

# Protection of Personal Information Act (POPI)

September 2016



## Information Regulator Appointment for POPI awaiting confirmation

The pending appointment of an Information Regulator for the Protection of Personal Information (POPI) Act, is nearing following the favourable vote for the nomination of Advocate Pansy Tlakula as the Chairperson of the Information Regulator and Advocate Lebogang Stroom and Johannes Weapond, as full time members of the Information Regulator, with Professor Tana Pistorius and Sizwe Snail as part-time members on 7 September 2016 and takes South Africa closer to the implementation of South Africa's first comprehensive piece of privacy legislation. The Information Regulator is primarily tasked with monitoring compliance and enforcing the provisions of POPI.

However, the Information Regulator will also play a key role in providing guidance on the conditions of the POPI Act as well as vital training and awareness to organisations processing personal information in respect of how they practically implement POPI and the general public around how to enforce their right to privacy. In other words, the Information Regulator will provide effect to the conditions of POPI by investigating suspected cases of non-compliance and levying fines and penalties for entities that are found to be non-compliant. Furthermore, the jurisdiction of the Information Regulator will not only include POPI but also cover the Promotion of Access to Information Act (PAIA) which is currently regulated by the Human Rights Commission of South Africa.

With the pending appointment of the Information Regulator subject to the confirmation of the President of South Africa, who reports to Parliament, it appears that the actual date of implementing the provisions of POPI by public and private organisations may well be nearing.

In this context, it becomes necessary to revisit some of the important provisions of POPI.

**Intent:** POPI governs the way personal information is collected, stored, used, disseminated, and deleted. The overarching objective of POPI is to protect personal information by enforcing standards on the lawful processing of personal information. Ultimately, the POPI Act brings South African organisations into line with numerous foreign countries who have had data protection legislation in place and aims to enable the free transfer of personal information across borders.

**Scope:** The provisions of the POPI Act applies to not only public and private organisations but also individuals who process personal information for commercial purposes. It specifically applies to:

- **South African organisations** which process personal information (including personal information pertaining to employees)
- **Foreign organisations** that process personal information in South Africa (unless information is merely forwarded) using automated means (use of electronic equipment operating automatically under instructions) or where the personal information forms part of a filing system.

It is important to note that processing purely for personal or household activities, or for journalistic, literary or artistic purposes is excluded from the confines of the POPI Act.

## Salient features:

- POPI prescribes eight conditions for the lawful processing of personal information which address how organisations demonstrate accountability for ensuring they respect the privacy of individuals. Some of these conditions touch on how organisations collect personal information and who they collect it from, the purposes for which personal information is processed and how long it is retained, the transparency of their processing activities, data quality, and the security of personal information.
- Personal information relating to children (i.e. under the age of 18) and special personal information (which includes private information relating to religious beliefs, race, trade union membership, health or sex life, biometrics and criminal offences) are subject to more austere processing obligations and may only be processed, with consent from individuals, or under specific circumstances as defined in the act. For example, cross-border transfers of these categories of information require prior approval from the Information Regulator if the foreign recipient does not provide an adequate level of protection.
- The POPI Act also grants subjects certain rights which are: (i) to know if an organisation holds personal information about them, free of charge; (ii) to request correction or deletion of inaccurate, irrelevant, excessive, out of date, incomplete, misleading or unlawfully obtained personal information; and (iii) to request the destruction or deletion of personal information that an organisation is no longer authorised to retain.
- Companies are prohibited from contacting a prospective customer through calls, messages or emails for the purposes of direct marketing without the person's informed consent. Current legislation in South Africa requires organisations to provide individuals with the opportunity to "opt-out" of receiving direct marketing communications. However, POPI redefines this by now requiring organisations to provide individuals with the opportunity to "opt-in" prior to receiving direct marketing communications.
- Personal information may only be transferred to a third party in a foreign country in limited circumstances. However, the act allows organisations to transfer personal information across borders with the subject's informed consent or where the foreign country to which the personal information is being transferred is subject to obligations similar to those under POPI in respect of the processing of personal information.
- In the event of a breach of personal information, individuals must be informed when there are reasonable grounds to believe that their personal information has been accessed or acquired by an unauthorised person.

- The act mandates the appointment of an 'Information Officer', as described in PAIA, whose main responsibility is to assist the Information Regulator with investigations and to deal with requests or concerns put forward by individuals in respect of the processing of their personal information.

## Historical timelines:

- The POPI Act, No. 4 of 2013, was signed into law on 19 November 2013, after being introduced in the National Assembly during 2009.
- It was published in the Government Gazette on 26 November 2013.
- The President proclaimed the effective date of certain sections of the Act as 11 April 2014. However, these effective sections pertained to the establishment of the Information Regulator and the creation of supporting regulations. Once the sections that place obligations on organisations to ensure the lawful processing of personal information are commenced, organisations will have one year following the date of commencement to comply with the provisions of POPI.
- On 7 September 2016, the National Assembly voted in favour of the nomination of Advocate Pansy Tlakula as the Chairperson of the Information Regulator its full-time and part-time members. The appointment of Advocate Tlakula and the members of the Information Regulator is subject to the confirmation by the President of South Africa.

## Consequences of non-compliance:

- Non-compliance with POPI may result in a civil action for damages, enforcement action by the Information Regulator (on its own initiative or on receipt of a complaint) or criminal action for any offence committed.
- Offences will be prosecuted in the magistrates' court and, on conviction, may give rise to imprisonment of up to 12 months or 10 years, depending on the severity of the offence, or a fine. On the other hand, the offence may warrant both imprisonment and a fine.
- Alternatively, the Information Regulator may issue an administrative fine up to R10million for a breach of POPI.