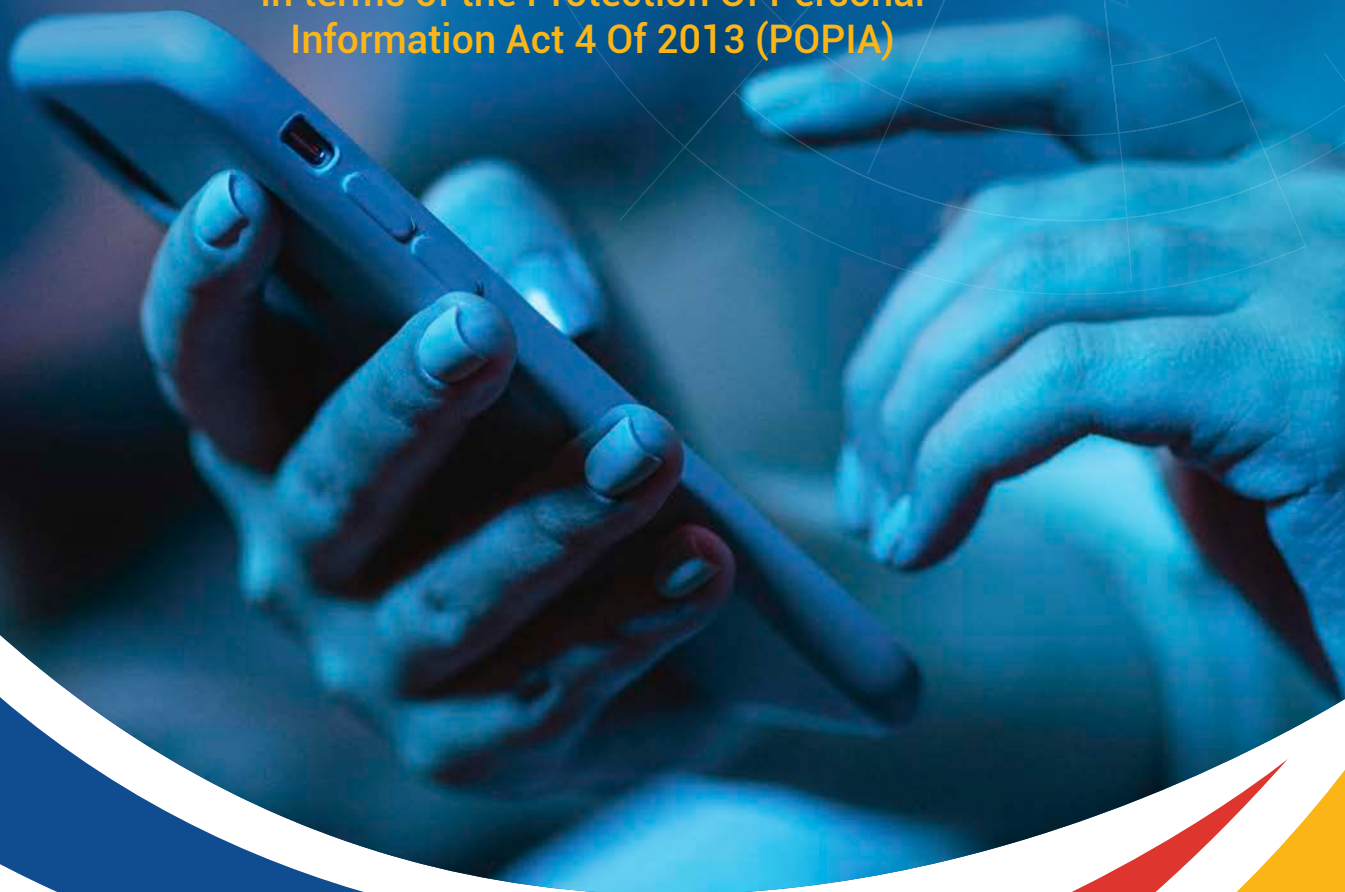


Guidance Note on Direct Marketing

In terms of the Protection Of Personal
Information Act 4 Of 2013 (POPIA)



**INFORMATION
REGULATOR
(SOUTH AFRICA)**

*Ensuring protection of your personal information
and effective access to information*

Guidance Note on Direct Marketing

**in terms of the Protection of Personal
Information Act 4 of 2013 (POPIA)**

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Definitions.

Automatic calling machine	means a machine that is able to do automated calls without human intervention where the term is used in section 69(1) of POPIA.
Consent	means any voluntary, specific and informed expression of will in terms of which permission is given for the processing of personal information.
Data subject	means the person to whom personal information relates.
Direct marketing	means to approach a data subject, either in person or by mail or electronic communication, for the direct or indirect purpose of – (a) promoting or offering to supply, in the ordinary course of business, any goods or services to the data subject; or (b) requesting the data subject to make a donation of any kind for any reason.
Electronic communication	means any text, voice, sound or image message sent over an electronic communications network which is stored in the network or in the recipient's terminal equipment until it is collected by the recipient.
Information matching programme	means the comparison, whether manually or by means of any electronic or other device, of any document that contains personal information about ten or more data subjects with one or more documents that contain personal information of ten or more data subjects, for the purpose of producing or verifying information that may be used for the purpose of taking any action in regard to an identifiable data subject.
Lead generation	means to seek contact details to use for direct marketing purposes, for example, from the individuals who buy products and services or who show interest or support a cause; or from third parties who sell or rent lists of contact details; or from publicly available sources. This information could be sought to reach potential new customers (e.g. obtaining contact details of people with which no prior relationship exists); to find new contact details for existing customers (e.g. adding new contact channels for them); or to profile customers (e.g. analysing their behavioural characteristics to find out their preferences). ¹
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.
Public body	means any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or any other functionary or institution when— (i) <i>exercising a power or performing a duty in terms of the Constitution or a provincial constitution; or</i> (ii) <i>exercising a public power or performing a public function in terms of any legislation.</i>
Public record	means a record that is accessible in the public domain, and which is in the possession of or under the control of a public body, whether or not it was created by that public body;

¹ Information Commission Officer (ICO) Direct Marketing Detailed Guidance (referred to herein as ICO Direct marketing Guidance) 05 December 2022 - 1.0.822 at 36.

1. Introduction

- 1.1 The Information Regulator (Regulator) is established as a juristic person in terms of section 39 of the Protection of Personal Information Act 4 of 2013 (POPIA). POPIA gives effect to the constitutional right to privacy, by safeguarding personal information when processed by the responsible party, subject to justifiable limitations that are aimed at (i) balancing the right to privacy against other rights particularly the right of access to information; and (ii) protecting important interests, including the free flow of information within the Republic and across international borders; regulates the manner in which personal information may be processed by establishing conditions, in harmony with international standards, that prescribe the minimum threshold requirements for lawful processing of personal information while providing persons with rights and remedies to protect their personal information from the processing that is not in accordance with POPIA.
- 1.2 Chapter 3 of POPIA provides for the conditions for lawful processing of personal information. The processing of personal information of data subjects for the purpose of direct marketing must comply with the eight (8) conditions for lawful processing of personal information.
- 1.3 This Guidance Note provides guidance to the responsible parties on how personal information should be processed in compliance with the eight (8) conditions for lawful processing of personal information. Therefore, this Guidance Note assists in the interpretation of POPIA in relation to direct marketing as defined in POPIA.

2. Purpose

- 2.1 The purpose of this Guidance Note is to guide the responsible parties on how to comply with POPIA when processing personal information of data subjects for direct marketing by means of unsolicited non-electronic communications in terms of sections 11 and unsolicited electronic communications in terms of section 69 of POPIA.

3. Legislative Framework

The following non exhaustive list of provisions in POPIA apply to the processing of personal information in respect of direct marketing:

3.1 Section 3(2): Application

- (a) “This Act applies, subject to paragraph (b), to the exclusion of any provision of any other legislation that regulates the processing of personal information and that is materially inconsistent with an object, or a specific provision, of this Act”.
- (b) “If any other legislation provides for conditions for the lawful processing of personal information that are more extensive than those set out in Chapter 3 of POPIA, the extensive conditions prevail”

3.2 Section 5: Rights of the data subject

- 3.2.1 *“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—*
- (e) *to object to the processing of his, her or its personal information—*
- (i) *at any time for purposes of direct marketing in terms of section 11(3)(b); or*
- (ii) *in terms of section 69(3)(c);*
- (f) *not to have his, her or its personal information processed for purposes of direct marketing by means of unsolicited electronic communications except as referred to in section 69(1);*
- (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”.*

3.3 Section 11: Consent, Justification and Objection

- 3.3.1 Section 11(1)(a) - “Personal information may only be processed if the data subject or a competent person where the data subject is a child consents to the processing”;
- 3.3.1 Section 11(1)(b) - “Processing is necessary to carry out actions for the conclusion or performance of a contract to which the data subject is party”,
- 3.3.1 Section 11(1)(c) - “Processing complies with an obligation imposed by law on the responsible party”,
- 3.3.1 Section 11(1)(d) - “Personal information may only be processed if the processing protects a legitimate interest of the data subject”;
- 3.3.1 Section 11(1)(f) - “Personal information may only be processed if processing is necessary for pursuing the legitimate interests of the responsible party or of a third party to whom the information is supplied”.
- 3.3.1 Section 11(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)”.
- 3.3.1 Section 11(3)(a) - “A data subject may object, at any time, to the processing of personal information in terms of subsection 11(1)(d) or (f)”.
- 3.3.1 Section 11(3)(b) - “A data subject may object, at any time, to the processing of personal information for purposes of direct marketing other than direct marketing by means of unsolicited electronic communications as referred to in section 69”.
- 3.3.1 Section 11(4) - “If a data subject has objected to the processing of personal information in terms of sections 11(3), the responsible party may no longer process the personal information”.

3.4 Section 18: Notification of the data subject

- 3.4.1 [Section 18\(1\)](#) - “If personal information is collected, the responsible party must take reasonably practicable steps to ensure that the data subject is aware of—
- 3.4.2 [Section 18\(1\)\(a\)](#) - the information being collected and where the information is not collected from the data subject, the source from which it is collected;
- 3.4.3 [Section 18\(1\)\(b\)](#) - the name and address of the responsible party;
- 3.4.4 [Section 18\(1\)\(c\)](#) - the purpose for which the information is being collected;
- 3.4.5 [Section 18\(1\)\(d\)](#) - whether or not the supply of the information by that data subject is voluntary or mandatory;
- 3.4.6 [Section 18\(1\)\(e\)](#) - the consequences of failure to provide the information;
- 3.4.7 [Section 18\(1\)\(f\)](#) - any particular law authorising or requiring the collection of the information;
- 3.4.8 [Section 18\(1\)\(g\)](#) - the fact that, where applicable, the responsible party intends to transfer the information to a third country or international organisation and the level of protection afforded to the information by that third country or international organisation;
- 3.4.9 [Section 18\(1\)\(h\)](#) - any further information such as the—
 - (i) *recipient or category of recipients of the information;*
 - (ii) *nature or category of the information;*
 - (iii) *existence of the right of access to and the right to rectify the information collected;*
 - (iv) *existence of the right to object to the processing of personal information as referred to in section 11(3); and*
 - (v) *right to lodge a complaint to the Information Regulator and the contact details of the Information Regulator, which is necessary, having regard to the specific circumstances in which the information is or is not to be processed, to enable processing in respect of the data subject to be reasonable”.*
- 3.4.10 [Section 18 \(2\)](#) - The steps referred to in subsection (1) must be taken—
- 3.4.11 [Section 18 \(2\)\(a\)](#) - “if the personal information is collected directly from the data subject, before the information is collected, unless the data subject is already aware of the information referred to in that subsection; or
- 3.4.12 [Section 18 \(2\)\(b\)](#) - in any other case, before the information is collected or as soon as reasonably practicable after it has been collected”.
- 3.4.13 [Section 18 \(3\)](#) - “A responsible party that has previously taken the steps referred to in subsection (1) complies with subsection (1) in relation to the subsequent collection from the data subject of the same information or information of the same kind if the purpose of collection of the information remains the same”.
- 3.4.14 [Section 18 \(4\)](#) - “It is not necessary for a responsible party to comply with subsection (1) if—
 - (a) the data subject or a competent person where the data subject is a child has provided consent for the non-compliance;
 - (b) non-compliance would not prejudice the legitimate interests of the data subject as set out in terms of this Act;

- (c) non-compliance is necessary—
- (i) *to avoid prejudice to the maintenance of the law by any public body, including the prevention, detection, investigation, prosecution and punishment of offences;*
- (ii) *to comply with an obligation imposed by law or to enforce legislation concerning the collection of revenue as defined in section 1 of the South African Revenue Service Act, 1997 (Act No. 34 of 1997);*
- (iii) *for the conduct of proceedings in any court or tribunal that have been commenced or are reasonably contemplated; or*
- (iv) *in the interests of national security;*
- (d) compliance would prejudice a lawful purpose of the collection;
- (e) compliance is not reasonably practicable in the circumstances of the particular case; or
- (f) the information will—
 - (i) *not be used in a form in which the data subject may be identified; or*
 - (ii) *be used for historical, statistical or research purposes”.*

3.5 Section 69 Direct marketing by means of unsolicited electronic communications.

- 3.5.1 Section 69(1) – “The processing of personal information of a data subject 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 the data subject —
- (a) has given his, her or its consent to the processing; or
 - (b) is, subject to subsection (3), a customer of the responsible party”.
- 3.5.2 Section 69(2)(a) – “A responsible party may approach a data subject—
- (i) *whose consent is required in terms of subsection (1)(a); and*
 - (ii) *who has not previously withheld such consent, only once in order to request the consent of that data subject”.*
- 3.5.3 Section 69(2)(b) – “The data subject’s consent must be requested in the prescribed manner and form”.
- 3.5.4 Section 69(3) – “A responsible party may only process the personal information of a data subject who is a customer of the responsible party in terms of subsection (1)(b)—
- (a) if the responsible party has obtained the contact details of the data subject in the context of the sale of a product or service;
 - (b) for the purpose of direct marketing of the responsible party’s own similar products or services; and
 - (c) if the data subject has been given a reasonable opportunity to object, free of charge and in a manner free of unnecessary formality, to such use of his, her or its electronic details—

- (i) *at the time when the information was collected; and*
- (ii) *on the occasion of each communication with the data subject for the purpose of marketing if the data subject has not initially refused such use”.*

3.5.5 Section 69(4) “Any communication for the purpose of direct marketing must contain—

- (a) details of the identity of the sender or the person on whose behalf the communication has been sent; and
- (b) an address or other contact details to which the recipient may send a request that such communications cease”.

3.5.6 Section 69(5) “Automatic calling machine, for purposes of subsection (1), means a machine that is able to do automated calls without human intervention.

4. Direct Marketing and the types of direct marketing in terms of POPIA.

4.1 POPIA draws a distinction between two types of direct marketing namely:

4.1.1 Direct marketing other than by means of unsolicited electronic communication in terms of section 11 of POPIA. ²

Examples of this type of direct marketing include:

- (i) *Direct marketing by means of post or hand-delivered mail;*
- (ii) *In person;*
- (iii) *Letterbox drops distributed to an identified address in a specific area.*

4.1.2 Direct marketing by means of unsolicited electronic communication in terms of section 69 of POPIA.

Examples of this type of direct marketing include direct marketing by means of:

- (i) *Telephone;*
- (ii) *Automatic calling machines;*
- (iii) *Facsimile machines;*
- (iv) *SMSS; or*
- (v) *E-mail.*

² These include direct marketing by using means that are non-electronic communication.

5. Direct marketing other than direct marketing by means of unsolicited electronic communications.

Where direct marketing communication is by non-electronic means, the responsible party may be able to process personal information for direct marketing without obtaining consent from the data subject. This is possible where the responsible party relies on section 11(1) (d or (f) as justification for dispensing with the consent required in terms of section 11(1) (a); in these instances, the responsible party will need to first identify the legitimate interest of the data subject, the responsible party or third party (whichever is applicable).

5.1 Legitimate interest as justification for lawful processing of the personal information.

Legitimate interest is not defined in POPIA. The term “legitimate” is defined as “able to be defended with logic or justification”³ while “interest” is defined in this context as “the advantage or benefit of someone”.⁴ To be considered legitimate, the interest must be lawful.⁵ In application to the direct marketing context, a legitimate interest provides justification that is to the advantage or benefit of a data subject, responsible party or third party which can be defended or validated.

The reliance on legitimate interest as a legal justification is not automatic. The onus is on the responsible party to justify the use of legitimate interests as the relevant basis for the processing of personal information.

5.1.1 Protection of the legitimate interest of a data subject as justification for lawful processing of the personal information of a data subject.

Before adopting legitimate interest as justification for the processing of personal information of data subjects, the responsible party must have regard to whether the processing will protect the legitimate interests of the data subjects. It is not sufficient that the processing will be of benefit to a data subject.

Responsible parties may not use the legitimate interest as a basis where the data subjects are likely to view the processing as pervasive, disruptive, intrusive”⁶ and generally not acceptable to the recipient.

5.1.1.1 Examples of processing that protects a legitimate interest of the data subject (the list is non-exhaustive)-

- (a) Direct marketing will be in the interest of the data subject where he/she/it will receive “money-off products” (discount);
- (b) The responsible party approaches the data subjects with the product or service that is likely to be of interest to that data subject, based on the historical information regarding buyer behaviour of the data subject.

3 Concise Oxford English Dictionary Eleventh Edition revised, 2006, Soanes C, and Angus Stevenson. Oxford University Press.

4 As above

5 Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC/844/14/ EN WP 217, adopted on 9 April 2014.

6 Gbadamosi A, Contemporary issues in Marketing, 2019, SAGE publishing, at 242

- (c) Historical information is created in instances where the data subject logs into a company's website to browse its range of products, and the data subject completes an online enquiry form asking for more details about a product or range of products. Legitimate interest is created as there is an expectation by the data subject to have the personal information processed for the purpose related to their interaction with the company.⁷

5.1.2 Processing in pursuance of the legitimate interest of the responsible party.

Personal information may in terms of section 11(1)(f) be processed if the processing is necessary for pursuing the legitimate interests of the responsible party or of a third party to whom the information is supplied.

5.1.2.1 Examples of processing that pursues the legitimate interest of responsible parties are not limited to the following:

- (a) to increase sales,⁸
- (b) to persuade a data subject to purchase,⁹
- (c) to 'educate the data subjects about products'¹⁰
- (d) 'profiling data subjects to target direct marketing'.¹¹

5.2 The Legitimate Interest Assessment (LIA).¹²

To rely on legitimate interest as a lawful basis for processing personal information for direct marketing purposes, the responsible party must undertake the following three (3) stage assessment:

5.2.1 The first assessment relates to the purpose test that helps to objectively identify a legitimate interest and that requires the following related considerations to be made by the responsible party:-

- (a) What is the purpose of processing personal information of data subjects?
- (b) What is the benefit to be derived from the processing?
- (c) What is the interest (benefit) of the responsible party or of any third party in the processing?
- (d) Is the processing not in conflict with the interests of society?
- (e) What will be the consequences for the responsible party if the processing does not proceed?
- (f) Is the processing compliant with a legislation, by-law, rule or policy?¹³

⁷ ICO Direct Marketing Guidance) at 42

⁸ Information Commissioner's Office (ICO), General Data Protection Regulations (GDPR) UK (ICO Legitimate Interest Guide)

⁹ Gbadamosi A, Contemporary issues in Marketing, 2019, SAGE Publishing at 309

¹⁰ Gbadamosi A, Contemporary issues in Marketing, 2019, SAGE Publishing, at 30

¹¹ ICO Legitimate Interest Guide) at 28

¹² The Information Commissioner's Office (ICO), General Data Protection Regulations (GDPR) UK <https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/lawful-basis/legitimate-interests/how-do-we-apply-legitimate-interests-in-practice/> (How do we apply legitimate interests in practice?) accessed 15.09.2024 and 11.10.2024

¹³ Article 29 Data Protection Working Party; Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC Adopted on 9 April 2014, at 58 (Article 29 WP)

5.2.2 The second assessment relates to the necessity test to consider the connection between the processing and the interests pursued as well as purpose stated in the first test above.¹⁴ The responsible party should determine aspects not limited to the following:

- (a) Is the processing of personal information necessary to achieve the specified purpose?
- (b) Is the processing proportionate to what the responsible party is trying to achieve with the processing purpose?
- (c) Can the processing never proceed with less personal information processed or with no processing of personal information at all?
- (d) Is the processing method (including method of communication) the least intrusive method (approach) available to achieve the specified purpose?

5.2.3 The third assessment relates to the balancing test.

The responsible party should balance the legitimate interest of that responsible party against the interests and rights of the data subject. The rights of the data subjects will override the interests of the responsible party or a third party.¹⁵ In the balancing test, the responsible party should determine factors not limited to the following:

- (a) the **nature of the personal data** it wants to process and whether the processing involves any type of personal information that falls under the special personal information in terms of section 27 (1) of POPIA e.g. (biometric information, health information, genetic information) or the processing personal information is related to children and minors. There are stricter requirements for the processing of the latter type of personal information.

In addition to the preceding considerations in (a) to (c), the responsible party should ask the following questions

- (i) *Is the personal information such which data subjects are likely to consider as 'private'?*
 - (ii) *Is the personal information about the data subjects in their personal or professional capacity?¹⁶*
- (a) the reasonable expectations of the data subject who will be affected by the processing and
 - (b) the likely impact of the processing on the data subject and whether any safeguards can be put in place to mitigate the negative impacts.

5.2.4 When to conduct the assessment on legitimate interest.

The responsible party must conduct the legitimate interest assessment before commencing with the processing activity as the result of the assessment will help to identify and to confirm whether the legitimate interest can be a lawful basis for the processing.

5.2.5 Consequence of not meeting all the criteria in the LIA.

The responsible party who fails to establish a legitimate interest for the processing of personal information will not have established a lawful basis for such processing and will be in breach of POPIA.

¹⁴ ICO Legitimate Interest Guide at 28

¹⁵ ICO Legitimate Interest Guide at 38

¹⁶ ICO Legitimate interests assessment (LIA) template, LIA template 20180319 , v1.0

6. Objection in terms of section 11 (3)(b) of POPIA.

6.1 Objection at any time.

The data subject who has received direct marketing messages through mail or post or in person, from the responsible party that relied on the legitimate interest justification in terms of section 11(1)(d) or (f) may in terms of section 11(3) (b) of POPIA, at any time, object to this type of direct marketing.

6.2 Manner of objection.

The data subject who wishes to object must lodge the objection on the prescribed Form 1 provided for in the Regulations Relating to Protection of Personal Information POPIA (made in terms of section 112(2) of POPIA)¹⁷ or any form which is substantially similar to Form 1. The submission of the form must be free of charge and must be made readily accessible to a data subject. Submit means submit¹⁸ by:-

- (a) data message;
- (b) electronic communication;
- (c) registered post;
- (d) electronic mail;
- (e) facsimile; and
- (f) personal delivery.

These methods of submission do not exclude any other method that achieves the purpose of enabling the data subject to object to the processing for purposes of direct marketing. This form may be obtained from the website of the Regulator by accessing the below link:

[Form-1-Objection-to-the-processing-of-personal-information.pdf \(inforegulator.org.za\)](https://inforegulator.org.za/form-1-objection-to-the-processing-of-personal-information.pdf)¹⁹

6.3 Processing after objection must stop.

Where the data subject has objected to the processing of personal information for the purposes of direct marketing in terms of section 11(3)(b) of POPIA, the responsible party must in terms of section 11(4) not contact the data subject again. If the responsible party is relying on legitimate interests for direct marketing purposes, and the data subject objects, the processing must stop.²⁰

6.4 Database of objections

The responsible party must compile and maintain a database of all data subjects who have objected to direct marketing through the means contemplated in paragraph 6.2 above and must not contact the data subjects who are in the database.

¹⁷ Regulations Relating to Protection of Personal Information (POPIA), 2018. (POPIA Regulations)

¹⁸ Regulation 1 of the POPIA Regulations.

¹⁹ <https://inforegulator.org.za/popia-forms/> . Link tested to be functional on 14.11.2024

²⁰ ICO Legitimate Interest Guide at 46.

7. Direct marketing by means of unsolicited electronic communication in terms of section 69 of POPIA.

7.1 Methods of direct marketing by means of unsolicited electronic communication are not limited to the following:

- (a) Telephone;
- (b) Email;
- (c) Short Message Service (SMS);
- (d) Automatic calling machines; or
- (e) Facsimile machines (fax);
- (f) Push notification;²¹
- (g) Direct messaging in Instagram or LinkedIn;²²
- (h) Use of cookies.²³

7.1.1 It is the view of the Regulator that telephone calling is electronic communication by virtue of telephone communications technology having become digital over time. Telephone calls predominantly use VoIP (Voice over Internet Protocol) which is packet-switched telephony rather than the public-switched telephony previously used for analogue communication.

7.1.2 The analogue voice is encoded into a digital stream that is divided into small data packets which are labelled according to their order. These voice data packets are transmitted using real-time protocols during a telephone call are stored on the network. The voice data packets are re-assembled to match the original order of transmission, error correction is applied to digital data stream to compensate for the delay caused by packet re-assembly and finally relayed to the recipient's terminal equipment to be decoded into analogue voice for consumption upon the recipient's acceptance of the call.

7.2 Unsolicited electronic communication where a data subject is not a customer.

7.2.1 The responsible party who intends to use unsolicited electronic communication to send a direct marketing message to a data subject who is not their customer, must obtain the consent of such a data subject before sending the communication as stipulated in section 69(1)(a) of POPIA. This means that the first communication which the responsible party sends to the data subject must be a communication requesting consent of the data subject to market their goods, or services or to request a donation.

7.2.2 The responsible party who wants to send direct marketing communication by means of unsolicited electronic may approach the data subject only once for the purpose of obtaining the consent of such data subject and can only approach the data subject who has not previously withheld consent as stipulated in section 69(2)(a)(i) and (ii) of POPIA.

21 Stadler E, *Over-thinking POPIA*, Juta and Company 2022 at 477

22 Stadler E, *Over-thinking POPIA*, Juta and Company 2022 at 477

23 Information Commissioner's Office, *Guide to Privacy and Electronic Communications Regulations (PECR) 2018* (ICO-PECR, 2018), at 31 -36 and Opinion, 2, 2010, Working, Party, online, behavioural, advertising, wp171.

7.2.3 The responsible party who wishes to obtain consent of the data subject must obtain the written consent by making use of Form 4 which has been prescribed by the Regulator or in any form which is substantially similar to this Form 4 and in manner that may be expedient, free of charge and readily accessible to the data subject by “data message; electronic communication; registered post; electronic email; facsimile and personal delivery”²⁴. Form 4 can be obtained from the Information Regulators’ website on this link - [Form-4-Application-for-the-consent-of-a-data-subject-for-the-processing.pdf](https://info regulator.org.za/Form-4-Application-for-the-consent-of-a-data-subject-for-the-processing.pdf) (info regulator.org.za).²⁵

7.2.4 It is important to note that this form requires:

- (a) a data subject to consent to receive direct marketing messages through unsolicited electronic communication,
- (b) the responsible party to specify the goods or services he, she or it intends to market to the data subject through unsolicited electronic communication. This will enable the data subject to give voluntary, specific, and informed consent.
- (c) a data subject to specify the method of communication which the responsible party can use to send the communication to him or her. The responsible party must adhere to the method chosen by the data subject to send him or her direct marketing messages.

7.2.5 The responsible party who uses methods of communication such as a fax machine, a SMS or an email can use an electronic version of Form 4 to obtain consent of a data subject, as long as it contains all the information prescribed in that form. The form can contain the words “I give my consent” and “I do not give my consent” at the end. A data subject can choose “I give my consent” to give consent or “I do not give my consent” to withhold consent.

7.2.6 The responsible party who uses a telephone to obtain consent must read out the contents of Form 4 to the data subject to obtain his or her consent. The telephone call must be recorded.

7.2.7 The responsible party who uses an automatic calling machine must ensure that the recorded message that they use to obtain consent of a data subject contains all the information in Form 4 and that it enables a data subject to provide all the required information, including the choice to “I give my consent” and “I do not give my consent”. A data subject’s response must be recorded.

7.2.8 In terms of section 11 (2) (a) of POPIA, the responsible party bears the onus of proving that a data subject gave consent to receive direct marketing messages through unsolicited electronic communication.

7.2.9 A data subject who has given consent to receive direct marketing messages by means of unsolicited electronic communication can withdraw his, her or its consent at any time. However, the direct marketing messages received before the withdrawal of consent will not be affected.²⁶

²⁴ Regulation 1 of the *Regulations Relating to Protection of Personal Information (POPIA)*, 2018.

²⁵ <https://info regulator.org.za/popia-forms/> Link tested to be functional on 14.11.2024

²⁶ Section 11(2) (b) of POPIA.

7.3 Where the data subject is a customer of the responsible party.

The responsible party can send direct marketing messages through unsolicited electronic communication only to a data subject who is its customer as required by section 69 (3):

- 7.3.1 If the responsible party has obtained the contact details of a data subject in the context of a sale of a product or service, for example, a data subject opens an account at a retail store which sells clothing, and the responsible party records her contact details for the purpose of opening the account.
- 7.3.2 For the purpose of direct marketing of a responsible party's similar products or services, for example, in a clothing retail store, similar products include shoes, belts etc. A funeral insurance cover will not constitute a similar product.
- 7.3.3 If the data subject has been given a reasonable opportunity to object, free of charge and in a manner free of unnecessary formalities, to such use of his, her or its electronic details-

(i) *At the time the information was collected,*

Example,

At the time of opening a credit account at a clothing retail store, a responsible party can ask a data subject if they "do not give consent" (object) to receiving direct marketing messages of similar products or services through electronic communication. If they "do not give consent" (object), the responsible party cannot send them direct marketing messages; and

(ii) *On the occasion of each communication with a data subject for the purpose of marketing if a data subject has not initially refused such use.*

Example,

If a data subject had given consent to receive direct marketing messages of similar products or services through electronic communication when he or she opened an account, such data subject must be given an opportunity to object on each occasion she receives such a message. It is important to note that a data subject who was not asked whether she consented to receiving direct marketing messages at the time of opening an account cannot be deemed to have given her consent since consent means a voluntary, specific and informed expression of will in terms of which permission is given for the processing of personal information. Therefore, silence cannot mean consent.

- 7.3.4 Any communication sent by the responsible party for the purpose of direct marketing (in terms of both section 11 and section 69 of POPIA) must contain the following information as stipulated in section 69 (4) of POPIA:
 - 7.3.4.1 details of the identity of the sender or the person on whose behalf the communication has been sent; and
 - 7.3.4.2 an address or other contact details to which the recipient may send a request that such communications cease.
- 7.3.5 The responsible party must compile and maintain a database of data subjects who have withheld their consent in terms of section 69(2)(a)(ii) and data subjects who have objected in terms of section 69 (3)(c) of POPIA.

8. Registering a pre-emptive block in terms of section 11 of the Consumer Protection Act 68 of 2008.

- 8.1 Section 11 of the Consumer Protection Act 68 of 2008 (CPA) makes provision for the establishment of the registry in which any person may register a pre-emptive block against any electronic communication that is intended for the purposes of direct marketing of goods or services.
- 8.2 POPIA requires that responsible parties must in terms of section 69(1)(a) of POPIA obtain consent. Section 69(2)(a) of POPIA requires the responsible party to contact the data subject only **once** in order to obtain such consent, provided that the data subject has not previously withheld such consent.
- 8.3 A responsible party cannot therefore contact a data subject, who has not registered a pre-emptive block direct marketing messages by means of unsolicited electronic communication, without having obtained their consent.
- 8.4 In other words, even if a data subject has not registered a pre-emptive block, a responsible party must still comply with the requirements in section 69(1) and (2) of POPIA before sending a data subject direct marketing messages through unsolicited electronic communication. A responsible party cannot therefore contact a data subject for purposes of direct marketing simply because they (data subject) have not registered a pre-emptive block.

9. Compliance with the eight conditions for the lawful processing of personal information

A responsible party who processes personal information for purposes of direct marketing must comply with all the conditions for the lawful processing of personal information some of which have been discussed herein below. All other relevant sections of POPIA must be complied with.

9.1 Collection directly from the data subject - Section 12(1) of POPIA

- 9.2 In terms of section 12(1) of POPIA, personal information must be collected directly from the data subject.
- 9.3 Collecting directly from the data subject will provide opportunity to the responsible party to obtain consent from that data subject where the data subject is approached for the first time for direct marketing purposes.

Examples of collection directly from the data subject other than by means of electronic communication are not limited to the following:

- (i) In person: The responsible party collects personal information during a consultative meeting with a client.
- (i) By mail: A data subject responding to promotional mail or catalogue by signing up for further supply of products promoting subscriptions for further supply of print catalogue.

Examples of collection directly from the data subject by means of electronic communication:

- (i) *The responsible party contacts the data subject through telephone to collect the personal information directly from the data subject.*

Examples of collection directly from the data subject by both electronic means and in person:

- (i) *The data subject provides their personal information when signing up to take advantage of the offers or discount vouchers (for example, for shopping or dining).*
- (ii) *The data subject provides contact details when signing up for catalogues that market products.*

9.4 Collection of personal information from other sources - Section 12 (2) of POPIA.

The responsible party can collect personal information about the data subject from another source if the data subject has consented to such collection or if the personal information is contained in or derived from a public record or has deliberately been made public by the data subject or collection of the information from another source would not prejudice a legitimate interest of the data subject; in terms of section 12(2)(a),(b) and (c) of POPIA respectively.

- 9.4.1 Personal information is obtained from other sources if the information is contained in or derived from a public record (viz, a record that is accessible in the public domain and which is in the possession of or under the control of a public body, whether or not it was created by that public body) or has deliberately been made public by the data subject.
- 9.4.2 The responsible party may in terms of section 12(2)(b) collect personal information of a data subject from another source where the data subject has consented to the collection of the information.
- 9.4.3 The information may in terms of section 12(2)(c) of POPIA be collected from another source if such collection would not prejudice a legitimate interest of the data subject.
- 9.4.4 To confirm that such collection would not prejudice a legitimate interest of the data subject, the legitimate interest assessment discussed above will be applicable in this instance.
- 9.4.5 Information may in terms of section 12(2)(d)(v) of POPIA be collected from another source if the collection is necessary to maintain the legitimate interests of the responsible party or of a third party to whom the information is supplied.
- 9.4.6 A necessity test must be conducted as in 5.2.2 above to confirm the processing of personal information is necessary to maintain the interest of the responsible party or third party; (the legitimate interest assessment discussed above will be applicable in this instance)-

Example of collection of personal information contained in or derived from a public record²⁷: (not limited to the following):-

- (i) *Personal information published in a public register “collected under a statutory authority and to which a right of public access is authorised by law”. The source must be a record under the control of a public body such as the personal information that is stored in the deeds office register that allows deeds search in terms of the Deeds Registries Act, 2013.²⁸*

²⁷ Section 1 of POPIA defines “public record as “a record that is accessible in the public domain and which is in the possession of or under the control of a public body, whether or not it was created by that public body”.

²⁸ <https://www.gov.za/services/services-residents/place-live/get-deeds-registry-information>; Section 7 of the Deeds Registries Act, 1937 (Act 47 of 1937) Link tested to be active on 14 November 2024

Examples of personal information deliberately made public by the data subject:

- (i) *Contact details of an estate agent on 'for sale' signs.*

Examples of personal information collected from another source to maintain the legitimate interests of the responsible party or of a third party to whom the information is supplied are limited to the following:

- (i) *List and databases such as direct mail and email lists. These lists can be sourced within the country and across the borders of a country.* ²⁹

9.5 Collection for specific purpose - Section 13 of POPIA.

9.5.1 A responsible party must in terms of section 13 (1) of POPIA, collect information for a specific, explicitly defined and lawful purpose related to a function or activity of a responsible party.

9.5.1.1 A responsible party must make it clear and must specify that the purpose of collecting personal information of the data subject is for direct marketing.

9.5.1.2 The lawful purpose for direct marketing must relate to the definition of direct marketing in terms of section 1 of POPIA which is to approach a data subject, either in person or by mail or electronic communication, for the direct or indirect purpose of—

- (i) *promoting or offering to supply, in the ordinary course of business, any goods or services to the data subject; or*
- (ii) *requesting the data subject to make a donation of any kind for any reason.*

Examples of collection for direct purposes of direct marketing.

- (i) *Direct mail sent to an identified data subject suggesting an offer of a discounted price on the product if the data subject purchases within a certain time period.*
- (ii) *A responsible party may share samples of products with data subjects to promote or introduce a new brand of a product ³⁰ with the view that when the data subject is interested, he/she will make a purchase.*

Examples of collection for indirect marketing purposes

- (i) *Indirect marketing purposes mainly relate to marketing communication³¹ to raising or increasing awareness about products or services of the responsible party and or to the responsible party seeking to build relationships with new customers or to retain existing ones ³² or for brand marketing (viz boost knowledge of a company or products' name etc.).³³*

²⁹ <https://www.frescodata.com/mailling-lists-and-email-lists-by-countries/south-africa/>

³⁰ Gbadamosi A, Contemporary issues in Marketing, 2019, SAGE Publishing.

³¹ Above at 309 "on marketing communication tools"

³² <https://ahrefs.com/blog/indirect-marketing/accessed> 15.4.24.

³³ Gbadamosi A, Contemporary issues in Marketing, 2019, SAGE Publishing, at 726.

9.5.2 Section 13(2)

A responsible party must take steps in accordance with section 18 (1) (discussed herein below) to ensure that the data subject is aware of the purpose of the collection of the information where the personal information is collected from other sources and not directly from the data subject, unless the exceptions provisions of section 18(4) are applicable. To ensure that the data subject is aware of the purpose for processing the information, the responsible must ensure that the notification that meets the requirements set in section 18(1) of POPIA) is made readily accessible to the data subject.

9.6 Further processing to be compatible with purpose of collection - Section 15 of POPIA.

9.6.1 Section 15(1) on further processing of personal information.

Further processing of personal information must be in accordance or compatible with the purpose for which it was collected, the purpose which must be compliant with section 13. The responsible may further process the personal information of a data subject direct marketing purposes if section 15(2) or section 15 (3) of POPIA is adhered to.

Example of marketing not related to the original purpose.

- (i) *'A customer applied for a credit card from a bank and consented to the use by the bank of their personal information for marketing its banking-related products and services. A new consent has to be obtained if the bank later intends to transfer the customer's personal data to the bank's subsidiary for the latter's direct marketing of its insurance products'* ³⁴

9.6.2 In terms of section 15(3), the further processing of personal information is not incompatible with the purpose of collection if -

- (a) *the data subject or a competent person where the data subject is a child has consented to the further processing of the information;*³⁵ or
- (b) *the information is available in or derived from a public record or has deliberately been made public by the data subject.*³⁶
- (c) *the information is used for historical, statistical or research purposes and the responsible party ensures that the further processing is carried out solely for such purposes and will not be published in an identifiable form.*³⁷

Example of direct marketing not related to the original purpose.

- (i) *'A customer provided his/her personal information to the responsible party for joining its customer loyalty scheme in order to enjoy discounts and other benefits for purchases made at the responsible parties grocery stores. For the transfer of the personal data to other companies which belong to the same responsible parties [group of companies] for direct marketing purposes, the customer's written consent is required'. ³⁸ The company would be*

³⁴ Office of the Privacy Commissioner for Personal Data, Hong Kong, *Guidance on Direct Marketing, April 2023* (referred to hereafter as *OPCPD Guidance on Direct Marketing, 2023*) at 19.

³⁵ Section 15 (3) (a)

³⁶ Section 15 (3) (b)

³⁷ Section 15 (3) (c)

³⁸ *OPCPD Guidance on Direct Marketing, 2023*) at 19

processing the same information for a purpose different to the original purpose. The example applies also to the use of information for telemarketing where this was not the original purpose for which the personal information was collected.

9.7 The responsible party must take reasonably practicable steps to ensure that the data subject is aware of the processing of their personal information in terms of Section 18:

- 9.7.1 In terms of section 18(1) of POPIA, if personal information is collected about the data subject, the responsible party must take reasonably practicable steps to ensure that the data subject is aware of the amongst others, information being collected and where the information is not collected from the data subject, the source from which it is collected.
- 9.7.2 Steps taken to ensure that the data subject is aware of such collection may include making a privacy notice available and accessible to data subjects.
- 9.7.3 A privacy notice of the responsible party should align with the method of communication used to communicate to the data subject for direct marketing purposes.

Examples of notification to the data subject in accordance with the method of communication:

- (i) *For in person direct marketing: privacy information may be explained or provided verbally.*
- (ii) *For print/mail communication: information 'leaflets or infographics'³⁹ can be used to provide relevant privacy information to data subjects.*
- (iii) *For email communication: a brief message to explain how your personal information will be used for marketing;*
- (iv) *For electronic communication (viz mobile or SMS): in [telemarketing] where text messages are limited to 160 characters, the data subject may be provided with a short notice and a website address or another source where the data subject may access all the essential information.⁴⁰*

- 9.7.4 It is key that the responsible party must be open and transparent about its direct marketing practices when communicating the information, required in section 18(1) to the data subject.

9.7.5 Section 18(1)(h)

'The responsible party must also take reasonably practical steps to make the data subject is aware of any further information among others as the existence of the right to object in the prescribed manner provided for in terms of section 11(3)(a) and the right to lodge a complaint to the Information Regulator and the contact details of the Information Regulator, which is necessary, having regard to the specific circumstances in which the information is or is not to be processed, to enable processing in respect of the data subject to be reasonable'.

³⁹ Stadler E. *Over Thinking POPIA* , at 332

⁴⁰ Federation Of European Direct And Interactive Marketing: *European Code Of Practice For The Use Of Personal Data In Direct Marketing Electronic Communications Annex (FEDMA Code)* at 6

10. General guidance regarding sharing of personal information and automated decision making

- 10.1 Lead generation is not defined in POPIA.⁴¹ However, it is a direct marketing practice that involves collecting personal information in terms of section 12(1) and (2). Leads are identified through the various ways not limited to “sign-up forms, pop-ups, landing pages, and social media posts”.⁴² These methods of identifying leads enable the collection of personal information and the generation of lists of contact details of data subjects. Where the responsible parties share the contact details of data subjects with other responsible parties and where third parties sell or rent lists in the context of direct marketing, this is deemed as further processing, and such processing must comply with section 15 of POPIA. Further, this processing must also comply with section 18 of POPIA.
- 10.2 Profiling is not defined in POPIA, however the data subject has the right not to be subject, under certain circumstances, to a decision which is based solely on the basis of the automated processing of his, her or its personal information intended to provide a profile of such person as provided for in terms of section 71.⁴³
- 10.3 Processing personal information to generate leads may entail collecting and collating large amounts of information about data subjects necessitating the use of automated processes. Section 71 (1) of POPIA restricts automated decision making to the extent that:
- 10.3.1 a data subject is subject to a decision which results in legal consequences for him, her or it, or the processing affects them to a substantial degree; and
 - 10.3.2 the decision is based solely on the basis of the automated processing of personal information; and
 - 10.3.3 the processing is intended to provide a profile of such person relating to but not limited to performance at work, or his, her or its credit worthiness, reliability, location, health, personal preferences or conduct.
- 10.3.4 The conditions in 10.3.1 -10.3.3 above must all be present for section 71 (1) to be invoked.
- 10.4 Compliance with the conditions for lawful processing of personal information while processing personal information for the purposes of lead generation, profiling, information matching programme and automated decision-making, is expected of the responsible party. Non-compliance will be deemed to be in breach of POPIA.

11. Legal effect of the Guidance Note.

The Guidance note is advisory in nature. Accordingly, the Guidance Note shall not be construed to limit or restrict the Information Regulator’s administration and enforcement of POPIA.

The provisions of POPIA and the Regulations will prevail over the Guidance Note in the event of any inconsistency. The Guidance note should be read in conjunction with other Guidance Notes issued by the Information Regulator. This Guidance note does not constitute legal advice.

41 In terms of the Lead Generation - A beginner’s guide, lead generation is the process of triggering interest in the product or service in order to drive individual leads to buy. Leads can be acquired from a variety of sources.

42 Lead Generation - A beginner’s guide, at 1, <https://www.zoho.com/marketinghub/>

43 Section 5 of POPIA

12. Contact details

12.1 Physical Address

JD House, 27 Stiemens Street, Braamfontein,
Johannesburg,
2001.

12.2 Postal Address

P.O Box 31533, Braamfontein,
Johannesburg,
2017

12.3 Telephone Numbers

Tel: +27 10 023 5200
Toll Free: +27 80 001 7160

12.4 Complaints and enquiries

enquiries@inforegulator.org.za
POPIAComplaints@inforegulator.org.za
PAIAComplaints@inforegulator.org.za
POPIACompliance@inforegulator.org.za
PAIACompliance@inforegulator.org.za

13. Reference List:

13.1 Legislation:

1. Protection Of Personal Information Act No 4 of 2013, Department of Justice and Constitutional Development, South Africa
2. Regulations to the Protection Of Personal Information Act No 4 of 2013 (2018) Government Gazette No. 42110, Notice NO. R. 1383, Department of Justice and Constitutional Development, South Africa

13.2 International Guidelines:

3. Information Commission Officer (ICO) Direct marketing Data Protection Act Privacy and Electronic Communications Regulations Direct marketing 2018.03. 06 Version: 2.3 at (referred to herein as ICO Direct marketing Regulations). (pink)
4. Information Commission Officer (ICO) Direct Marketing Detailed Guidance (referred to herein as ICO Direct marketing Guidance) 05 December 2022 - 1.0.822 (pink)
5. Information Commission Officer (ICO) Guide to the Privacy and Electronic Communications Regulations 09 May 2018 - 2.4.962 (referred to herein as ICO PECR). (blue)
6. European Commission-Article 29 Data Protection Working Party 844/14/EN WP 217; Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC/844/14/EN WP 217, Adopted on 9 April 2014.

13.3 Books:

7. Brian Thomas FIDM and Matthew Housden MIDM, Direct Marketing in Practice Published in association with The Institute of Direct Marketing published 2011 by Routledge New York, NY 10017, USA. ISBN-13: 978-0-7506-2428-2 Thomas B. FIDM and Housden M. www.theidm.com .
8. Mullinm Roddy (R), Direct Marketing: A Step-by-Step Guide to Effective Planning and Targeting Series Editor, Publication date: 2002.
9. Stadler, E; Hattingh, IL; Esselaar, P; Boast, J. Year Published: 2021. Edition. 1st Edition.
Other sources
10. Federation Of European Direct and Interactive Marketing: European Code Of Practice For The Use Of Personal Data In Direct Marketing Electronic Communications Annex (FEDMA Code).

13.4 Internet sources

9. http://www.associatedcompliance.co.za/AC_Manual_2013/19_Advertising/Advertising%20and%20Direct%20Marketing%20AC%20Note%20Jun%202013.pdf 11 October 2024.
10. <https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/lawful-basis/legitimate-interests/how-do-we-apply-legitimate-interests-in-practice/> accessed 11 October 2024.
11. <https://open.lib.umn.edu/principlesmarketing/> accessed 11 October 2024.

