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Attorneys | Conveyancers | Notaries

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RE: POPIA AND COMMUNITY SCHEME LIVING

1. The value of information and data has increased exponentially over the last decade. Some researchers have referred to information as ‘the oil of the 21st Century’. As the value of information has evolved, the law regulating the economic use of personal information and data resources has also evolved.
2. Historically, the right to privacy, which is also enshrined in section 14 of the Constitution, was by the common law. The Protection of Personal Information Act (“*POPIA*”) heralds a dramatic change in the landscape of personal information protection and regulation in South Africa, with stringent obligations being imposed on the custodians of personal information.
3. With the *POPIA* “date of compliance” steadily approaching, our offices have been inundated with queries relating to the impact of *POPIA* on community schemes. This note seeks to address some of these questions.

Does POPIA apply to community schemes?

4. In terms of section 3 of *POPIA*, the Act applies to any natural or juristic person who processes personal information by entering it in a record.
5. In terms of section 1 of *POPIA*:

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- 5.1. “processing” means any activity or set of operations, relating to personal information including, *inter alia*, collection, dissemination, transmission storage, and destruction of personal information;
 - 5.2. “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 *inter alia*, full names, identity numbers, contact details, addresses, financial information, etc;
 - 5.3. “record” means any form or medium within which personal information is captured, whether in writing or computerised.
6. When considering the above, it is quite clear that all community schemes must adhere to the provisions and principles of POPIA.

When should community schemes be POPIA compliant?

7. The deadline for compliance with the provisions of POPIA is 1 July 2021.

What are the consequences of non-compliance with POPIA?

8. The sanction/s for non-compliance with POPIA include:
- 8.1. a fine or penalty not exceeding R 10 000 000.00; and/or
 - 8.2. up to 12 months imprisonment.
9. In addition, person(s) whose personal information have been compromised due to the failure to comply with POPIA, may institute a claim for damages.



Can community schemes be exempted from being POPIA compliant?

10. In terms of section 37 of POPIA, the Information Regulator may exempt certain natural and legal persons from complying with the principles of POPIA, in instances where:
 - 10.1. the public interest substantially outweighs, the interference with the privacy of individual(s); or
 - 10.2. the processing of the personal information involves a clear benefit to such a person or a third party, which benefit outweighs, to a substantial degree the interference with the individual(s)' privacy.
11. No such exemption has been afforded to community schemes, irrespective of the size of the community scheme, nor has the Information Regulator expressed any intention to exempt community schemes.

Should the community scheme and/or the managing agent be POPIA compliant?

12. It is understandable that governing bodies of community schemes may be of the view that, as the managing agent is the party responsible for the processing of personal information, managing agencies (as opposed to the scheme itself) ought to be compliant.
13. This is however not the case. As the community scheme is ultimately required to process the personal information of its members, the community scheme itself must be POPIA compliant. Similarly, as the managing agent processes such information on behalf of the community scheme, such managing agent will also be required to be POPIA compliant.



14. There is accordingly a dual compliance obligation on community schemes and managing agents.

What are the principles of POPIA when processing personal information?

15. POPIA prescribes 8 (eight) basic principles for the lawful processing and use of personal information. These principles are summarised as follows;
 - 15.1. Accountability – You must ensure that all the principles contained in POPIA, and all the measures that give effect to these principles are complied with.
 - 15.2. Processing Limitation – Personal Information must be processed in a fair and lawful manner.
 - 15.3. Purpose Specification – Personal Information may only be processed for specific and legitimate reasons.
 - 15.4. Further Processing Limitation – Personal Information may not be processed further unless it is compatible or related to the original purpose.
 - 15.5. Information Quality – Personal Information must be reliable, accurate and up to date.
 - 15.6. Openness – A person / data subject must be adequately informed when Personal Information is processed.
 - 15.7. Security Safeguards – Personal information must be kept secure against the risk of loss, unauthorised access, interference, modification, destruction, and disclosure.



- 15.8. Data Subject Participation – A person / data subject may request access to, correction and deletion of their Personal Information.

Should a community scheme appoint an information officer?

16. POPIA is applicable to community schemes, and therefore the appointment of an information officer is mandatory.

Who is the information officer?

17. In terms of section 1 of POPIA, an “information officer”, for the purposes of a private body, is defined as “the head of a private body as contemplated in section 1, of the Promotion of Access to Information Act” (“PAIA”).
18. PAIA defines the “head” of a private body as either:
- 18.1. “the chief executive officer or equivalent officer of the juristic person or any person duly authorised by that officer; or
- 18.2. the person who is acting as such or any person duly authorised by such acting person”.
19. The Information Regulator clarified the meaning of “duly authorised” in its *Guidance Note on Information Officers and Deputy Information Officers* (“Guidance Note”) published in April 2021, by stating that an individual “duly authorised” is:
- 19.1. any person at an executive level or in an equivalent position to the head of the institution; and



- 19.2. an employee of the private body.
20. This a very wide definition, applicable to any entity ranging from multi structural corporate companies to a street vendor, and everything in between (including community scheme). Wide as it may be, the meaning of 'duly authorised' remains problematic for community schemes as its members and executive committee are not regarded as employees.
21. A further consequence hereof is that doubt is cast upon whether a community scheme is entitled to appoint a managing agent as the information officer of the scheme, as it does not act on an executive level, nor is it an employee of the scheme. In the absence of a further Guidance Note to clarify this lacuna, community schemes should err on the side of caution when deciding who is to be appointed as the information officer.

If the community scheme does not appoint an information officer, what happens then?

22. The default position in terms of POPIA and PAIA, if a specific person is not appointed as the information officer, is that the head of the institution would be regarded as having assumed this position.
23. It is also noteworthy that POPIA requires the appointment of an individual and not a collective, such as the executive committee of the community scheme.
24. We are of the view that the proverbial "head" of a community scheme is the chairperson of its executive committee and the chairperson would thus, for the purposes of POPIA, be regarded as the information officer of the community scheme.
25. Whilst this is not expressly provided for and/or supported in governing legislation (the STSMA and Companies Act), if regard is had to the additional



competencies of a chairperson (as opposed to a single trustee or director), no other interpretation would be viable in a community scheme context.

26. We are of the view that community schemes would be well advised to act proactively in appointing an information officer itself, rather than deferring this to the Information Regulator's discretion.

What are the duties of the information officer?

27. POPIA prescribes the following duties to an information officer:
 - 27.1. to perform a personal information impact analysis (or gap analysis) to ensure that adequate measures and standards exist in order to comply with the conditions for the lawful processing of personal information;
 - 27.2. to develop, implement, monitor and maintain a compliance framework;
 - 27.3. to develop and implement internal measures to process requests for personal information;
 - 27.4. to create internal awareness regarding the provisions of POPIA;
 - 27.5. to encourage compliance with the conditions of lawful processing of personal information;
 - 27.6. to deal with requests made by both the Information Regulator and the stakeholders of the community scheme;
 - 27.7. to assist and work with the Information Regulator in relation to investigations conducted in relation to the body; and



- 27.8. to otherwise ensure the community scheme's compliance with the provisions of POPIA.
28. PAIA prescribes the following duties to an information officer:
- 28.1. encourage and ensure compliance with PAIA;
 - 28.2. develop, update and monitor the PAIA manual for the community scheme; and,
 - 28.3. assess and provide outcomes to any requests for access to information of the scheme within the applicable time periods.

How do you register the information officer?

29. Registration of the information officer should occur via:
- 29.1. email: registration.IR@justice.gov.za ;
 - 29.2. postal address: P.O. Box 31533, Braamfontein, Johannesburg, 2017; or
 - 29.3. the registration portal: <https://www.justice.gov.za/inforeg/portal.html>.
30. The registration of the information officer should be accompanied by the Information Officer's Registration Form as contained in the Guidance Note.

Is your staff ready?

31. In terms of POPIA, community schemes and managing agents are required to implement certain measures to safeguard the personal information of members. One of these are organisational measures, which are measures to be taken by



the community scheme and managing agents to raise awareness of the members' right to privacy. These measures include *inter alia* the following:

- 31.1. training and/or workshops;
- 31.2. internal policies and measures; and
- 31.3. continuous POPIA awareness.

Should data protection measures be implemented with service providers?

32. In terms of POPIA, community schemes should implement the necessary data protection measures with service providers and/or third parties, who process personal information on their behalf.
33. These data protection measures may include a review and/or an amendment of any existing service level agreements, to ensure that all applicable agreements contain the necessary data protection clauses, so to safeguard the personal information processed on behalf of the community scheme.
34. Community schemes will be well advised to ensure that all service providers are POPIA compliant, as the community scheme will ultimately be held accountable for the personal information processed on their behalf.

Conclusion

35. We may sometimes feel that the road to becoming POPIA compliant is tedious and unnecessary, however, our constitutional right to privacy is indeed a tenet worth protecting. In the words of Alan Grayling:



“No human rights convention is complete without an article that defends privacy, for the excellent reason that privacy is an indispensable adjunct of the minimum that individuals require for a chance to build good lives. One aspect of its importance is that it gives people a measure of control over the front they offer to others, and the amount of information that others have about them, concerning matters that are personal, intimate, eccentric or constitutive of the individual’s inner life...”

But the foremost reason for privacy is that it is crucial for personal autonomy and psychological wellbeing. Even lovers require a degree of privacy from each other, for the lack of a reserve selfhood is almost the same as not having a self at all.”

36. Should you require any advice or guidance in relation to the law pertaining to community schemes and POPIA compliance, do not hesitate to contact writer.

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