

30 April 2025

## **POPI Act – Important aspects to employ and update on the Act.**

### **1. When Concluding a Contract – POPI Act Sections Applicable:**

1.1. Section 3(b) of the POPI Act:

“3. This Act must be interpreted in a manner that—

**(b) does not prevent any public or private body from exercising or performing its powers, duties and functions in terms of the law as far as such powers, duties and functions relate to the processing of personal information and such processing is in accordance with this Act or any other legislation, as referred to in subsection (2), that regulates the processing of personal information.”**

1.2. Section 6(1)(c) of the POPI Act:

“6. (1) This Act does not apply to the processing of personal information—

(c)by or on behalf of a public body—

- (i) which involves national security, **including activities that are aimed at assisting in the identification of the financing of terrorist and related activities**, defence or public safety; or
- (ii) the purpose of which is the **prevention, detection, including assistance in the identification of the proceeds of unlawful activities and the combating of money laundering activities**, investigation or proof of offences, the prosecution of offenders or the execution of sentences or security measures, to the extent that adequate safeguards have been established in legislation for the protection of such personal information;”

- The POPI Act specifically exempts certain institutions from provisions in the Act, if another Act expects such institution to collect personal information.
- The FIC Act defines the Real Estate Industry as Accountable Institutions, in terms of Item 3 of Schedule 1 that accompanies the Act. As part of the requirements that Accountable Institutions must uphold, is the prevention of Money Laundering and Terrorist Financing Activities by doing Customer Due Diligence.

- It is important to remember that **the FIC Act supersedes the POPI Act in certain aspects**, especially as it relates to Customer Due Diligence. **You have a responsibility to do sufficient due diligence to mitigate Money Laundering and Terrorist Financing risks, which is not possible if you are unable to collect personal information on your clients.**
- Does this mean you can ignore the POPI Act entirely? NO! There are still sections of the POPI Act that you have to keep in mind when preparing and finalizing contracts.

### 1.3. Rights of Data Subjects:

#### 1.3.1. Chapter 2 Section 5: Rights of Data subjects

Section 5 clauses (a), (b), (c), (d), (h) and (i) of the POPI Act States:

“ 5. A data subject has the right to have his, her or its personal information processed in accordance with the conditions for the lawful processing of personal information as referred to in Chapter 3, including the right—

- a) to be **notified** that—
  - i) **personal information** about him, her or it is **being collected** as provided for in terms of section 18; or
  - ii) his, her or its personal information has been **accessed or acquired by an unauthorised person** as provided for in terms of section 22;
- b) **to establish whether a responsible party holds personal information of that data subject and to request access to his, her or its personal information** as provided for in terms of section 23;
- c) **to request, where necessary, the correction, destruction or deletion of his, her or its personal information** as provided for in terms of section 24;
- d) **to object, on reasonable grounds** relating to his, her or its particular situation to the processing of his, her or its personal information as provided for in terms of section 11(3)(a);
- h) to **submit a complaint to the Regulator** regarding the alleged interference with the protection of the personal information of any data subject or to submit a complaint to the Regulator in respect of a determination of an adjudicator as provided for in terms of section 74; and
- i) to **institute civil proceedings** regarding the alleged interference with the protection of his, her or its personal information as provided for in section 99.”

#### 1.3.2. Chapter 3 Section 10: **Minimality**

“Section 10 of the POPI Act States that:

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

### 1.3.3. Chapter 3 Section 11: **Consent, justification and objection**

Section 11 of the POPI Act states:

“11.(1) Personal information may only be processed if—

- a) the data subject or a competent person where the data subject is a child **consents to the processing;**
- b) **processing is necessary to carry out actions for the conclusion or performance of a contract** to which the data subject is party;
- c) processing **complies with an obligation imposed by law on the responsible party;**
- d) processing **protects a legitimate interest of the data subject;**
- e) processing is necessary for the proper performance of a public law duty by a public body; or
- f) processing is necessary for **pursuing the legitimate interests of the responsible party or of a third party to whom the information is supplied.**

(2) (a) The **responsible party bears the burden of proof for the data subject’s** or competent person’s **consent** as referred to in subsection (1) (a).

(b) The data subject or competent person **may withdraw his, her or its consent**, as referred to in subsection (1)(a), at any time: provided that the lawfulness of the processing of personal information before such withdrawal or the processing of personal information in terms of subsection (1) (d) to (f) will not be affected.

(3) A data subject **may object**, at any time, to the processing of personal information—

- a) in terms of subsection (1)(d) to (f), in the prescribed manner, **on reasonable grounds** relating to his, her or its particular situation, **unless legislation provides for such processing;**”

### 1.3.4. Chapter 3 Section 27: **General Authorisation concerning special personal information**

“27(1) The prohibition on processing personal information, as referred to in section 26, does not apply if the—

- (a) **processing is carried out with the consent of a data subject** referred to in section 26;

(b) **processing is necessary for the establishment, exercise or defence of a right or obligation in law;”**

The three things that stand out when we are talking about our clients’ rights in relation to the POPI Act, is that **they have to be informed their data is being processed, they must be informed on why their data is being processed, and the data being collected must be appropriate to the context of the transaction.**

- They have to be informed that their data is being processed:
  - Data subjects must be informed, and give consent for their data to be processed.
  - Remember, the FIC Act supersedes the POPI Act when it comes to data collection, but that does not mean that we ignore the POPI Act
  - We need to remain mindful of our clients’ rights, and ensure we have written consent to process their data.
  - If a client / data subject decides they do not want to give consent for their data to be processed for the purposes of the FIC Act, we then need to consider the implications of not being able to comply with the FIC Act.
- They must be informed on WHY their data is being processed:
  - It is important to communicate to our clients why we are collecting their information.
  - Your POPI Act Consent form must explain that you are collecting information for the purposes of your FIC Act obligations, and to enable you to facilitate the execution of the relevant contract.
- The Data being collected must be appropriate to the extent of the transaction:
  - We cannot collect data of clients that do not have a specific and lawful purpose.
  - We DO NOT need to know:
    - (i) Religious or philosophical beliefs
    - (ii) Trade union membership
    - (iii) Political persuasion
    - (iv) Health or sex life
    - (v) Biometric information
  - The above information is not relevant for the purposes of executing your duties under the FIC Act.

If the data collected is not being used directly or indirectly for the purposes of executing your duties as an estate agent, you may not collect it.

## 2. In Relation to marketing: POPI Act Sections Applicable

### 2.1. Direct marketing:

#### 2.1.1. Obtaining Consent to employ Direct Marketing (emails, WhatsApps, cold calling):

Regulation 6 of the Regulations is hereby substituted for the following regulations:

“Request for a data subject's consent to process personal information for direct marketing through unsolicited electronic communication.

6.1. A responsible party who wishes to process the personal information of a data subject for the purposes of direct marketing through unsolicited electronic communication must in terms of section 69(2) of the Act obtain written consent from a data subject on a form substantially similar to **Form 4** or in any manner that may be expedient, free of charge and reasonably accessible to a data subject, including-

6.1.1. email;

6.1.2. telephonically;

6.1.3. SMS or WhatsApp;

6.1.4. facsimile;

6.1.5. automated calling machine.

**6.2. A request for a data subject's consent to the processing of his, her, or its personal information as referred to in sub-regulation 6.1 above by telephonic means must be electronically recorded by a responsible party and such recording must, upon request, be made available to a data subject in any manner, including the transcription thereof which must be free of charge.**

6.3. A request for a data subject's consent to the processing of his, her, or its personal information as referred to in sub regulation 6.1 **by an automated calling machine must be electronically recorded by the responsible party and such recording must, upon request, must be made available to a data subject in any manner, including the transcription thereof which must be free of charge.**

6.4. For the purposes of direct marketing through unsolicited electronic communications, opt-out shall not constitute consent as referred to in section 69 (2) of the Act.”

- **Before you start marketing to your clients directly** (meaning unsolicited contact, so cold calling, WhatsApps and emails sent prior to receiving a lead from a client), **you must obtain their consent to process their personal information for this reason.**
- **You need to keep record of the consent given, even if by phone call, this consent must be recorded and transcribed.**
- During the initial consent request, you must:
  - Specify the goods / services to be marketed
  - Explain the data subjects right to refuse the processing of their personal information for the purpose you intend to use it for
  - Keep record of the initial request’s result (meaning was consent given, yes or no?)
- You may thus make initial contact to get consent to market directly, but if consent is denied, you may no longer directly market to the data subject(s).

**It is important to note that the exclusion of certain provisions of the Act because the FIC Act supersedes certain sections of the POPI Act CANNOT be used as an excuse to process data subjects’ information without their consent for marketing purposes. All sections as discussed in point 1 is also applicable to marketing.**

**FURTHER RESOURCES TO BE ATTACHED TO THIS SUMMARY / UPLOADED TO NPP PLATFORM:**

1. Copy of the POPI Act
2. Copy of the POPI Act Regulations
3. Latest Amendment to the Regulations
4. Guidance Note on Direct Marketing