



FORM 15

**ENFORCEMENT NOTICE IN TERMS OF SECTION 95 OF THE PROTECTION
OF PERSONAL INFORMATION ACT 4 OF 2013)
REGULATIONS RELATING TO THE PROTECTION OF PERSONAL INFORMATION,
2018**

[Regulation 12(2)(c)]

Reference number: **OIA02/23**

DETAILS OF DATA SUBJECT	
Name(s) and surname/ registered name of data subject/complainant/aggrieved party:	Information Regulator Own-Initiative Assessment in terms of section 89 of POPIA on Department of Basic Education
Unique Identifier/ Identity Number	N/A
Residential, postal or business address:	JD House 27 Stiemens Street Braamfontein Code (2001)
Contact number(s):	010 023 5200
Fax number E-mail address:	POPIACompliance@infoeregulator.org.za
B DETAILS OF RESPONSIBLE PARTY	
Name(s) and surname/ Registered name of responsible party:	Department of Basic Education
Residential, postal or business address:	222 Struben Street Pretoria Central Pretoria Code (0001)
Contact number(s):	
Fax number/ E-mail address:	mweli.m@dbe.gov.za ; FMutsei@justice.gov.za

Be pleased to take notice that the Information Regulator (Regulator) after having conducted an own initiative assessment in terms of section 89 (1) of Protection of Personal Information Act 4 of 2012 (POPIA) decides that the responsible party has interfered with the protection of personal information of the data subjects as follows:

A breach of the conditions for the lawful processing of personal information.

Non-compliance with the duty to notify security compromises (section 22 of the Protection of Personal Information Act 4 of 2013)

Non-compliance with the duty of confidentiality (section 54 of the Protection of Personal Information Act 4 of 2013)

Non-compliance with obligations for direct marketing by means of unsolicited electronic communications (section 69 of the Protection of Personal Information Act 4 of 2013)

Non-compliance with obligations regarding the inclusion of personal information in directories (section 70 of Protection of Personal Information Act 4 of 2013)

Non-compliance with obligations regarding automated decision making (section 71 of the Protection of Personal Information Act 4 of 2013)

Non-compliance with obligations regarding personal information outside the Republic of South Africa (section 72 of the Protection of Personal Information Act 4 of 2013)

Breach of the provision of a code of conduct issued in terms of section 60: Code of Conduct of (Reference)

A. BREACH OF THE CONDITIONS FOR THE LAWFUL PROCESSING OF PERSONAL INFORMATION

The responsible party has breached the conditions for the lawful processing of personal information as listed in the following sections of POPIA:

1.1. Section 11 of POPIA.

“Personal information may only be processed if—

- (a) the data subject or a competent person where the data subject is a child consents to the processing;*
- (b) processing is necessary to carry out actions for the conclusion or performance of a contract to which the data subject is party;*
- (c) processing complies with an obligation imposed by law on the responsible party;*
- (d) processing protects a legitimate interest of the data subject;*
- (e) processing is necessary for the proper performance of a public law duty by a public body; or*
- (f) processing is necessary for pursuing the legitimate interests of the responsible party or of a third party to whom the information is supplied”.*

1.1.1. The data subject or a competent person where the data subject is a child consents to the processing (section 11(1)(a)):

Responsible parties can rely on this justification if it obtains the consent of the data subject or a competent person where the data subject is a child consents to the processing.

The DBE failed to obtain consent of the learners who are above eighteen (18) years or that of parents/ guardian for learners below eighteen (18) years who sat for the 2023 National Senior Certificate examinations, as per its own admission, and proceeded to publish the personal information of such learners in the newspapers.

1.1.2. Processing is necessary to carry out actions to conclude or perform in terms of a contract (section 11(1)(b)):

Responsible parties can rely on this justification if the processing of personal information is necessary for the purpose of concluding a contract or performing an obligation in terms of a contract.

When determining what is “necessary” to conclude or perform in terms of a contract, a fact-based assessment must be made of the processing to determine whether the processing is necessary for the objective pursued by the contract.

The DBE failed to demonstrate that processing of personal information of learners through publication of their matric results in the newspapers was necessary for the purpose of concluding a contract or performing an obligation in terms of a contract

1.1.3. Processing complies with an obligation imposed by law on the responsible party; (section 11(1)(c))

If a law requires that a processing activity takes place and such law is compatible with POPIA, then such processing is lawful.

In his letter to the Regulator dated 21 December 2021, the Director General (DG) states “the DBE is fully justified to process to personal information of learners under the provisions of either section 11(1)(c) and/or section 11(1)(d) to be read together with the constitutional injunction of section 28(2) of the Constitution of the Republic of South Africa, 1996 (the Constitution) that the child’s best interest are of paramount importance on any matter concerning a child....)

The processing prescribed in section 11(1)(c) must be necessary to fulfill a legal obligation imposed on the responsible party.

Further to the above, a document termed the National Policy Pertaining to the Conduct, Administration and Management of the National Senior Certificate Examination published as Government Notice No. 564 in Government Gazette No. 30048 of 6 July 2007 as amended also mentioned by the DG in his letter of 21 December 2021 and provided to the Regulator during the assessment, details the entire administration and management of matric examinations.

In addition to the above-mentioned document, the Regulator has had due regard to the Regulations relating to the administration of assessments for the senior certificate termed the Regulations for the Conduct, Administration and Management of Assessments for the Senior Certificate, published by means of Government Notice No.1044 in Government Gazette No. 28156 of 21 October 2005 as amended.

The DBE has failed to demonstrate that the above-mentioned documents impose a legal obligation on it to process personal information of learners by publishing the matric results in the newspaper. There is no provision in the aforementioned documents that provides for the publication of matric results in the newspapers.

1.1.4. Processing protects a legitimate interest of the data subject; (section 11(1)(d))

The DBE has stated that it is justified in processing personal information under the provisions of section 11(1)(c) and/or section 11(1)(d) to be read together with the constitutional injunction of section 28(2) of the Constitution. The DBE contends that the said processing of personal information (publication) is in the best interests of the child.

The DG in this letter (21 December 2021) failed to demonstrate how and what legitimate interest of learners would be protected by the publication of matric results in the newspapers given that the publication in the newspaper, is not the only method available to learners to obtain their National Senior Certificate Examination results.

1.1.5. Processing is necessary for the proper performance of a public law duty by a public body; (section 11(1)(e))

In his letter to the Regulator dated 21 December 2021, the DG states that “the justification by the DBE in relation to whether the processing is necessary for the proper performance of a public law duty by a public body is section 11(1)(c) and/or section 11(1)(d) of POPIA read together with the Constitutional injunction of section 28(2) of the Constitution that the child’s best interest are of paramount

importance on any matter concerning a child and/or section 11(1)(e) and/or section 11(1)(f) of POPIA”.

The DG in his letter (21 December 2021) failed to demonstrate that the processing of personal information of the learners through the publication of their results in the newspapers was necessary for the performance of a legal obligation imposed on it. Furthermore, the DBE failed to demonstrate the legal obligation upon which it relied to justify the publication of the matric results in any newspaper.

The Regulations for the Conduct, Administration and Management of Assessments for the Senior Certificate, published by means of Government Notice No.1044 in Government Gazette No. 28156 of 21 October 2005 as amended and all other regulations mentioned do not place a legal obligation on the DBE to publish matric results in the newspapers.

Insofar as the DG’s reliance on sections 11(1)(c) and 11(1)(d) of POPIA is concerned, please refer to the response contained in paragraphs 1.1.3 and 1.1.4. Insofar as the DG’s reliance on section 11(1)(f) of POPIA is concerned, please refer to our response contained in paragraph 1.1.6 below.

1.1.6. Processing is necessary for pursuing the legitimate interests of the responsible party or of a third party to whom the information is supplied. (section 11(1)(f))

In his letter to the Regulator dated 21 December 2021, the DG states “the DBE is fully justified to process personal information of learners under the provisions of either section 11(1)(c) and/or section 11(1)(d) to be read together with the constitutional injunction of section 28(2) of the Constitution that the child’s best interest are of paramount importance on any matter concerning a child and/or section 11(1)(e) and/or section 11(1)(f) of POPIA”.

The responsible party’s interest in the processing must be distinguished from the purpose of the processing activity. The purpose is the reason why the personal information is processed, whereas the responsible party’s interest in the

processing activity is the broader stake that it has in the processing or the benefit that it might derive from the processing activity.

The DBE failed to demonstrate how its legitimate interests would be pursued by publishing the matric results of learners in the newspapers and what those interests are.

Having stated the above, it is therefore essential to state that the interests of the DBE or the media (3rd party) cannot override the interests or fundamental rights and freedoms of the data subjects (learners).

B. THE RESPONSIBLE PARTY IS HEREBY ORDERED TO:

Take the following specified steps:

1. In respect of the breach of section 11(1) of POPIA:

In relation to the 2024 matric examination results:

- 1.1. The DBE must provide the Regulator within thirty-one (31) days of receipt of this report, with an undertaking that it will not publish the results of the 2024 matriculants in the newspapers; and
- 1.2. The DBE must not publish the results for the 2024 matriculants in newspapers and must make these results available to the learners using methods that are compliant with POPIA such as each learner obtaining their result from the school or using the secure SMS platform of the DBE which enables each learner to access their results confidentially.

In relation to the 2025 matric examination results

- 1.3. The DBE must obtain the consent of learners who are above the age of eighteen (18) years or the parents/guardians of those below the age of eighteen (18) years who will write the matric examination in 2025 before publishing their results in newspapers;
- 1.4. In complying with the above requirement of consent as contained in section 11(1)(a) of POPIA and considering the large number of learners who write matric examination every year, the DBE must develop a system which will enable it to obtain the consent of the learners or their parents/guardians before the publication of their matric results in newspapers;
- 1.5. The DBE should design the above-mentioned system in a manner that will ensure that the consent given by the learners, or their parent/ guardian complies with the definition of consent in section 1 of POPIA, namely that it is a voluntary, specific and is an informed expression of will in terms of which they consent to the publication of their matric results in newspapers. In other words, the system should be designed in a manner that will make it clear to the learners or their parents/ guardians what they are consenting to. The system should also make provision for the withdrawal of consent.
- 1.6. The DBE must provide the Regulator within ninety (90) days of receipt of this report with an undertaking that it will design a system, which will be used to obtain consent of the learners or their parents/guardians before publishing the results of the 2025 matriculants.
- 1.7. The DBE must afford the Regulator the opportunity to verify that the system is compliant with POPIA prior to deploying it.
- 1.8. Further to the above, the DBE must devise another method of assigning examination numbers to the learners. In the event it decides to retain the current numbering method, it must ensure that the results are published in the newspapers in a manner that will not make it possible for the learners in the same school to identify other learners and their results.

- 1.9. In the event that the DBE devices another method of assigning examination numbers to the learners, it must ensure that such method complies with the provisions of POPIA. It must further to this, provide the Regulator within 90-days of receipt of this report, with proof of having devised such method. Such proof should clearly contain the method of assigning the examination numbers in question to ensure that the learner is not identifiable. The DBE should not publish the results of the 2025 matriculants if the above-mentioned recommendations have not been complied with.

C. TIME PERIODS

- 1.1. The DBE must provide the Regulator within thirty-one (31) days of receipt of this report, with an undertaking that it will not publish the results of the 2024 matriculants in the newspapers.
- 1.2. The DBE must provide the Regulator within ninety (90) days of receipt of this report with an undertaking that it will design a system which will be used to obtain consent of the learners or their parents/guardians before publishing the results of the 2025 matriculants.

D. RIGHT OF APPEAL

The responsible party may appeal against this Enforcement Notice within thirty (30) days of the date of receipt of this Enforcement Notice as provided for in section 97(1) of POPIA.

E. CONSEQUENCES FOR NON-COMPLIANCE WITH AN ENFORCEMENT NOTICE

Please note that a responsible party which fails to comply with this Enforcement Notice is guilty of an offence and liable upon conviction to fine or to imprisonment for a period not exceeding ten (10) years or to both such a fine and such imprisonment.

DATED at JOHANNESBURG on 06 NOVEMBER 2024



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ADV. PANSY TLAKULA

CHAIRPERSON OF THE INFORMATION REGULATOR