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Protection of Personal Information Act (POPIA)

The over-arching purpose of the **Protection of Personal Information Act (POPIA)**, **commonly referred to as the POPI Act,** is to protect individuals' personal information from misuse by other parties who may access such information.

The **Protection of Personal Information Act** (POPIA) was signed into law by the President on 19 November 2013 and published in the Government Gazette Notice 37067 on 26 November 2013. The presidency announced on the 22 June 2020 that sections 2 to 38; sections 55 to 109; section 111; and section 114 (1), (2) and (3) shall commence on 1 July 2020, and sections 110 and 114(4) shall commence on 30 June 2021.

Section 114(1)c which will commence on 01 July 2020, is of particular importance as companies and other parties to whom the Act applies (i.e. those parties that process personal information), have a **one year grace period from the date of commencement** to conform to the requirements of the POPI Act, and put in place the required processes and procedures in order to ensure compliance with the Act, unless this grace period is extended, as allowed for by the Act.

The POPI Act does not operate in isolation to other legislation but is part of network of legislation with which it must be read in conjunction with other legislation. Section 32 of the Constitution of the Republic of South Africa, 1996 supplemented by the Promotion of Access of Information Act 2 of 2000 guarantees that certain types of information are made available to a party requesting it.

POPIA IS NOT a blanket prohibition to stop "responsible parties" (in this context, scheme executives or the managing agent) from sharing "data subjects'" (the owners and residents in the scheme) personal information in every circumstance. The over-riding principle applied should be that a person is entitled to be furnished with any available information that materially affects their interest, and this may include the personal information of another resident in the scheme being reasonably provided to such a person by a "responsible party" such as the Managing Agent holding such information.

In section 5 of POPIA "data subjects" have the right to have their **personal information processed lawfully, and in accordance with POPI, as well as the right to object to their information being processed on reasonable grounds relating to his or her particular situation.**

The sections which will commence on 1 July 2020 are essential parts of the Act and comprise sections which relate to:

• The conditions for the lawful processing of personal information;

• The regulation of the processing of special personal information;

• Codes of Conduct issued by the Information Regulator;

• Procedures for dealing with complaints;

• Provisions regulating direct marketing by means of unsolicited electronic communication, and general enforcement of the Act.

The provisions of the POPIA will need to be complied with by those with access to Community Scheme members' information and by those that may request such information in terms of the community scheme's governing legislation and governance documents.

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Some of the applicable sections of the POPI Act are:

- ***Section 9:*** *personal information must be processed (a) lawfully; and (b) in a reasonable manner that does not infringe on the privacy of the data subject;*
- ***Section 10:*** *Personal information may only be processed if, given the purpose for which it is processed, it is adequate, relevant, and not excessive.*
- ***Section 11:*** *Personal information may only be processed if — (c) processing complies with an obligation imposed by law on the responsible party; (d) processing protects the legitimate interests of the data subject; (e) processing is necessary for pursuing the legitimate interests of the responsible party or the third party (the other owners in the scheme) to whom the information is supplied.*

This will mean that **a community scheme must ensure that personal information of owners and tenants and visitors provided to the scheme** (for instance schemes that scan the visitor's personal information on their driver's license for access control or that require the writing down of information in an visitor's log) **is only processed for specific, explicitly defined and legitimate reasons** that relate to their specific functions or activities.

Schemes will also have to ensure that the person providing the personal information is fully aware of the purpose for which these details are required, and ensure that personal information is only kept or stored for as long as it is required, in safe controlled environment and that the information is deleted when it is no longer required.

While all companies are required to comply including Home-Owner Associations, the Act will also apply to the information held by trustees of a Body Corporates and other community schemes. **The POPI Act will apply to personal information of owners and residents held by Managing Agents and by Estate Managers**, especially information that is not in the public domain.

Whether the Act will require a **Community Scheme to appoint a compliance information officer and /or a POPIA consultant** to provide a service of ensuring a community scheme does comply with the Act, is still unclear, especially if the scheme has appointed a Managing Agent, as it is the Managing Agent who is the holder and keeper of the personal information of members of a schemes.

The CSOS will have to provide directives to give certainty and clarity with the interpretation of the POPI Act for the management of Community Schemes, as disputes could arise in a community scheme regarding how the personal information of members of a scheme is being treated and stored. In particular, the CSOS will have to provide direction on the requirements of POPI and how it applies to the STSMA requirements for owner / tenant information to be made available to certain parties. (as found in STSMA #3.1(n), PMR 27.2(b), PMR 27.4, and PMR 27.5)

Bodies corporate, trustees and any appointed Managing Agent all have the responsibility in terms of various provisions in the Sectional Titles Schemes Management Act and its Regulations and the CSOS Act and it's Regulations, to process owner's personal information, thus making them the **"responsible party"** and the owners, tenants, employees, contractors etc. to whom the personal information will relate, will be the **"data subject**."

"Personal information" has a wide definition in section 1 and includes information relating to race, gender, pregnancy, marital status, sexual orientation, age, physical or mental health, religion, language, education, financial history, identifying number, e-mail address, physical address, telephone number, location information, online identifier, personal opinions, views or preferences, confidential correspondence, views or opinions of another individual about the person, and the name of the person if it appears with other personal information.

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A community scheme's requirement for personal information must not intrude on an owner's privacy to an unreasonable extent. Any **information collected must be for a specific, defined and legitimate purpose** in terms of the governing legislation and scheme governance documentation, and for Sectional Title schemes in terms of the STSMA and the CSOSA**,** and it cannot be used for any different purpose.

The community scheme executives and any agent of theirs who has access to this information, must ensure that the personal information gathered is accurate and complete, as required by legislation and the information must be updated when necessary. A member of the community scheme should be informed on request of where and why the personal information is being kept, and they must have the opportunity to check such information, and amend it if necessary

Community Scheme executives, on behalf of their community scheme, will have to consider what data they keep, how it is stored, secured, used and how it is made available to outside parties. They must also ensure that there are appropriate technical security safeguards for where and how the information is stored and managed and how readily and securely it can be accessed by nominated parties.

POPI should be used as an excuse not to make available certain personal information of the members of a community scheme as the living communally will require that the inhabitants have reasonable access to each other's contact details in order to exercise their rights and to contact other residents in their scheme if need be.

The Sectional Titles Schemes Management Act provides that owners and other parties are reasonably entitled to information listed in the Prescribed Management Rules (PMR) Annexure 1 of the Regulations of the STSMA. (as referenced by STSMA #3.1(n), PMR 27.2(b), PMR 27.4, PMR 27.5)

The POPIA must be read in conjunction with the STSM Act and other legislation and in particular to the role of trustees and managing agents in performance of their duties. The trustees are responsible for carrying out the duties of the body corporate, which includes the responsibility for the overall management of the scheme; and, further, that they are empowered to do all thing necessary to enforce the rules. The sharing of an owner's contact details may be required if it is primarily intended to assist the trustees, residents, and owners, in fulfilling their obligations to the scheme and to other residents.

The POPIA requires that the information shared is adequate, relevant and not excessive in the circumstance, so legislation in the STSMA and the STSMA REGULATIONS that allows trustees to provide contact details to owners when requested to do so, may in a particular circumstance supersede any associated infringement on an owner or residents "right to privacy", **if it is deemed reasonable and justifiable and necessary for pursuing a "legitimate interest"** which for a community scheme would be the effective management of the community scheme.

Personal information and personal data has huge worth to companies particularly in the form of a databases POPI will apply to all in the country who are involved in gathering and processing personal information, including employers, companies and individuals, directors, trustees and managing agents, all of whom will have to assume responsibility as the guardians of customer information, and do what is reasonably required to protect such information as required by the POPI Act.

We will have to wait and see what is required of the property management industry in terms of the POPI Act and take our lead to some degree from bodies such as CSOS, NAMA and even the EEAB, who will hopefully be able to provide a consolidated document with procedures for handling this particular legislation in conjunction with other legislation governing community schemes, that give the direction and clarity needed.