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A Critical Discussion of the Protection of Personal Information Act 4 of 2013 ("POPIA") in relation to the Eight Lawful Conditions of Processing and South African Businesses Readiness of the POPIA

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## INTRODUCTION

The Protection of Personal Information Act 4 of 2013 ("POPIA") focuses on the privacy and protection of the data subjects [1] personal information. Therefore, it can be said that the purpose of POPIA applies to the processing of personal data, that relates to a data subject, by a responsible party or operators. POPIA provides lawful processing conditions by responsible parties to process the personal information of data subjects in a manner that is clearly defined within the Act.

The following critical discussion will analyze eight lawful conditions for processing of personal information in terms of POPIA and the readiness of South African Business for the implementation of the POPIA. Due to implementation of Information Regulator [2] by the President of the Republic of South Africa on 01 December 2016 there has been steady growth for the need of compliance of the POPIA by responsible parties. [3]



[1] Data subject is defined in terms of Section 1 of the Protection of Personal Information Act 4 of 2013 as "a person to whom personal information relates."

[2] Section 39 of the Protection of the Personal Information Act 4 of 2013 reads as follows -  
"There is hereby established a juristic person to be known as the Information Regulator, which -  
a) has jurisdiction through the Republic;

b) is independent and is subject only to the Constitution and to the law and must be impartial and perform its functions and exercise its powers without fear, favor or prejudice;

c) must exercise its powers and perform its function in accordance with this Act and the Promotion of Access of Information Act; and

d) is accountable to the National Assembly."

[3] SAICA, 2017 Draft legislations: *POPIA, SAICA*, access on 28 May 2020, from <https://www.pwc.co.za/en/assets/pdf/popi-white-paper-2011.pdf>

## THE EIGHT LAWFUL CONDITIONS FOR PROCESSING OF PERSONAL INFORMATION IN TERMS OF POPIA

a. What Would Qualify the Compliance of the Eight Conditions of Lawful Processing of Personal Information.

The lawful processing of a data subject's personal information must be, conducted lawfully and be done in a reasonable manner, so that it may no infringe on the privacy of the data subject. Therefore, the POPIA requires certain responsible parties to comply with the minimum requirements of the eight conditions of lawful processing. [4] If, the POPIA requires for a responsible party to adhere to the conditions, first what is the definition of a responsible party in terms of POPIA? POPIA defines a responsible party as 'a public or private body or any other person which, alone or in conjunction with others, determines the purpose of and means for processing information.' [5]

An example of a responsible party could be a law firm. A law firm collects various amounts of personal data from its client, hereinafter referred to as a 'data subject', in order for the furtherance of the data subject's instructions. It is necessary for a law firm to collect the correct information from the data subject to ensure the correct processing information to assist with providing proper advise to a data subject. Therefore, and inference can be drawn from the definition of the POPIA that the purpose of a law firm would qualify as responsible party and further, would be obligated to comply with the eight lawful conditions of processing POPIA.

b. What are the Eight Conditions of Lawful Processing of Personal Information and its Overarching Purpose as defined in the Protection of Personal Information Act 4 of 2013.

Chapter 3 of the POPIA addresses the conditions for lawful processing of personal information. The right conditions as set out within the POPIA are: 1) Accountability; 2) Processing limitation; 3) Purpose specification; 4) Further processing limitation; 5) Information quality; 6) Openness; 7) Security safegaurds; and 8) Data subject participation.

The conditions are intended to firstly, ensure that the conditions are met are lawful for any processing of personal data within the law [6] and secondly, on regard to the context of a data subject the conditions qualify the right a data subject has in terms of POPIA, which allows for the data subject to enforce compliance of the conditions against the responsible party, if the conditions for the lawful processing of personal information has been contravened.



[4] D Millard & EG Bascerano "Employers' Statutory Vicarious Liability in Terms of the Protection of Personal Information Act" PER 2016 (19) at 10.

[5] Responsible Party is defined in Section 1 of the Protection of Personal Information Act of 2014.

[6] Roos "Chapter 10: Protection of Personal Information" in Neethling et al *Neethling of Personality Rights* (2019) 381.

**The eight conditions will be briefly discussed and its intended purpose in terms of the POPIA.**

(i) The first conditions of accountability [7] imposes a duty of diligence upon the responsible party to ensure that the provisions of the POPIA are complied with from the beginning, during and after of the data collection process. Therefore, it should be noted that a data subject does not have a right to accountability, this is because Section 8, referring to accountability, is not expressly mentioned in terms of Section 5 of a data subject's rights. [8]

(ii) The second condition is processing limitation, which has four subsections of (i) lawfulness and reasonableness [9]; (ii) minimality [10]; (iii) consent, justification and objection; and (iv) direct collection. The overarching aspects of the four subsections is to highlight the limits to the processing of the personal data of data subject to ensure that such processing is done lawfully. [11]

(iii) The third conditions is purpose specification is closely related to 'specific and informed consent. There cannot be specific and informed consent if a responsible party cannot provide the data subject with expressly informed information about the processing of information and that the information should not be kept longer than its intended purpose. [12]

(iv) Further processing limitation is the fifth condition; the responsible party may not further process the personal information of a data subject in a way that goes beyond the normal parameters for which it was initially collected. [13]

(v) The sixth conditions is information quality [14] therefore, information is required to be updated regularly and verified with the data subject periodically.

(vi) The security safegaurds are held in from Section 19 and Section 22 of POPIA, this requires the responsible party to have reasonable safegaurds internally and externally measures which relate to the integrity and confidentiality of personal information. [15] Reasonable measures includes risk assessments internally and externally of all reasonably foreseeable risk i.e. background checks on people dealing with data, security system of the building. If there is a breach of the security safegaurds then a data subject should be informed immediately either via mail, email or a media statement as reasonably possible and to the Information Regulator.

(vii) Data subject participation principle allows for the data subject to participate and have a measure of influence, the processing of data on them by other individuals or organizations. [16] Furthermore, data subjects can request from the responsible part personal information at a required fee and a responsible party may refuse such information, if the Promotion of Access of Information 2 of 2000 ("PAIA") provides ground of refusal. [17]

[7] The condition of 'Accountability' is held in terms of Section 8 of Personal Protection of Information Act 4 of 2013.

[8] The Rights of the Data Subject is enshrined in terms of Section 5 of Personal Information Act 4 of 2013. This ensures that the data subject has recourse to have his or her personal information processed in accordance of the lawful processing pf personal information as referred to in Chapter 3 of the Act. Accountability as a right is not afforded to the data subject in terms of Section 5.

[9] Section 9 ' Lawfulness of Processing'

(a) lawfully; and

(b) in a reasonable manner that does not infringe the privacy of the data subject

Lawfulness is the corner stone of all manners of processing personal information and is a circular provision. If lawfulness is not applied to all eight conditions, the responsible part would have contravened the Act and will result in penalties against the responsible party.

[10] Section 10 -

"Personal information may only be processed if, given the purpose for which it is processed, it is adequate, relevant and not excessive."

[11] Roos ' Chapter 10: Protection of Personal Information' in Neethling et al *Neethling in Personality Rights* (2019) 381.

[12] Section 14 of the Protection of Personal Information Act 4 of 2013.

[13] Supra note 11, 385. Section 15 of the Act stipulates that further processing must be in accordance or compliant with the purposes that it was collected.

[14] Section 16 requires for a responsible party to take reasonable practicable steps to ensure that the data is correct, complete and accurate.

[15] Supra note 11, 388

[16] Ibid, 390.

[17] The grounds of refusal in terms of the Promotion to Access to Information is held in terms of Chapter 4 of the Act. The grounds of refusal relate to protecting the privacy of a third part, protecting the commercial records of a third part in terms of an agreement, protecting confidential information in terms of an agreement, protecting the safety of a person or Juristic person, protecting information in legal proceedings and national security.



With an understanding of the background of POPIA and the eight lawful processing conditions that are required to be complied with the responsible party's what does this mean for South African business going forward?

## **SOUTH AFRICAN BUSINESS AND ITS READINESS FOR PROTECTIONS OF PERSONAL INFORMATION ACT 4 OF 2013**

It should be noted that the POPIA is not fully operational as an Act and will commence at a later stage. [18] However, the POPIA can provide a good guideline as to how the POPIA will operate once it fully comes into effect. However, once the POPIA becomes fully operational, business will need to understand the provision stipulated in the POPIA and be able to adapt these provisions to their businesses. This means that business must make adaptive changes and place measures on their employees, systems and technology. [19] If business don't comply with the provisions of the POPIA, the could be fined or a possible prison sentence. [20]

Firstly, for South African business to be aware of their readiness three questions needs to be asked by the Information Regulator to the businesses; firstly, are companies aware of the POPIA? Secondly, have companies taken measures to comply with the provisions with POPIA? Thirdly, if businesses fail to comply with the provisions what effect will it have on their business? [21]

[18] The current provisions of the Protection of Personal Information Act 4 of 2013 that are operational are the definitions in Section 1, the Information Regulator in terms of Chapter 5, the Regulations in Section 112 and the Procedure for making regulations in terms of Section 113.  
[19] Kandeh et al "Enforcement of the Protection of Personal Information (POPI) Act: Perspective of Fata Management Professionals" 2018 20(1) South African Journal of Information Management 3.  
[20] Offences, Penalties and Administrative Fines are held in terms of Chapter 11 of the Protection of Personal Information Act 4 of 2013.  
[21] Supra note 19 at 5. These questions had been formulated toward Information Technology (IT) companies, however it can be a good indicator of how businesses that deal with personal information are prepared for the POPIA.

What can be taken from the article by Kandeh is that there is a general awareness of the POPIA but the implementation varies due to the challenges and complexities of the POPIA. Therefore, some measures are taken but will not be enough once the Act becomes fully operational. A great point made is that each industry should create their own code of conduct or guidelines in relation to the POPIA so that all business can be compliant once the POPIA becomes fully operational in law. [22] Furthermore, most businesses are reluctant to adopt the provisions of the POPIA into their day-to-day operations because until such a time the Act becomes operational, business see that full compliance as a distant concept, most business sees it as a financial burden to comply. The general consensus is that until the POPIA becomes fully operational, most businesses are not enthusiastic to employ full-sale implementation of the regulations and provisions of the POPIA as it might disrupt their operations. [23]

## CONCLUSION

The POPIA provides the data subjects rights which are afforded to them by provisions of the Act. This requires that a responsible party to lawfully process the data subject information in terms of the POPIA. If the responsible party breaches or fails to comply with the provisions, the could be fined and imprisoned by an order made by the Information Regulator. Therefore, if the POPIA requires responsible parties to comply with these provisions, are businesses in South Africa, that handle personal information of data subject, ready to implement the provisions and if not, what were the reasons of non-compliance.

There needs to be a greater awareness of the POPIA in terms of business and the consequences of non-compliance by parties. Furthermore, due to the fact that the POPIA is not fully operational, there is a lack of urgency of business to comply or begin to implement the provisions through their operations systems. The success of POPIA will occur through implementation of guidelines or codes of conduct on the processing of a personal information tailored to each industry. This will ensure that compliance is met timeously.

[22] Supra note 19 at 8.

[23] Ibid

