject to cease processing the personal information immediately.

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