

## ESTATE AGENT PRACTICE MANUAL TO SOUTH AFRICAN PRIVACY LAWS AN OVERVIEW

### Index

#### Chapter 1: Introduction

#### Chapter 2:

- 2.1 Bird's eye view of the act
- 2.2 Bird's eye view of the regulations

#### Chapter 3: Application to estate agencies (scope of application)

- 3.1 POPIA applies to property practitioners (and business partners such as conveyancing firms) in different ways
- 3.2 "Data subject" is the one whose information is protected
- 3.3 The "responsible party" is in most cases the estate agency
- 3.4 The operator
- 3.5 Examples of interaction between roles: estate agent can be data subject, operator or responsible party, depending on the circumstances

#### Chapter 4: When can it be said that an estate agency is "processing" personal information (as responsible party)?

- 4.1 Which activities of estate agents fall within the meaning of "processing"?
- 4.2 What is personal information?
- 4.3 Exceptions and rules relating to "special personal information"
- 4.4 Processing special personal information

#### Chapter 5: An estate agency as a business and responsible party under POPIA: how may personal information be processed?

- 5.1 The 8 conditions for lawful processing

#### Chapter 6: The new regulatory authority

- 6.1 The regulator for data protection
- 6.2 main powers, duties and responsibilities of the regulator
- 6.3 submitting complaints to the regulator

## The Big Small Firm

[stbb.co.za](http://stbb.co.za)

Commercial Law | Conveyancing | Development Law | Labour Law | Estates | Family Law | Litigation | Personal Injuries & Third Party Claims

Cape Town  
Claremont  
Fish Hoek  
Helderberg

T: 021 406 9100  
T: 021 673 4700  
T: 021 784 1580  
T: 021 850 6400

Blouberg  
Tyger Valley  
Illovo  
Fourways

T: 021 521 4000  
T: 021 943 3800  
T: 011 219 6200  
T: 010 001 2632

Centurion  
Bedfordview  
East London

T: 012 001 1546  
T: 011 453 0577  
T: 043 721 1234

## Chapter 7: Special notification/registration requirements

## Chapter 8: The POPIA compliance officer in the estate agency & registration requirements

## Chapter 9: Steps estate agents must implement to become compliant and marketing

- 9.1 What compliance will require of the estate agency
- 9.2 Employees and employment contracts
- 9.3 Effect on certain marketing procedures
  - 9.3.1 Electronic direct marketing and consent
  - 9.3.2 Lead generator service providers
  - 9.3.3 Cold calling

## Chapter 10: Further compliance considerations

- 10.1 Data breach notification
- 10.2 Sanctions
- 10.3 Data retention
- 10.4 Data transfers and outsourcing

The Big Small Firm

[stbb.co.za](http://stbb.co.za)

Commercial Law | Conveyancing | Development Law | Labour Law | Estates | Family Law | Litigation | Personal Injuries & Third Party Claims

Cape Town  
Claremont  
Fish Hoek  
Helderberg

T: 021 406 9100  
T: 021 673 4700  
T: 021 784 1580  
T: 021 850 6400

Blouberg  
Tyger Valley  
Illovo  
Fourways

T: 021 521 4000  
T: 021 943 3800  
T: 011 219 6200  
T: 010 001 2632

Centurion  
Bedfordview  
East London

T: 012 001 1546  
T: 011 453 0577  
T: 043 721 1234

## Chapter 1

### INTRODUCTION

South Africa's constitution entrenches the right to privacy. In order to give flesh to this right, the Protection of Personal Information Act 4 of 2013 ('POPIA' or 'the Act') was promulgated. In essence, the Act sets the parameters in which businesses may legitimately deal with the personal information of natural persons and entities. (In addition, there exists some provisions in the Electronic Communications and Transactions Act of 2002 ('ECTA') that regulate privacy in the electronic collection of personal information, but compliance is voluntary. These provisions of the ECTA pertaining to the protection of personal information will, however, be repealed on 30 June 2021, when compliance with POPIA is expected (see 2.1 below).

## CHAPTER 2

### 2.1 BIRD'S EYE VIEW OF THE ACT

After piecemeal introduction of some sections of the Act following on its promulgation in 2013, POPIA was finally proclaimed on 1 July 2020 when the majority of the operative provisions of the Act came into effect. Accordingly, as of 1 July 2020, the following provisions of POPIA are in force:

- **Chapter 1** (sections 1 and 2) – the definitions and purpose sections of POPIA respectively, came into effect on 11 April 2014;
- **Chapter 2** – generally described as “the application provisions” but more specifically including: the specific application and interpretation provisions (section 3); descriptions of the conditions for the lawful processing of personal information, and the application thereof (section 4); descriptions of the rights of data subjects (section 5); and exclusions from the scope of POPIA, describing those

The Big Small Firm

[stbb.co.za](http://stbb.co.za)

Commercial Law | Conveyancing | Development Law | Labour Law | Estates | Family Law | Litigation | Personal Injuries & Third Party Claims

Cape Town  
Claremont  
Fish Hoek  
Helderberg

T: 021 406 9100  
T: 021 673 4700  
T: 021 784 1580  
T: 021 850 6400

Blouberg  
Tyger Valley  
Illovo  
Fourways

T: 021 521 4000  
T: 021 943 3800  
T: 011 219 6200  
T: 010 001 2632

Centurion  
Bedfordview  
East London

T: 012 001 1546  
T: 011 453 0577  
T: 043 721 1234

circumstances under which the POPIA does not apply to the processing of personal information (sections 6 and 7);

- **Chapter 3** (sections 8 - 35) – conditions for the lawful processing of personal information, which conditions must be complied with by responsible parties when processing personal information;
- **Chapter 4** (sections 36 - 38) – exemptions from the conditions for the lawful processing of personal information which, if applicable, will exempt a responsible party for processing that is in breach of the conditions for the lawful processing of personal information;
- **Chapter 5 – Part A** (sections 39 - 54) – pertaining to the establishment of the Information Regulator (Sections 39 – 54 came into effect on 11 April 2014); **Part B** (sections 55 - 56) – pertaining to the requirements for information officers;
- **Chapter 6** (sections 57 - 59) – pertaining to the requirements for responsible parties to obtain prior authorisation from the Information Regulator for specific types of planned processing activities;
- **Chapter 7** (sections 60 – 68) – pertaining to the issuing of codes of conduct by the Information Regulator;
- **Chapter 8** (sections 69 - 71) – pertaining to the requirements in respect of direct marketing, directories, and automated decision making;
- **Chapter 9** (section 72) – pertaining to trans-border information flows;
- **Chapter 10** (sections 73 - 99) – pertaining to the enforcement of POPIA;
- **Chapter 11** (sections 100 -109) – pertaining to offences, penalties and administrative fines;
- **Chapter 12** (sections 111 – 115) of which section 114(1)(2)(3) is specifically important. It provides **for a one-year transition period following the commencement of POPIA to allow persons to become compliant. Responsible parties (estate agencies) will need to comply with all of the provisions of POPIA from 1 July 2021**, but may (in terms of Section 114(2) of POPIA) be granted an extended grace period not exceeding three additional years if the relevant responsible party is

granted such extension (upon request) by the Minister in consultation with the Information Regulator.

## 2.2 BIRD'S EYE VIEW OF THE REGULATIONS

The regulations to the Act are mainly administrative in nature and prescribe a number of forms to be used in order to take certain types of action under POPIA. These are, amongst others:

- The manner in which an objection to the processing of personal information can be made (reg 2), **Form 1**;
- Requests for the correction or deletion of personal information or the destruction or deletion of a record of personal information (reg 3), **Form 2**;
- Applications for the Information Regulator to issue industry codes of conduct (reg 5), **Form 3**;
- Manner in which consent is requested for processing of personal information for direct marketing by means of unsolicited electronic communications (reg 6), **Form 4**;
- Submission of complaints or grievances (reg 7), **Form 4**;
- Where the Information Regulator acting as a conciliator during an investigation (reg 8), **Forms 6 and/or 7**;
- Notification requirements of the Information Regulator to provide notification and information to all affected parties to a complaint/investigation (reg 12), **Forms 13-19** ; and
- Notification requirements of the Information Regulator to provide notification to affected parties of its intention to carry out assessments or relating to a request by a third party to do so (reg 11), **Forms 11 and/or 12**.

The Forms referred to are attached hereto 1n **Annexure A**.

## CHAPTER 3

### APPLICATION TO ESTATE AGENCIES

#### (SCOPE OF APPLICATION)

#### 3.1 POPIA APPLIES TO PROPERTY PRACTITIONERS (AND BUSINESS PARTNERS SUCH AS CONVEYANCING FIRMS) IN DIFFERENT WAYS

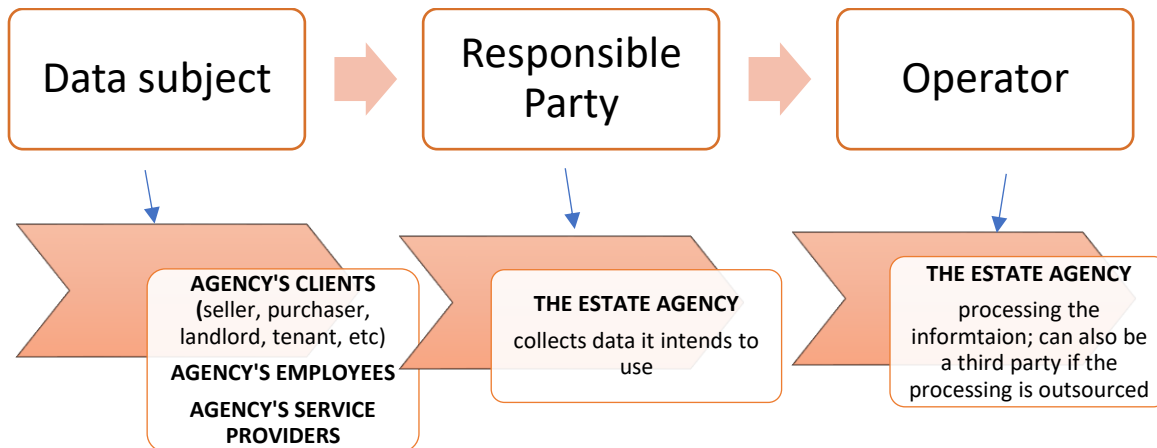
POPIA regulates all organisations that process<sup>1</sup> personal information. The term personal information includes a wide variety of details which are discussed later on herein, but includes details typically collected by estate agents when they perform functions on behalf of clients, such as identity numbers, names, residential address, work address, email address, cellular phone details, and so forth.

The personal information that is protected does not relate only to the clients of an estate agency; also included is information about the agency's employees, customers, suppliers and those to whom processing activities are outsourced.

---

<sup>1</sup> The technical meaning of the term 'process' for purposes of POPIA is discussed at chapter 4 hereof. For the time being, the reader may assume that this means the collection, storage, use and deletion of personal information of clients.

There are **three players** that are part of any personal information transaction. They are:



More about these players:

### 3.2 “DATA SUBJECT” IS THE ONE WHOSE INFORMATION IS PROTECTED

**The data subject** is the **person or entity** to whom the data (personal information) belongs. In the context of the business of an estate agent, the data subject will in most cases be the **seller or purchaser of a home, or lessor or lessee of premises**.

#### Rights of the data subject:

- Under POPIA, personal information may only be processed (ie., collected, stored, used, shared) if the data subject (or a competent person where the data subject is a child) expressly **consents** to the processing of the personal information, unless the **exclusions** (see below) with regard to consent apply.
- The consent of the data subject is not required where the processing of personal information:
  - is necessary to carry out actions for the conclusion or performance of a contract to which the data subject is party. **For example**, in an estate agency’s context, this would

allow the agency to collect and use the personal information of a seller or buyer in a property sale transaction and share it with the conveyancing attorney.

Such use (processing) must however be limited to the purpose of the transaction and only the information reasonably required may be obtained and shared under this exclusion. The collection, sharing and use of the information must furthermore processed responsibly. **For example**, where an identity document is copied for the agent's records, or sent to a conveyancer, responsible actions must be adopted to ensure that such records do not fall into the hands of third parties.

- ii. complies with an obligation imposed by law on the responsible party. **For example**, where the agent collects proof of residence in order to comply with the Financial Intelligence Centre Act, or asks a non-resident applicant tenant for a copy of a residence permit;
  - iii. protects a legitimate interest of the data subject;
  - iv. is necessary for the proper performance of a public law duty by a public body; and
  - v. is necessary for pursuing the legitimate interests of the responsible party or of a third party to whom the information is supplied.
- c) The personal information must ideally be **collected directly** from the data subject, except in some instances, for example, where the information is already contained in, or derived from, a public record, or has deliberately been made public by the data subject, or where collection of the information from another source would not prejudice a legitimate interest of the data subject. **For example**, information in the deeds office database may be collected without consent and without the need to collect it directly from the client, because it is available on the (public) deeds office database. (Nonetheless, despite it being derived from a public record, an agent must act responsibly when using and sharing the information so obtained.)

Note that a data subject may:

## The Big Small Firm

[stbb.co.za](http://stbb.co.za)

Commercial Law | Conveyancing | Development Law | Labour Law | Estates | Family Law | Litigation | Personal Injuries & Third Party Claims

Cape Town  
Claremont  
Fish Hoek  
Helderberg

T: 021 406 9100  
T: 021 673 4700  
T: 021 784 1580  
T: 021 850 6400

Blouberg  
Tyger Valley  
Illovo  
Fourways

T: 021 521 4000  
T: 021 943 3800  
T: 011 219 6200  
T: 010 001 2632

Centurion  
Bedfordview  
East London

T: 012 001 1546  
T: 011 453 0577  
T: 043 721 1234



- withdraw his/her/its consent at any time;
- request that a responsible party correct or delete personal information that is inaccurate, irrelevant and excessive (not necessary for the purposes, for example where the estate agent collected names and birth date details of a client's children without apparent need therefore), or which the responsible party is no longer authorised to retain.

### 3.3 THE "RESPONSIBLE PARTY" IS IN MOST CASES THE ESTATE AGENCY

**The responsible party** is exactly that, the party that carries the lion's share of responsibility in terms of POPIA. This is the party that decides what information is to be collected and how it will be used. In this sense, estate agencies often are the "responsible party", as it determines what information it will ask for from its clients, employees and service providers.

The "responsible party" can be a natural person, or public or private body and bears the onus to ensure that it meets the conditions of lawful processing of personal information (as set out in POPIA, and explained in chapter 5 below) and adheres to the security measures on integrity and confidentiality in respect thereof.

#### Rights and responsibilities

The rights and responsibilities of a responsible party are not separately specified, but are incorporated in relation to the conditions of legitimate processing (as discussed in chapter 5 hereof). These provide that the responsible party (estate agent) may process (which includes to collect and use it) personal information where, inter alia:

- the information protection conditions (see chapter 5) are met;
- the processing is performed in a reasonable manner that does not infringe the data subject's privacy and is for a specific, explicitly defined and lawful purpose related to a function or activity of the responsible party (see chapter 5.1 and 5.3);

## The Big Small Firm

[stbb.co.za](http://stbb.co.za)

Commercial Law | Conveyancing | Development Law | Labour Law | Estates | Family Law | Litigation | Personal Injuries & Third Party Claims

Cape Town  
Claremont  
Fish Hoek  
Helderberg

T: 021 406 9100  
T: 021 673 4700  
T: 021 784 1580  
T: 021 850 6400

Blouberg  
Tyger Valley  
Illovo  
Fourways

T: 021 521 4000  
T: 021 943 3800  
T: 011 219 6200  
T: 010 001 2632

Centurion  
Bedfordview  
East London

T: 012 001 1546  
T: 011 453 0577  
T: 043 721 1234

- the data subject has been made aware of, inter alia, the nature of the information being collected, the identity of the responsible party and the purpose of the collection of the information; in relation to processing, such processing is adequate, relevant, and not excessive (see chapter 5.5. and 5.6);
- the data subject has consented thereto, or the processing is necessary for the conclusion of a contract, complies with an obligation imposed by law, protects a legitimate interest of the data subject, or is necessary for pursuing the legitimate interests of the responsible party or a third party to whom the information is supplied (see chapter 5.2);
- the personal information is collected directly from the data subject - unless the other exceptions apply, ie that the information has been made public by the data subject, the data subject has consented to collection from another source, the data subject's interests would not be prejudiced by the collection, the collection is necessary per the grounds contemplated in POPIA, and the lawful purpose of the collection would be prejudiced or compliance is not reasonably practicable (see chapter 5.6);
- the data subject will continue to have access to the personal information (subject to certain exemptions); and
- the responsible party has taken appropriate technical and organisational measures to safeguard the security of the information.

### 3.4 THE OPERATOR

The operator is the party that performs the actual processing of the data subject's personal information on behalf of the responsible party. **The responsible party and the operator could be the same person or business**, or could be separate, such as when the operator is a third party to the main business.

**For example:** An estate agent outsources its payroll administration to a third party service provider. The agency, as responsible party with regard to the information of its employees collected and shared with the

## The Big Small Firm

[stbb.co.za](http://stbb.co.za)

Commercial Law | Conveyancing | Development Law | Labour Law | Estates | Family Law | Litigation | Personal Injuries & Third Party Claims

Cape Town  
Claremont  
Fish Hoek  
Helderberg

T: 021 406 9100  
T: 021 673 4700  
T: 021 784 1580  
T: 021 850 6400

Blouberg  
Tyger Valley  
Illovo  
Fourways

T: 021 521 4000  
T: 021 943 3800  
T: 011 219 6200  
T: 010 001 2632

Centurion  
Bedfordview  
East London

T: 012 001 1546  
T: 011 453 0577  
T: 043 721 1234

payroll company, must ensure that POPIA compliance is included as one of the obligations of its contract with the service provider. In turn, the operators must ensure that they maintain security safeguards and must notify the responsible party immediately where there are reasonable grounds to believe that the personal information of a data subject has been accessed or acquired by any unauthorised person. The operator has a joint liability with the responsible party in that they need to process lawfully in accordance with the responsible party's needs, as well as take adequate measures to comply with the same regulation that the responsible party complies with.

### **The estate agent's obligations with regard to operators:**

POPIA contemplates that a responsible party:

- retains ultimate accountability for an operator; and
- must ensure that an operator must only processes the information furnished to it with the knowledge or authorisation of the responsible party, must treat personal information which comes to their knowledge as confidential and must not disclose it to others (unless required by law or in the course of the proper performance of their duties);
- must, in terms of a written contract between the responsible party and the operator, ensure that the operator which processes personal information for the responsible party establishes and maintains the security measures as prescribed under POPIA.

### **Duties of the operator**

POPIA prescribes that an operator must notify the responsible party immediately where there are reasonable grounds to believe that the personal information of a data subject has been accessed or acquired by any unauthorised person.

## **3.5 EXAMPLES OF INTERACTION BETWEEN ROLES: ESTATE AGENT CAN BE DATA SUBJECT, OPERATOR OR RESPONSIBLE PARTY, DEPENDING ON THE CIRCUMSTANCES**

### **The Big Small Firm**

**stbb.co.za**

Commercial Law | Conveyancing | Development Law | Labour Law | Estates | Family Law | Litigation | Personal Injuries & Third Party Claims

Cape Town  
Claremont  
Fish Hoek  
Helderberg

T: 021 406 9100  
T: 021 673 4700  
T: 021 784 1580  
T: 021 850 6400

Blouberg  
Tyger Valley  
Illovo  
Fourways

T: 021 521 4000  
T: 021 943 3800  
T: 011 219 6200  
T: 010 001 2632

Centurion  
Bedfordview  
East London

T: 012 001 1546  
T: 011 453 0577  
T: 043 721 1234

Remember that the roles change, depending on the particular transaction.

**For example:**

- If the estate agent outsources part of its IT function, the IT services provider will almost certainly be processing personal information that the estate agency collected and provided to the service provider. In this relationship, the estate agent is the responsible party and the IT services provider the operator.  
However, from the IT service provider's point of view, its client is the estate agency and the agency's personal information, as data subject vis-à-vis the IT service provider (as responsible party).;
- Where the estate agency is sending email campaigns with the assistance of outside software provider, the third party software provider (operator) is processing personal information (eg, email addresses) for the estate agent (responsible party); and/or
- Where a homeowners' association provides a list of owners in its association to an estate agency for the latter to perform certain tasks as its managing agent and to collect levies, the agency is the operator and the homeowners' association the responsible party.

## The Big Small Firm

[stbb.co.za](http://stbb.co.za)

Commercial Law | Conveyancing | Development Law | Labour Law | Estates | Family Law | Litigation | Personal Injuries & Third Party Claims

Cape Town  
Claremont  
Fish Hoek  
Helderberg

T: 021 406 9100  
T: 021 673 4700  
T: 021 784 1580  
T: 021 850 6400

Blouberg  
Tyger Valley  
Illovo  
Fourways

T: 021 521 4000  
T: 021 943 3800  
T: 011 219 6200  
T: 010 001 2632

Centurion  
Bedfordview  
East London

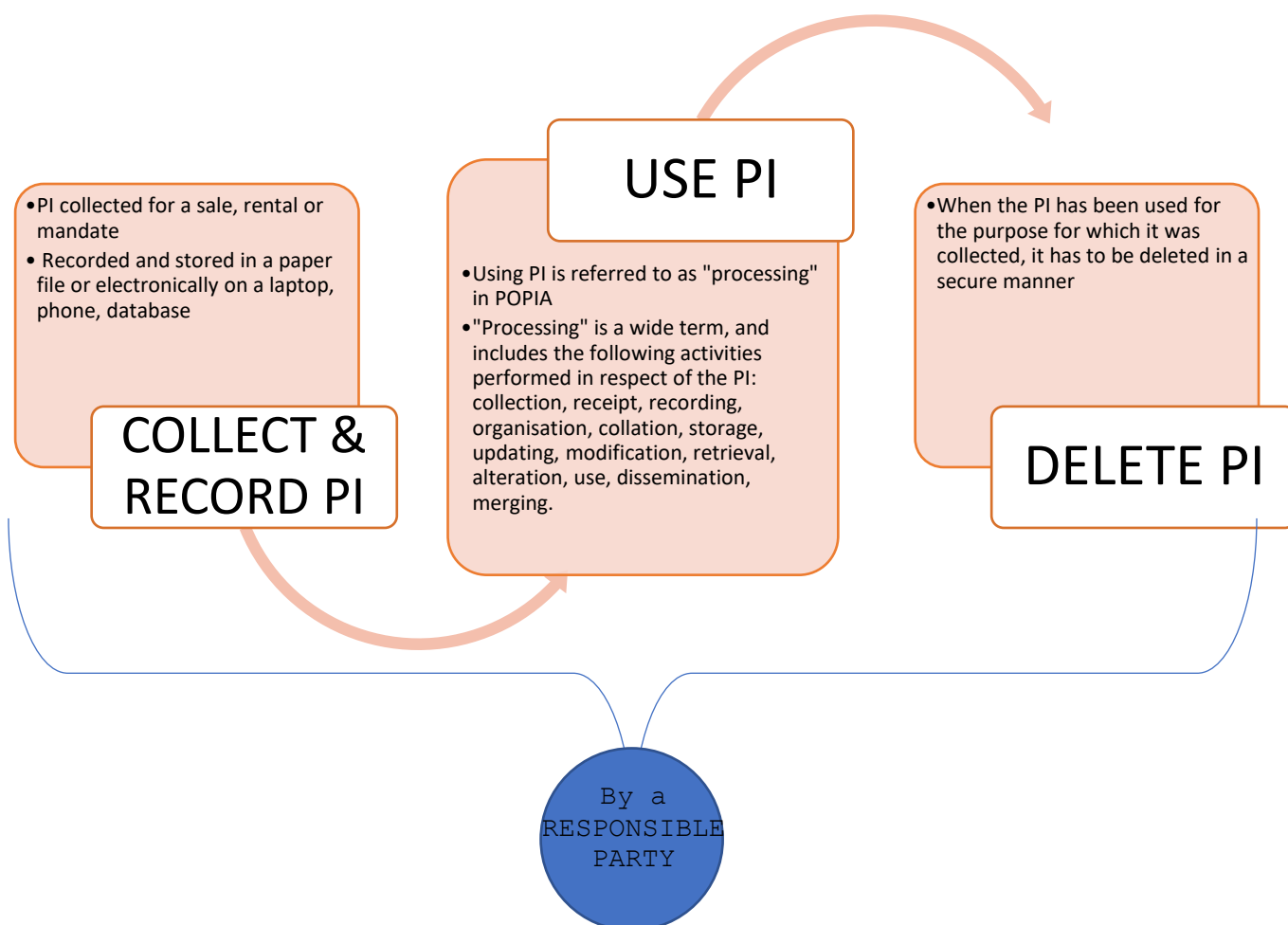
T: 012 001 1546  
T: 011 453 0577  
T: 043 721 1234

## CHAPTER 4

## WHEN CAN IT BE SAID THAT AN ESTATE AGENCY IS “PROCESSING” PERSONAL INFORMATION (AS RESPONSIBLE PARTY)?

## 4.1 WHICH ACTIVITIES OF ESTATE AGENTS FALL WITHIN THE MEANING OF “PROCESSING”?

POPIA applies to the **processing** (widely defined under POPIA) of **personal information** by a responsible party. This is illustrated in the diagram below:



*\*store - for example, in the estate agency context, will be when the agent stores and records the identity document copy or proof of address on a laptop, in office software programmes, or in a paper file.*

The Big Small Firm

stbb.co.za

Commercial Law | Conveyancing | Development Law | Labour Law | Estates | Family Law | Litigation | Personal Injuries &amp; Third Party Claims

Cape Town  
Claremont  
Fish Hoek  
Helderberg

T: 021 406 9100  
T: 021 673 4700  
T: 021 784 1580  
T: 021 850 6400

Blouberg  
Tyger Valley  
Illovo  
Fourways

T: 021 521 4000  
T: 021 943 3800  
T: 011 219 6200  
T: 010 001 2632

Centurion  
Bedfordview  
East London

T: 012 001 1546  
T: 011 453 0577  
T: 043 721 1234

## 4.2 WHAT IS PERSONAL INFORMATION?

**Personal information** is a broad term and relates to an identifiable, natural person or legal entity and includes, but is not limited to:

- Contact information – telephone number, email address, residential address, place of employment, etc;
- Private correspondence;
- Biometric information – blood group etc;
- Demographic information – age, gender, race, date of birth, ethnicity etc;
- Opinions of and about a person or group;
- History – employment, financial information, medical history, criminal history as well as educational history.

## 4.3 EXCEPTIONS AND RULES RELATING TO “SPECIAL PERSONAL INFORMATION”

If the information that has been processed does not fall within the definition of personal information, it is excluded from POPIA and the processing of the information may proceed without compliance with POPIA.

The following types of processing are **excluded**, namely information:

- processed for purely personal or household activity;
- that has been de-identified (if the information which links it to a specific data subject has been deleted or the link between a data subject and their personal information has been broken to such an extent that someone cannot link the information back to the relevant data subject again. **An example** would be a medical report without the name or any contact detail of the person to whom it relates.);

The Big Small Firm

[stbb.co.za](http://stbb.co.za)

Commercial Law | Conveyancing | Development Law | Labour Law | Estates | Family Law | Litigation | Personal Injuries & Third Party Claims

Cape Town  
Claremont  
Fish Hoek  
Helderberg

T: 021 406 9100  
T: 021 673 4700  
T: 021 784 1580  
T: 021 850 6400

Blouberg  
Tyger Valley  
Illovo  
Fourways

T: 021 521 4000  
T: 021 943 3800  
T: 011 219 6200  
T: 010 001 2632

Centurion  
Bedfordview  
East London

T: 012 001 1546  
T: 011 453 0577  
T: 043 721 1234

- processed on behalf of the State or used by the Cabinet, Executive Council of a province and any municipality;
- processed for investigation and prosecution of criminal matters;
- used exclusively for journalistic purposes;
- required for the judicial functions of courts, and/or
- which is exempted by the Regulator (in terms of section 34 of POPI).

#### 4.4 PROCESSING SPECIAL PERSONAL INFORMATION

POPIA creates a particular category of personal information called “special personal information.” A stricter degree of protection is required in respect of special personal information given the sensitive nature thereof. “Special personal information” includes:

- information concerning a child;
- personal information concerning the religious or philosophical beliefs, race or ethnic origin, trade union membership, political opinions, health, DNA, sexual life or criminal behaviour of a data subject.

You are not allowed to process this special personal information unless:

- it is done with consent; or
- is necessary in law; or is done for historical, statistical or research purposes;
- the information has been deliberately made public by the subject.

There are a few exceptions to the limitations placed on processing of special personal information. These relate to situations when this information is specifically relevant and constitutes the purpose for which the information is being collected, for example for the purposes of BEE or for insurance.

## CHAPTER 5

### AN ESTATE AGENCY AS A BUSINESS AND RESPONSIBLE PARTY UNDER POPIA: HOW MAY PERSONAL INFORMATION BE PROCESSED?

#### 5.1 THE 8 CONDITIONS FOR LAWFUL PROCESSING

The nature of the business of estate agents is such that they frequently deal with (“process” – see chapter 4) the personal information of clients. In the next paragraphs we look at the requirements imposed by POPIA for the lawful use of personal information, being the eight conditions for lawful processing listed in sections 8 - 25 of the Act. If you collect and process data in accordance with these conditions (and allowable exceptions), your handling thereof will not breach the Act nor the person’s right to privacy. Think of these as legally-binding principles that must underpin all processing of personal information within your company.

The conditions are listed below, and are explained by way of an example.

*Pretend that on behalf of your agency, you were requested to find a suitable tenant for home that your client, the landlord, wishes to rent out.*

Summarised, the conditions for processing will require:

1. **Accountability:** The principle of accountability is met if the agent/agency ensures that POPIA is complied with when collecting and processing the personal information (such as confirmation of employment and income, details of references, identity document, and the like) of the prospective tenant.
2. **Lawfulness:** The collection of personal information must not be excessive, it must be legally justifiable, and it must not be collected from third parties without good reason.

There are six justification grounds in order to lawfully process personal information. The lawful

The Big Small Firm

[stbb.co.za](http://stbb.co.za)

Commercial Law | Conveyancing | Development Law | Labour Law | Estates | Family Law | Litigation | Personal Injuries & Third Party Claims

Cape Town  
Claremont  
Fish Hoek  
Helderberg

T: 021 406 9100  
T: 021 673 4700  
T: 021 784 1580  
T: 021 850 6400

Blouberg  
Tyger Valley  
Illovo  
Fourwavs

T: 021 521 4000  
T: 021 943 3800  
T: 011 219 6200  
T: 010 001 2632

Centurion  
Bedfordview  
East London

T: 012 001 1546  
T: 011 453 0577  
T: 043 721 1234



basis will have to be determined before a business may start processing personal information.

The six justification grounds are:

**Consent:** The individual has given clear consent for a business to process his/her/its personal data for a specific purpose. **For example**, the prospective tenant gives consent that his place of employment and email address and other details be made known to the prospective landlord.

**Contract:** The processing is necessary for the performance or conclusion of a contract to which the data subject is a party. **For example**, where full names and identity numbers are required to register transfer of a property in a deeds registry.

**Legal obligation:** The processing is necessary as it complies with an obligation imposed by law. **For example**, obtaining proof of the residential address of a seller or buyer in order to comply with the Financial Intelligence Centre Act ("FICA");

**Public law:** The processing is necessary to perform a public law duty by a public body.

**Legitimate interest of the data subject:** Processing protects the vital interests of the data subject (ie an individual or entity).

**Legitimate interests of the responsible party** (ie the estate agency/business that collects or holds the personal information) **or of the data subject**. "Legitimate interest" is not defined in POPIA but can be seen as a flexible ground of justification. It is likely to be appropriately used where the processing is done in line with what the data subject would reasonably expect by data subjects or where the processing has a minimal privacy impact. **For example**, where a prospective purchaser furnishes his email address to the agent for communication in respect of an investment property that the purchaser is interested in. A sale does eventuate, but when the agent later on notices a similar investment property on the market, he includes this person's email address in a marketing drive relating to that second property.

## The Big Small Firm

[stbb.co.za](http://stbb.co.za)

Commercial Law | Conveyancing | Development Law | Labour Law | Estates | Family Law | Litigation | Personal Injuries & Third Party Claims

Cape Town  
Claremont  
Fish Hoek  
Helderberg

T: 021 406 9100  
T: 021 673 4700  
T: 021 784 1580  
T: 021 850 6400

Blouberg  
Tyger Valley  
Illovo  
Fourways

T: 021 521 4000  
T: 021 943 3800  
T: 011 219 6200  
T: 010 001 2632

Centurion  
Bedfordview  
East London

T: 012 001 1546  
T: 011 453 0577  
T: 043 721 1234

A legitimate interest assessment or legitimate interest opinion is one that identifies a legitimate interest, shows why the processing is necessary to achieve it, and balances the requirement for processing against the data subject's interests, rights and freedoms. The interest could be a commercial, individual or broader social interest. An important consideration is that the processing must be necessary.

3. **Purpose limitation:** Personal information must only be collected in connection with a specific purpose and must not be stored for longer than necessary.

**In our example,** were the agent to ask other details such as church affinity, gender, sexual orientation, it would exceed the purpose of what the agent is required to do, and will not be compliant with this principle.

4. **Restriction on further processing:** Personal information may only be processed for a purpose other than that for which it was collected under specific conditions.

**In our example,** were the agent to keep the email address and contact numbers of the landlord and/or tenant with the plan to market other properties to them for sale or to rent in future, without a specific consent to do so, this condition will be breached (unless one of the other exclusionary grounds apply, such as the example relating to the legitimate interests of the agency).

5. **Information quality:** Personal information must be complete and accurate and must ideally be obtained from the person himself, where possible. Only where this is not possible, may other sources be approached.

In other words, **in our example,** the information obtained must as far as reasonably possible, be sourced from the tenant himself, or from the landlord and the agent must make every reasonable effort to ensure that it is recorded correctly.

6. **Openness:** Personal information must be processed in a transparent manner. **In our example,** the tenant must therefore be made aware of the fact that his data is being collected for purposes of assessment of his application for the lease.
- This could be achieved fairly easily by inserting a note in the estate agency's standard application forms to the effect that the applicant's (data subject's) personal information is being collected for purposes of assessing his eligibility and financial capacity for the lease, and that the agency will securely store the details in terms of the agency's privacy policy – or words to this effect.
7. **Security safeguards:** Personal information must be processed securely and the responsible party must provide notification of any data breaches. This simply means that the agent must, when collecting and storing the information, take care to ensure that all is kept secure and not accidentally lost or made known to third parties.
- The Regulator requires the responsible party (estate agency) to take appropriate, reasonable technical and organisational measures to prevent the loss or damage to, or unauthorised access of, personal information. This includes putting in place measures to secure that the operator only applies and uses the information made available to it, for the purposes determined by the estate agency; and should enter into a written contract with the operator, and to ensure that an operator that processes personal information for it establishes and maintains the security measures; and, in the case of data breaches or unauthorised access to the system of an operator, that the operator reports the incident to the responsible party, and the responsible party must report the incident to the Regulator and the data subject/s within a reasonable time. A data breach notification must be in writing and communicated to the data subject in one of various ways, or as directed by the Regulator.
8. **Data subject participation:** Data subjects must be allowed access to their personal information held by the estate agency, and may request that it is corrected or deleted if it is inaccurate. This

## The Big Small Firm

[stbb.co.za](http://stbb.co.za)

Commercial Law | Conveyancing | Development Law | Labour Law | Estates | Family Law | Litigation | Personal Injuries & Third Party Claims

Cape Town  
Claremont  
Fish Hoek  
Helderberg

T: 021 406 9100  
T: 021 673 4700  
T: 021 784 1580  
T: 021 850 6400

Blouberg  
Tyger Valley  
Illovo  
Fourways

T: 021 521 4000  
T: 021 943 3800  
T: 011 219 6200  
T: 010 001 2632

Centurion  
Bedfordview  
East London

T: 012 001 1546  
T: 011 453 0577  
T: 043 721 1234

is self-explanatory. If the estate agency is obliged by law to keep the records for a certain period, then the agency may legitimately refuse to give heed to the data subject's request.

**In our example**, the agency must have a system/process in place to answer a data subject's enquiry regarding what information of him/her/it the agency is holding; they are allowed to view it and to ask for it to be rectified if the information is incorrect or incomplete.

## CHAPTER 6

### THE NEW REGULATORY AUTHORITY

#### 6.1. THE REGULATOR FOR DATA PROTECTION

POPIA introduces and provides for the establishment of an independent supervisory authority, the Information Regulator. It is specifically tasked with the duty to monitor and police compliance with the data protection provisions contained in POPIA.

#### 6.2 MAIN POWERS, DUTIES AND RESPONSIBILITIES OF THE REGULATOR

The Information Regulator is responsible for the oversight and enforcement of POPIA and has wide-ranging powers and responsibilities, including in relation to:

- facilitating education, training and awareness on data protection;
- monitoring and enforcing compliance with POPIA;
- consulting with any interested parties on data protection;
- handling complaints from data subjects and/or other parties in relation to data protection;
- research regarding privacy and data protection; issuing codes of conduct; and facilitating cross border cooperation in the enforcement of privacy laws.

#### 6.3 SUBMITTING COMPLAINTS TO THE REGULATOR

Any person may, either orally or in writing submit a complaint to the Information Regulator in the event of alleged interference with their rights to privacy.

After receipt of a complaint, the Information Regulator is obliged to investigate the complaint, act as a conciliator where appropriate and take further action as contemplated by POPIA.

In exercising its investigative powers, the Information Regulator may, amongst other things:

## The Big Small Firm

[stbb.co.za](http://stbb.co.za)

Commercial Law | Conveyancing | Development Law | Labour Law | Estates | Family Law | Litigation | Personal Injuries & Third Party Claims

Cape Town  
Claremont  
Fish Hoek  
Helderberg

T: 021 406 9100  
T: 021 673 4700  
T: 021 784 1580  
T: 021 850 6400

Blouberg  
Tyger Valley  
Illovo  
Fourways

T: 021 521 4000  
T: 021 943 3800  
T: 011 219 6200  
T: 010 001 2632

Centurion  
Bedfordview  
East London

T: 012 001 1546  
T: 011 453 0577  
T: 043 721 1234

- summon and enforce the appearance of persons;
- compel the provision of written or oral evidence under oath;
- receive evidence irrespective of whether such evidence is admissible in a court of law; and
- enter and search any premises occupied by a responsible party.

Where necessary, the Information Regulator may apply to a judge of the High Court or a magistrate to issue a warrant to enable the Information Regulator to enter and search premises.

The Big Small Firm

[stbb.co.za](http://stbb.co.za)

Commercial Law | Conveyancing | Development Law | Labour Law | Estates | Family Law | Litigation | Personal Injuries & Third Party Claims

Cape Town  
Claremont  
Fish Hoek  
Helderberg

T: 021 406 9100  
T: 021 673 4700  
T: 021 784 1580  
T: 021 850 6400

Blouberg  
Tyger Valley  
Illovo  
Fourways

T: 021 521 4000  
T: 021 943 3800  
T: 011 219 6200  
T: 010 001 2632

Centurion  
Bedfordview  
East London

T: 012 001 1546  
T: 011 453 0577  
T: 043 721 1234

## CHAPTER 7

### SPECIAL NOTIFICATION/REGISTRATION REQUIREMENTS

No registration or notification requirements for the processing of personal information are prescribed by POPIA other than prior authorisation with regard to certain limited categories of processing under Section 57 of POPIA which relates to the cross-border transfer of special personal information or personal information concerning children.

With regards to registration requirements with regards to the person acting as the business' Information Officer, see chapter 8.

## CHAPTER 8

### THE POPIA COMPLIANCE OFFICER IN THE ESTATE AGENCY & REGISTRATION REQUIREMENTS

POPIA makes it compulsory to appoint a (POPIA) information officer. In the Act, the definition of "information officer" is aligned with the definition thereof in section 1 of PAIA (The Promotion of Access to Information Act).

There is no formal prescribed procedure for the appointment by an organisation for the appointment of an individual as an information officer, as the position is automatically assigned to the head of an organisation (be it the chief executive officer or otherwise).

With the coming into force of POPI, the role of the information officer has expanded. Their role within an

The Big Small Firm

[stbb.co.za](http://stbb.co.za)

Commercial Law | Conveyancing | Development Law | Labour Law | Estates | Family Law | Litigation | Personal Injuries & Third Party Claims

Cape Town  
Claremont  
Fish Hoek  
Helderberg

T: 021 406 9100  
T: 021 673 4700  
T: 021 784 1580  
T: 021 850 6400

Blouberg  
Tyger Valley  
Illovo  
Fourways

T: 021 521 4000  
T: 021 943 3800  
T: 011 219 6200  
T: 010 001 2632

Centurion  
Bedfordview  
East London

T: 012 001 1546  
T: 011 453 0577  
T: 043 721 1234

organisation is now not only governed by the provisions of PAIA, but also POPI.

POPIA provides that the information officer is responsible for, amongst other things:

- ensuring that the organisation complies with the conditions of lawful processing of personal information (see chapter 5); and
- working with the Regulator in relation to any investigations conducted in accordance with the relevant provisions of POPIA.

These responsibilities are further extended in the regulations, which provide that an information officer is required to, amongst other things:

- ensure a compliance framework is developed, implemented, monitored and maintained;
- attend to a personal information impact assessment to ensure that adequate measures and standards exist within the responsible party in order to comply with the various conditions for lawful processing of personal information as contemplated in POPIA; and
- ensure that a manual as contemplated in PAIA is developed, monitored, maintained and made available; and
- ensure that internal awareness sessions are conducted regarding the provisions of POPIA, the regulations and any codes of conduct or information obtained from the Regulator.

An organisation may appoint deputy information officers as may be necessary to assist with and perform the duties placed on the information officer.

Although the position of the information officer remains an automatic appointment, the information officer is now required to register with the Regulator prior to taking up his or her duties as an information officer under POPIA. (It appears therefore that although an information officer may continue to act in accordance with the provisions of PAIA, he/she should first register with the Regulator before attending to his/her duties and responsibilities under POPIA.)

## The Big Small Firm

[stbb.co.za](http://stbb.co.za)

Commercial Law | Conveyancing | Development Law | Labour Law | Estates | Family Law | Litigation | Personal Injuries & Third Party Claims

Cape Town  
Claremont  
Fish Hoek  
Helderberg

T: 021 406 9100  
T: 021 673 4700  
T: 021 784 1580  
T: 021 850 6400

Blouberg  
Tyger Valley  
Illovo  
Fourways

T: 021 521 4000  
T: 021 943 3800  
T: 011 219 6200  
T: 010 001 2632

Centurion  
Bedfordview  
East London

T: 012 001 1546  
T: 011 453 0577  
T: 043 721 1234



The Information Regulator reported that the office intends to develop an electronic portal - (i) enabling an organisation to register its information officer and (ii) allowing access to the register of information officers to data subjects - by 3 March 2021 (section 55(2)).

The Big Small Firm

[stbb.co.za](http://stbb.co.za)

Commercial Law | Conveyancing | Development Law | Labour Law | Estates | Family Law | Litigation | Personal Injuries & Third Party Claims

Cape Town  
Claremont  
Fish Hoek  
Helderberg

T: 021 406 9100  
T: 021 673 4700  
T: 021 784 1580  
T: 021 850 6400

Blouberg  
Tyger Valley  
Illovo  
Fourways

T: 021 521 4000  
T: 021 943 3800  
T: 011 219 6200  
T: 010 001 2632

Centurion  
Bedfordview  
East London

T: 012 001 1546  
T: 011 453 0577  
T: 043 721 1234

## CHAPTER 9

### STEPS ESTATE AGENTS MUST IMPLEMENT TO BECOME COMPLIANT AND MARKETING

#### 9.1 WHAT COMPLIANCE WILL REQUIRE OF THE ESTATE AGENCY

Although this document is not a “POPIA checklist” or “POPIA toolkit” to achieve compliance, an overview of the general steps required in the process of becoming compliant, should nevertheless be of assistance to begin planning such a project.

The steps below are not set out in a particular order or sequence as the ideal solution for any business is particular to that organisation and depends on its readiness to implement POPIA. With ‘readiness’ it is meant that an organisation/estate agency which already functions in a way which incorporates healthy corporate governance principles, is more ready to absorb POPIA compliance measures than an agency without this awareness.

Compliance will generally involve these considerations:

- **The agency’s information officer’s role.** The default information officer of an estate agency is its head, which is generally the CEO/principal, unless it has been delegated. The first step to compliance would therefore be to appoint an information officer if the agency does not already have one, or to reassess the role of the existing information officer in line with the requirements set out in POPIA. The duties imposed on the information officer have been listed in chapter 8. These are mandatory.

The Big Small Firm

[stbb.co.za](http://stbb.co.za)

Commercial Law | Conveyancing | Development Law | Labour Law | Estates | Family Law | Litigation | Personal Injuries & Third Party Claims

Cape Town  
Claremont  
Fish Hoek  
Helderberg

T: 021 406 9100  
T: 021 673 4700  
T: 021 784 1580  
T: 021 850 6400

Blouberg  
Tyger Valley  
Illovo  
Fourways

T: 021 521 4000  
T: 021 943 3800  
T: 011 219 6200  
T: 010 001 2632

Centurion  
Bedfordview  
East London

T: 012 001 1546  
T: 011 453 0577  
T: 043 721 1234

- **Buy-in and staff training.** In order to ensure effective compliance, buy-in from senior management all the way down the chain of command is needed. Employees must be informed of what data privacy is about and what their duties are in terms of POPIA.
- **Find the personal information in your agency: Do a self-check/GAP analysis/ impact assessment.** Each agency should perform a detailed check on when and how information is collected, how it is stored and used and ultimately deleted or destroyed and whether it was collected with the necessary consent or otherwise obtained lawfully where consent is not required. Once such a “self-audit” is completed, there should be a clear understanding of how data is being processed in the agency. Gaps and risks should become identifiable.
- **Design a practicable compliance framework, which usually include identified processes and policies.** A proper gap analysis will help identify which processes and policies have to be put in place. These often include:
  - updates to employment contracts (see para 9.2);
  - updates to supplier agreements (see para 9.3);
  - changes to marketing practices (see para \_\_\_\_);
  - implementation of policies such as privacy policy, data breach policy, data subject record access request policy, CCTV camera policy, employee device policy, and so forth.
- **Implementation.** The compliance framework should be implemented, monitored and maintained. Policies and procedures do nothing to aid compliance if they are not properly implemented.

## 9.2 EMPLOYEES AND EMPLOYMENT CONTRACTS

The general provisions under POPIA will apply equally to any personal information processed as part of a

### The Big Small Firm

[stbb.co.za](http://stbb.co.za)

Commercial Law | Conveyancing | Development Law | Labour Law | Estates | Family Law | Litigation | Personal Injuries & Third Party Claims

Cape Town  
Claremont  
Fish Hoek  
Helderberg

T: 021 406 9100  
T: 021 673 4700  
T: 021 784 1580  
T: 021 850 6400

Blouberg  
Tyger Valley  
Illovo  
Fourways

T: 021 521 4000  
T: 021 943 3800  
T: 011 219 6200  
T: 010 001 2632

Centurion  
Bedfordview  
East London

T: 012 001 1546  
T: 011 453 0577  
T: 043 721 1234

data subject's employment. POPIA does specifically include a data subject's employment history within the definition of personal information. This means that POPIA applies to the collection and use of personal information of prospective employees, current employees and past employees, as well as the monitoring employees' email, internet access, location data and the video surveillance of employees in the employment context. Employee records recorded and maintained by an estate agent (as employer and responsible party) must be "processed" as provided for in POPIA.

This requires of the estate agency, as employer, to ensure:

- lawful justification for the processing of personal information;
- the personal information being processed must be relevant, adequate and not excessive having regard to the purpose for which it is processed;
- the employee must be notified of the purposes of collection and processing of personal information, and the employer must consider each employees' right to access, modification and erasure in light of POPIA requirements. (See chapter 5.1 where these "conditions for lawful processing" were discussed in more detail.)

It is further advisable to include provisions in the employment contract recording the employee's obligation to adhere to the privacy policies of the employer, both with regard to the private information of the employer and the private information of clients and service providers that the employee may come in contact with in the course of his/her employment.

The estate agency must also make every effort to maintain awareness of compliance with the privacy policies of the employer by way of regular training/updates of employees on the requirements of the Act and the employer's own policies.

## 9.3 EFFECT ON CERTAIN MARKETING PROCEDURES

### The Big Small Firm

[stbb.co.za](http://stbb.co.za)

Commercial Law | Conveyancing | Development Law | Labour Law | Estates | Family Law | Litigation | Personal Injuries & Third Party Claims

Cape Town  
Claremont  
Fish Hoek  
Helderberg

T: 021 406 9100  
T: 021 673 4700  
T: 021 784 1580  
T: 021 850 6400

Blouberg  
Tyger Valley  
Illovo  
Fourways

T: 021 521 4000  
T: 021 943 3800  
T: 011 219 6200  
T: 010 001 2632

Centurion  
Bedfordview  
East London

T: 012 001 1546  
T: 011 453 0577  
T: 043 721 1234

## DIRECT MARKETING

### 9.3.1 Electronic direct marketing and consent

According to POPIA, direct marketing is electronic communication that is directed at an individual or entity and which promotes or offers to supply any goods or services. Examples include emails, SMS messages, messages sent via social media platforms directly to a specific individual and advertising sent to a custom audience via social media platforms (ie, where it is known who the recipients are).

Once categorised as (electronic) direct marketing, an estate agency must then ascertain whether an opt-in consent must be obtained. There are two scenarios.

- If this is a **first approach** to the person, consent must be obtained for any unsolicited (ie, that person did not ask for it) marketing to that person. In other words, where an estate agency wants to contact a person for the first time with marketing communication which was not requested (unsolicited), the agency must obtain consent before sending electronic marketing to individuals. The agency may approach someone for direct marketing consent once only, and provided that they have not withheld consent previously.

There is a form (Form 4) in the Regulations to POPIA that sets out an example of such a consent. Agencies may use it as is, or choose to adapt it and make it more attractive than the legislature's attempt (whilst making sure the necessary information is contained therein so that the person knows at all times what marketing he is consenting to and from whom it will be received).

- On the other hand, when it comes to **contacting your existing customers**, there are **three criteria** that need to be met before you can start marketing to them directly:
  1. If the client's contact information was obtained in the context of a **rendering a service** (such as assistance with a sale or lease of immovable property);
  2. If the agency wants to **inform** that client of similar offerings;

## The Big Small Firm

[stbb.co.za](http://stbb.co.za)

Commercial Law | Conveyancing | Development Law | Labour Law | Estates | Family Law | Litigation | Personal Injuries & Third Party Claims

Cape Town  
Claremont  
Fish Hoek  
Helderberg

T: 021 406 9100  
T: 021 673 4700  
T: 021 784 1580  
T: 021 850 6400

Blouberg  
Tyger Valley  
Illovo  
Fourways

T: 021 521 4000  
T: 021 943 3800  
T: 011 219 6200  
T: 010 001 2632

Centurion  
Bedfordview  
East London

T: 012 001 1546  
T: 011 453 0577  
T: 043 721 1234

3. If the client is **given opportunities to refuse the direct marketing**, both at the time the information is collected and every time marketing is directed to him/her. For example, if an agent has an existing relationship with a property investor in terms of which he or she shall find options in new developments for purposes of leasing, marketing new suitable developments to that client will generally be in order provided an opt-out option appears in each electronic marketing message.

The estate agency must further manage its own client databases effectively and keep records of where, how and when the personal information was initially obtained; whether the person is an existing customer and, if so, in respect of what products or services; whether the person has consented to receiving direct marketing; and whether the person has unsubscribed from receiving direct marketing.

It is advisable therefore to:

- use bulk email and SMS **software that keeps track of opt-in and opt out information** and automatically **includes an automatic opt** out on each message sent to existing clients and others that have opted-in to receive marketing; and to
- **ask people directly** if they may be added to the agency's database.

### 9.3.2 Lead generator service providers

The business of buying and selling of personal information is tricky. In the context of POPIA, "personal information" refers to information relating to an identifiable, living natural person (and, where applicable, a juristic person), including your gender, marital status, age, identity number, email address, telephone number and physical address. There are a host of companies that have built up huge databases of contact details (including phone numbers and email addresses of individuals) and these are bought and sold on the open market. Often estate agents make use of these.

The provisions in POPIA requires of such lead generation companies to process ("processing" of personal

## The Big Small Firm

[stbb.co.za](http://stbb.co.za)

Commercial Law | Conveyancing | Development Law | Labour Law | Estates | Family Law | Litigation | Personal Injuries & Third Party Claims

Cape Town  
Claremont  
Fish Hoek  
Helderberg

T: 021 406 9100  
T: 021 673 4700  
T: 021 784 1580  
T: 021 850 6400

Blouberg  
Tyger Valley  
Illovo  
Fourways

T: 021 521 4000  
T: 021 943 3800  
T: 011 219 6200  
T: 010 001 2632

Centurion  
Bedfordview  
East London

T: 012 001 1546  
T: 011 453 0577  
T: 043 721 1234

information basically refers to anything the company can do with it, from receiving, storing, updating and disseminating it, through to erasing or destroying it) their databases in compliance with the Act. The generation of the lists must therefore be managed a lot more effectively than was the position in the past so that the records reliably record specific details, amongst other things: where, how and when the personal information was initially obtained; whether the person has 'opted in' or given their consent to be marketed to in this fashion.

### 9.3.3 Cold calling

As mentioned before, estate agents may not without consent send unsolicited SMS's or automated calls, as these are fall within the definition of direct marketing in POPIA. Agents may still do cold calling though, as this is a personal (not electronic) way of direct marketing and therefore not prohibited by the provisions of POPIA. The recipient of the call may ask the agent to stop contacting him or her, and this must then be adhered to.

However, where the estate agent uses lists purchased from a lead generation business, the position is trickier, as the estate agent will have to obtain confirmation from the lists provider that the records have been obtained and stored in a way that is compliant with POPIA and that consent is in place, as indicated above. That is generally difficult, as this was not the practice in the past to record the additional detail or to obtain consent.

When obtaining these records, it will be advisable for the estate agency to obtain confirmation from the provider of the records that the data provided has been obtained and recorded in a way that is POPIA compliant.

## CHAPTER 10

### FURTHER COMPLIANCE CONSIDERATIONS

#### 10.1 DATA BREACH NOTIFICATION

Where there are reasonable grounds to believe that a data subject's personal information has been accessed or acquired by an unauthorised person, the estate agency (as responsible party), or any third party processing personal information on instruction from the estate agency (the operator), must notify the Information Regulator and the data subject. (Notice to the data subject is not required if the identity of the data subject cannot be established as a result of the breach, in the hands of the recipient.)

Notification to the data subject must be:

- made as soon as reasonably possible after the discovery of the breach;
- sufficiently detailed;
- in writing; and
- communicated to the data subject by mail to the data subject's last known physical or postal address; or by email to the data subject's last known email address; or by placement in a prominent position on the website of the responsible party; or by publication in the news media; or as may be directed by the Information Regulator.

#### 10.2 SANCTIONS

It has been noted above that the Information Regulator is responsible for the investigation and enforcement of POPIA. A person contravenes the provisions of POPIA if he/she it:

- hinders, obstructs or unlawfully influences the Information Regulator;
- fails to comply with an information or enforcement notice;

The Big Small Firm

[stbb.co.za](http://stbb.co.za)

Commercial Law | Conveyancing | Development Law | Labour Law | Estates | Family Law | Litigation | Personal Injuries & Third Party Claims

Cape Town  
Claremont  
Fish Hoek  
Helderberg

T: 021 406 9100  
T: 021 673 4700  
T: 021 784 1580  
T: 021 850 6400

Blouberg  
Tyger Valley  
Illovo  
Fourways

T: 021 521 4000  
T: 021 943 3800  
T: 011 219 6200  
T: 010 001 2632

Centurion  
Bedfordview  
East London

T: 012 001 1546  
T: 011 453 0577  
T: 043 721 1234



- gives false evidence before the Information Regulator on any matter after having been sworn in or having made an affirmation;
- contravenes the conditions;
- knowingly or recklessly, without the consent of the responsible party, obtains, discloses, or procures the disclosure, sell, or offers to sell details of a data subject to another person;

and will be guilty of an offence.

Contravention of POPI could result in far-reaching sanctions, these include the imposition of fines up to R10 million, imprisonment for a period of 12 months to 10 years and/or a damages claim by the data subject.

### 10.3 DATA RETENTION

In terms of POPIA, records of personal information must not be retained any longer than is necessary for achieving the purpose for which the information was collected or subsequently processed (in compliance with the processing principle of **purpose limitation** - see chapter 5.2). The trigger for the application of data retention requirements will, therefore, depend on the activities conducted by a responsible party.

Personal information may however be retained for longer periods if:

- retention of the record is required or authorised by law;
- the responsible party reasonably requires the record for lawful purposes related to its functions or activities;
- retention of the record is required by a contract between the parties thereto; or
- the data subject or a competent person, where the data subject is a child, has consented to the retention of the record.

Notwithstanding these exceptions, records of personal information may be retained for periods in excess of these mentioned for historical, statistical, or research purposes if the responsible party has established appropriate safeguards against the records being used for any other purposes.

The Big Small Firm

[stbb.co.za](http://stbb.co.za)

Commercial Law | Conveyancing | Development Law | Labour Law | Estates | Family Law | Litigation | Personal Injuries & Third Party Claims

Cape Town  
Claremont  
Fish Hoek  
Helderberg

T: 021 406 9100  
T: 021 673 4700  
T: 021 784 1580  
T: 021 850 6400

Blouberg  
Tyger Valley  
Illovo  
Fourways

T: 021 521 4000  
T: 021 943 3800  
T: 011 219 6200  
T: 010 001 2632

Centurion  
Bedfordview  
East London

T: 012 001 1546  
T: 011 453 0577  
T: 043 721 1234

## 10.4 DATA TRANSFERS AND OUTSOURCING

POPIA provides that a responsible party may not transfer personal information about a data subject to a third party in a foreign jurisdiction unless:

- the recipient is subject to a law or contract which: upholds principles of reasonable processing of the information that are substantially similar to the principles contained in POPIA;
- includes provisions that are substantially similar to those contained in POPIA relating to the further transfer of personal information from the recipient to third parties;
- the data subject consents to the transfer;
- the transfer is necessary for the performance of a contract between the data subject and the responsible party, or for the implementation of pre-contractual measures taken in response to the data subject's request;
- the transfer is necessary for the conclusion or performance of a contract concluded in the interest of the data subject between the responsible party and a third party; or
- the transfer is for the benefit of the data subject and it is not reasonably practicable to obtain the consent of the data subject to that transfer; and if it were reasonably practicable to obtain such consent, the data subject would be likely to give it.