

TRAINING ON PROTECTION OF PERSONAL INFORMATION ACT 4 OF 2013 (POPIA)



ESTABLISHMENT OF THE INFORMATION REGULATOR

Ensuring protection of your personal information and effective access to information



**INFORMATION
REGULATOR
(SOUTH AFRICA)**
Ensuring protection of your personal information
and effective access to information

INTRODUCTION

- As you might be aware, the Regulator consists of the Chairperson and four ordinary members. The Chairperson and two ordinary members serve in a full- time capacity and the other two ordinary members serve in a part-time capacity.

- On 2 December 2016, the five members met for the first time in a board room of the Department of Justice and Constitutional Development in Pretoria at what was the inaugural meeting of the first and newly established Information Regulator in South Africa. After a brief exchange of pleasantries and self-introductions, we began to figure out what we needed to do to begin the mammoth task of establishing the Regulator. Armed with copies of the Constitution, the Protection of Personal Information Act (POPIA) and the Promotion of Access to Information Act (PAIA), we began the process of strategizing,

- conceptualizing and thinking through what we needed to do to give effect to what POPIA mandates us to do in Section 2 (a), namely,
- *"to 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:*
- *balancing the right to privacy against other rights, particularly the right of access to information; and protecting important interests, including the free flow of information within the Republic and across international borders."*

- In executing this mandate, we are guided by section 39(a) of POPIA, which provides inter alia that the *“Information Regulator is independent and is subject only to the Constitution and the law and must exercise its powers without fear, favour or prejudice.”*

- Our intention is to lay a solid foundation for the type of organization we hope to build- As our vision states, a world class institution for the protection of personal information and the promotion of access to information - An organization which will hold its own among the community of Information Regulators regionally and globally. A perception exists that the sole mandate of the Regulator is the protection of personal information. So much so that in some quarters we are referred to as the "POPI" Regulator. In other jurisdictions data protection as it is referred to, is regarded as an ICT issue. In South Africa the legislation that establishes the Regulator enjoins us to ensure respect for and to promote, enforce and fulfill the constitutionally guaranteed right of access to information and the right to privacy. Our mandate is human rights based and our mission is to give equal effect to these rights.

- **2. PROGRESS TO DATE**
- Section 43 (2)(a)(i) and (ii) of POPIA requires the Regulator to designate one full time member to perform functions and duties provided for in POPIA and the other full time member to perform functions and duties provided for in PAIA. Adv. Lebogang Stroom-Nzama is the full time member responsible for PAIA and Adv. Collen Weapond is the full time member responsible for POPIA.

- We are currently operating from the offices of the Department of Justice and Constitutional Development Offices at SALU building, Thabo Sehume Street in Pretoria, where we share four offices amongst us. In February 2017, at our first public appearance in Cape Town we unveiled our logo with the tagline, *“ensuring protection of your personal information and effective access to information.”*

- One of the tasks we undertook after we took office was to establish the governance structure of the Regulator. Section 49 of POPIA mandates the Regulator to establish one or more Committees for the proper performance of its functions. These Committees may consist of members of the Regulator or other members which the Regulator may appoint. In this regard we have established a number of committees. We took into consideration the experience and expertise of members to designate the chairpersons of each committee. We have established the following committees:

- Policy and Governance Committee, chaired by the Chairperson of the Regulator, Adv Pansy Tlakula;
- Enforcement Committee. We have designated Mr. Sizwe Snail ka Mtuze as the member representing the Regulator in the Enforcement Committee as envisaged in section 50 (1) (a) of POPIA. In terms of section 50 (2) this Committee must be chaired by a Judge of the High Court, or a magistrate with at least 10 years appropriate experience, whether in active service or not; or an advocate or attorney with at least 10 years appropriate experience whether in active service or not;

- Legal and Compliance Committee chaired by Adv. Lebogang Stroom- Nzama;
- Complaints and Dispute Resolution Committee chaired by Prof. Tana Pistorius;
- Finance, Risk and Information Technology and Communication Governance Committee (ITC) chaired by Adv. Collen Weapond;
- Outreach and Research Committee chaired by Mr. Sizwe Snail ka Mtuze, and
- Corporate Services Committee chaired by Adv. Collen Weapond.

- Members of the Regulator belong to one or more of these Committees. In due course we may appoint external members to these Committees and we will do so in consultation with the Minister of Finance as provided for in section 47(7) of POPIA.

- We have adopted our strategic plan for the years 2017-2020 and the annual performance plan for the year 2017- 2018. We have prioritized a number areas for this financial year. These areas are informed by the sections of POPIA that have already come into effect, namely, sections 39-54, 112 and 113. These areas are the following: the development of corporate governance policies, the development of the organizational structure and the identification and filling in of priority positions, the development of the stakeholder engagement strategy, the development of the research plan, the development of the branding and communications strategy, the drafting and approval of Regulations contemplated in POPIA and conducting two code of conduct needs assessment with identified industry stakeholders

- Progress has already been made in some of these areas. For example, the concept organizational structure has been developed and the grading of positions has been completed. POPIA requires us to consult the Minister of Finance on the organizational structure. This process will begin soon. We intend to have 80- 100 positions initially. We have already began engaging the department of Public Works on the acquisition of office space for the Regulator.

- As you might be aware, section 112(1) (a) of POPIA empowers the Minister of Justice and Constitutional Development to make regulations relating to the establishment of the Regulator. We have already consulted the Minister in this regard and his view is that “the provisions of the Act which deal with the establishment of the Regulator are extensive in nature and it is foreseen that it will not be necessary for the Minister to make any regulations.” For our part, we have already produced the second draft of the regulations envisaged in Section 112(2) of POPIA. Our intention is to publish these regulations for comment around August and to table them in Parliament in the fourth quarter of the current financial year. Apart from the regulations provided for in Section 112 (4) and (2), POPIA also mandates the Regulator to prescribe a number of areas by regulation. We have identified additional regulations required.

- Section 114 (4) of POPIA requires us to take over the function of enforcing PAIA from the South African Human Rights Commission (SAHRC). The legal process of doing so is regulated by Section 114 (4) read with section 110 of POPIA. We have held the first meeting with the SAHRC on the interpretation of the relevant provisions of PAIA and POPIA. Our opinion is that until such time that section 114(4) of POPIA has come into operation, the SAHRC should continue to enforce PAIA.

- As you might be aware, the Regulator may from time to time issue, amend and revoke codes of conduct for the lawful processing of personal information or make guidelines to assist bodies to develop codes of conduct or to apply codes of conduct. As I have already mentioned, we are conducting two code of conduct needs assessment with industry stakeholders. To enable us to do so, we must determine a criteria for the selection of industries to be consulted

- We are of the view that in our quest to establish a world class Regulator, it will be beneficial for us to learn from those who have been there before us. In this regard we have decided to undertake a number of benchmarking visits to a number of countries globally, starting with the UK and Germany. We have also identified countries on the African Continent and in the developing world such as Ghana and Mexico from whom we can learn. We have already joined the Network of Commonwealth Countries Data Authorities known as Common Threat and we are in the process of seeking accreditation with the Network of African Data Protection Authorities and the International Data Protection Commissioners.

- **3. EMERGING ISSUES**

- There are a number of emerging issues that we have already dealt with since our establishment. One of these is the case of *The Black Sash v The Minister of Social Development and Others* which was heard by the Constitutional Court earlier this year in which the Regulator was cited as the 7th Respondent. The Regulator filed an explanatory affidavit to clarify the relief that was sought by the applicant relating to personal information of grant beneficiaries.

- The court held amongst others that the South African Social Security Agency (SASSA) is under a duty to ensure that the payment method it determines " *contains adequate safeguards to ensure that personal data obtained in the payment process remains private and may not be used for any purpose other than payment of the grants*" and " *precludes a contracting party from inviting beneficiaries to 'opt in' to the sharing of confidential information for the marketing of goods and services,*" We are monitoring the implementation of the order of the Constitutional Court and in this regard, we have written to both SASSA and Cash Payment Services(CPS). CPS has already responded and have informed us of the measures that they have taken to give to effect the court order.

- Another interesting issue relates to relationship between the Consumer Protection Act (CPA) and POPIA on the protection of consumers in relation to direct marketing. CPA mandates the National Consumer Commission (NCC) to establish a “National Opt Out Register” for consumers who have opted out of marketing approaches. In terms of section 4 of the CPA, marketers must remove names of those consumers who have indicated that they do not wish to be approached for direct marketing. On the other hand, section 69 of POPIA provides that a consumer can only be approached for direct marketing purposes through electronic communication if such a consumer has given his or her consent, i.e. if he or she has opted in. POPIA defines *'consent'* as *"any voluntary, specific and informed expression of will in terms of which permission is given for the processing of personal information."* There are obvious contradictions and overlaps between POPIA and CPA and these contradictions will have to be resolved as soon as possible. In this regard, we have already held the first meeting with the NCC.
- We have also met with the IEC to discuss the impact of POPIA on the processing of personal information contained on the voters roll.

- The Regulator has received a number of complaints from individuals regarding allegations of unlawful processing of their personal information. These complaints are primarily against banks, cellphones service providers and insurance companies. In the absence of a complaints handling system and procedure and without the requisite human resources capacity, it is not possible for the Regulator to investigate these complaints. We have however taken a strategic decision to refer the complaints to responsible parties complained against and request them to investigate the complaint and revert to us.
- We have also started receiving requests from some industries requesting advice on their draft codes of conduct.

- In conclusion, POPIA is a reality and is here to stay. It will affect all public and private bodies who process personal information irrespective of their size. Our advice to all public and private bodies who process personal information is to ensure that they take reasonable, adequate and proportionate measures necessary to comply with POPIA.

QUESTIONS

THANK YOU

