

PoPI Act could kill more than just spam

The long-awaited Protection of Personal Information (PoPI) Act regulations were published last year in September. They don't say much, but what they do say spells more than just sleepless nights for direct marketers. If accepted as is, these regulations have the potential to send direct marketing in SA back to the stone age.



By Elizabeth de Stadler 21 Feb 2018



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I'm the first to admit that I hate spam when it's uninvited and comes from a company you have never dealt with before, much less have given your info to. Mild irritation quickly turns into rage when you realise that your private information is being sold as 'leads' without you knowing. These are some of the concerns that are meant to be addressed by PoPI Act, which will come into effect sometime during 2018.

Balanced approach needed

PoPI Act will make it mandatory to ask for consent before electronic direct marketing is sent to a person for the first time. It will also make it virtually impossible to sell a person's private information to a third party without their permission. This all sounds like a bloody good idea, I hear you say. Well yes, in principle. But only if a balanced approach is taken.



LEGISLATION & REGULATION

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15 May 2017

Even as an avid supporter of privacy rights and control over personal information, I'm concerned that the draft regulations which outline the way direct marketing consent must be obtained is overkill. The kind of overkill that could hurt SA's digital economy significantly. As much as we hate spam, we must also acknowledge that not all direct marketing is Freddy Krueger level evil.

The evolution of digital marketing and advanced analytics enables marketers to better target their communications. This means they can give consumers information about product and services that can help them make informed decisions, all conveniently delivered to their inbox and devices.

LEGISLATION & REGULATION

How will your right to privacy change under POPIA?



Here is a simple example. A woman has returned to work after maternity leave. She would probably really appreciate a heads-up from a retailer that their nappies are on special this week only. When you juggle work, life and two kids, there is hardly any time left to scan traditional media for deals and specials, never mind pop into a shop to compare prices. If it wasn't for the email she saw in her inbox this morning, she would have missed out on the deal. A few small breaks like this per month could make a huge difference when she tries to balance her budget in the current economic climate.

I'm not saying consumers should not have a choice in whether to receive direct marketing. I just want the choice to be an informed one and I want consumers to be able to accurately make it. Which brings me to my next concern: the format of consent.

The format of the consent

Section 69 of PoPI Act says that if you want to send electronic direct marketing to a person to whom you have never sent before, you have to contact them first to ask for consent. The Regulator was given the power to prescribe what this consent should look like. This is what they came up with:

FORM 4

**APPLICATION FOR THE CONSENT OF A DATA SUBJECT FOR THE PROCESSING OF
PERSONAL INFORMATION FOR THE PURPOSE OF DIRECT MARKETING IN TERMS OF
SECTION 69(2) OF THE PROTECTION OF PERSONAL INFORMATION ACT, 2013 (ACT NO.
4 OF 2013)**

REGULATIONS RELATING TO THE PROTECTION OF PERSONAL INFORMATION, 2017
[Regulation 6]

TO: _____

(Name and address of data subject)

FROM: _____

Contact number(s): _____
Fax number: _____
E-mail address: _____
(Name, address and contact details of responsible party)

Dear *Mr/Ms/Dr/Adv/Prof _____

PART A

1. In terms of section 69 of the Protection of Personal Information Act, 2013 (Act No. 4 of 2013), the processing of personal information of a data subject (the person to whom personal information relates) for the purpose of direct marketing by means of any form of electronic communication, including automatic calling machines, facsimile machines, SMSs or e-mail is prohibited unless written consent to the processing is given by the data subject. You may only be approached once for your consent by this responsible party. After you have indicated your

And it goes on...

wishes in Part B, you are kindly requested to submit this Form either by post, facsimile or e-mail to the address, facsimile number or e-mail address as stated above.

2. "Processing" means any operation or activity or any set of operations, whether or not by automatic means, concerning personal information, including—

- (a) the collection, receipt, recording, organisation, collation, storage, updating or modification, retrieval, alteration, consultation or use;
- (b) dissemination by means of transmission, distribution or making available in any other form; or
- (c) merging, linking, as well as restriction, degradation, erasure or destruction of information.

3. "Personal information" means information relating to an identifiable, living, natural person, and where it is applicable, an identifiable, existing juristic person, including, but not limited to—

- (a) information relating to the race, gender, sex, pregnancy, marital status, national, ethnic or social origin, colour, sexual orientation, age, physical or mental health, well-being, disability, religion, conscience, belief, culture, language and birth of the person;
- (b) information relating to the education or the medical, financial, criminal or employment history of the person;
- (c) any identifying number, symbol, e-mail address, physical address, telephone number, location information, online identifier or other particular assignment to the person;
- (d) the biometric information of the person;
- (e) the personal opinions, views or preferences of the person;
- (f) correspondence sent by the person that is implicitly or explicitly of a private or confidential nature or further correspondence that would reveal the contents of the original correspondence;
- (g) the views or opinions of another individual about the person; and
- (h) the name of the person if it appears with other personal information relating to the person or if the disclosure of the name itself would reveal information about the person.

(Signature of person authorised by responsible party)

Full names and designation of person signing on behalf of responsible party:

And on...

Date: _____

PART B

I, _____ (full names) hereby:

Consent to goods and services to be marketed by means of unsolicited electronic communication.

And on... (wait, is that an actual signature?)

SPECIFY GOODS AND SERVICES:

SPECIFY METHOD OF COMMUNICATION: FAX :
E - MAIL :
SMS :
OTHERS – SPECIFY:

☐

Give my consent.

☐

Do not give my consent.

Signed at this day of20.....

.....
Signature of data subject

Where to start? Well, it is two pages long and it is not in plain language. This means that the majority of South Africans will not be able to understand it. This will make it extremely difficult for them to give their informed consent. Which is kind of th

point of PoPI Act – to give control back to people.

Not in keeping with international best practices

It is not technology neutral, while the lion's share of direct marketing is done via digital channels, the form requires a physical signature even though there is no legal requirement for it. Biometric information like signatures are very sensitive and should never be collected if it is not absolutely required.

When you apply big picture thinking to all of the above, you soon spot a more serious issue. The PoPI Act regulations, as they stand, are not in keeping with international best practices. The proposed approach will certainly negatively affect South African business' capabilities to compete in the global marketplace. Foreign business will be able to market more efficiently giving them the leading edge, at the expense of local businesses and our economy.

In my opinion, the PoPI Act regulations are coming dangerously close to over-regulating South African businesses. Potentially, this could not only be detrimental to our economy, but also to the very consumers they are trying to protect. I'll unpacking the above and several other PoPI Act issues in more detail during my talk at the [IAB Digital Summit 2018](#).



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Leigh Andrews 20 Feb 2018

ABOUT ELIZABETH DE STADLER

Elizabeth specialises in all things Consumer Law, plain language drafting and designing and delivering training. She prides herself on being slightly out there and bringing a fresh perspective to compliance issues. She has a Masters (cum laude - the nerd) in Consumer Law. In 2011 Elizabeth joined Esselaar Attorneys (she is still a senior associate at the firm). In 2013 she founded Novation Consulting with Paul Esselaar.
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