



**INFORMATION
REGULATOR
(SOUTH AFRICA)**

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

**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: CDR 464-21

A	DETAILS OF DATA SUBJECT
Name(s) and surname/ registered name of data subject/complainant/aggrieved party:	Mr. Willem Esterhuysen
Unique Identifier/ Identity Number	N/A
Residential, postal or business address:	P.O. Box 1111 Stellenbosch Valley 7120 Stellenbosch
Contact number(s):	N/A
Fax number E-mail address:	info@westerhuysen.co.za
B	DETAILS OF RESPONSIBLE PARTY
Name(s) and surname/ Registered name of responsible party:	FT Rams Consulting
Residential, postal or business address:	160 Constantia Drive Constantia Kloof Roodepoort
Contact number(s):	011 462 4621 or 011 462 4622
Fax number/ E-mail address:	info@ftrams.co.za

A. Be pleased to take notice that the Information Regulator (Regulator) after having considered the report of the Enforcement Committee hereby decides that the protection of personal information of the data subject has been interfered with 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 transferred 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 POPIA.

B. The reasons for reaching this conclusion are:

1. The responsible party has contravened the following sections of the Protection of Personal Information Act 4 of 2013 (POPIA):

1.1 Section 69 (1) and (2) by transmitting to the data subject through emails persistent direct marketing communications pertaining to the courses or webinars which it offered without first obtaining his consent. Section 69 (1) provides:

“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.

(b)

Section 69 (2) (a) provides:

“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”.

1.1.1 The direct marketing communications which the responsible party sent to the data subject by means of an email constituted direct marketing by means of unsolicited electronic communication. **The responsible party was supposed to approach the data subject only once to obtain his consent before sending him such communications, provided that the data subject had not previously withheld his consent. In other words, the responsible party had to first send the communication to the data subject to obtain his consent before sending communications in which it marketed its services.**

1.1.2 The responsible party was supposed to use the form (Form 4) prescribed by the Regulator in terms of Regulation 6 it made in terms of section 112 (2) of POPIA to obtain the data subject’s written consent. This form can be obtained

from www.inforegulator.org.za. The data subject was supposed to give consent to receive direct marketing communication of services specified in the form, and to specify the method of communication which the responsible party could use to send him direct marketing services.

1.1.3 Section 11 (2) of POPIA places the burden of proving that the data subject had given his consent to the responsible party, and he failed to discharge this onus. The responsible party failed to comply with the requirements of consent stipulated above.

1.1.4 The fact that the direct marketing emails which were sent to the data subject gave him the option to “opt out” did not remedy non-compliance with section 69 (1) of POPIA which required the responsible party to first obtain the consent of the data subject before sending him the communication in which it marketed its services. The “opt out” or “unsubscribe” could be included in the email which the responsible party sent to the data subject to obtain his consent. If the data subject chose to “opt out”, the data subject had to immediately cease to send him unsolicited direct marketing messages. By sending the data subject unsolicited direct marketing emails without first obtaining his consent to receive such emails, the responsible party violated section 69 (1) (a) and (2) (i) and (ii) of POPIA.

1.2 Section 69 (4) (b) by failing to include in the communications for direct marketing that was sent to the data subject contact details of the employee or officer who had sent such communications to enable the data subject to inform such employee or officer to stop sending him the communications, taking into consideration the diverse subject matter of the courses it marketed.

Section 69 (4) (b) provides as follows:

“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”.

1.3. Section 12 (1) in that it did not collect personal information of the data subject directly from him. Section 12 provides as follows:

“12 (1) Personal information must be collected directly from the data subject, except as otherwise provided for in subsection (2).

(2) It is not necessary to comply with subsection (1) if-

(a) the information is derived contained in or derived from a public record or has been made public by the data subject;

(b) the data subject or a competent person where the data subject is a child has consented to the collection of the information from another source”.

1.3.1. The onus is on the responsible party to prove that the personal information of the data subject, including his email addresses was contained in or derived from a public record or that data subject had deliberately made such personal information public. It did not discharge this onus. Furthermore, the responsible party did not present evidence that the data subject had consented to his personal information being collected from another source. The fact that the responsible party used five (5) possible email domains to which the direct marketing messages were sent to the data subject may point to the fact that it did not obtain these details directly from him.

1.4. Section 18 in that it did not take reasonable steps to ensure that the data subject was aware that his personal information was being collected at the time it was collected. Section 18 provides inter alia as follows:

“18 (1) If personal information is collected, the responsible party must take reasonably practicable steps to ensure that the data subject is aware of-

(a) the information being collected and where the information is not collected from the data subject, the source from which it is collected;

(b) the name and address of the responsible party;

(c) the purpose for which the information is being collected;

.....”

1.4.1. The responsible party bears the onus of proving that it was not necessary for him to take reasonably practical steps to ensure that the data subject was aware that his personal information was being collected and the source from which it was collected because the data subject had consented to non-compliance with this requirement. The responsible party did not discharge this onus.

1.4.2. The requirement of notification to the data subject of the processing of his personal information is an essential element in the protection of personal information. It ensures that a data subject has knowledge of any processing of his personal information and enables him to take steps against the infringement of his right to privacy.

C. The responsible party is hereby ordered:

To take the following steps:

1. Immediately stop sending unsolicited direct marketing messages to any data subject, including the complainant, by means of any form of electronic communication, including email, SMS, facsimile machine (fax), automatic calling machine or telephone whose consent is required and who has not consented to receiving such messages and submit an undertaking in this regard to the Regulator within ninety (90) days of receipt of this notice.
2. In compliance with sections 69 (1) (a) and (2) (a) (i) and (ii) of POPIA, ensure that the first communication that it sends a data subject he intends to send unsolicited direct marketing message by means of electronic communication to, and whose consent is required, is one in which he requests the consent of such a data subject to receive such a message. It must ensure that it approaches such a data subject only once for the purpose of obtaining his or her consent. It must also ensure that it only sends such a message to a data subject who had not previously withheld his or her consent.
3. Ensure that it uses the form (Form 4) which has been prescribed by the Regulator in Regulation 6 of the Regulations it made in terms of section 112 (2) (f) of POPIA to obtain consent from a data subject whose consent is required. These Regulations can be found on the website of the Regulator, which is www.inforegulator.org.za.
4. Ensure that it obtains the personal information of data subjects it intends to send unsolicited direct marketing messages by means of electronic communication for the purpose of obtaining their consent lawfully and submit an undertaking to the Regulator in this regard within ninety (90) days of receipt of this notice.

5. Compile and maintain a data base of all data subjects who withheld or did not consent to receiving unsolicited direct marketing messages by means of any form of electronic communication to ensure that these data subjects are not contacted again and submit a design of such a data base to the Regulator within ninety (90) days of receipt of this notice.
6. Ensure that any communication it sends to data subjects for the purposes of direct marketing contains the details of the identity of the sender or the person on whose behalf the communication has been sent and an address or other contact details to which the recipient may send a request that such communication ceases in compliance with section 69 (4) (a) and (b) of POPIA. The design of such communication must be sent to the Regulator within ninety (90) days of receipt of this notice.
7. Adopt a privacy policy and submit it to the Regulator within ninety (90) days of receipt of this notice.
8. Conduct a Personal Information Impact Assessment and submit the results thereof to the Regulator within ninety (90) days of receipt of this notice.
9. Develop and implement a POPIA compliance framework and submit the framework to the Regulator within ninety (90) days of receipt of receipt of this notice.
10. Develop a POPIA training manual which includes a chapter on Direct Marketing as set out in Sections 69 and 11 (3) and (4) of POPIA and submit it to the Regulator within ninety (90) days of receipt of this notice.
11. Train all its staff on POPIA.
12. Provide confirmation to the Regulator within ninety (90) days of receipt of this notice that:
 - 12.1. it has appointed an information officer and registered such information officer with the Regulator in terms of section 55 (2) of POPIA to perform duties and responsibilities set out in section 55 (1) of POPIA.

12.2. it has designated, if necessary, one or more persons as deputy information officers, to whom the information officer has delegated his or her duties and responsibilities as set out in section 55 (2) of POPIA.

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 21 FEBRUARY 2024.



.....

ADV. PANSY TLAKULA

CHAIRPERSON OF THE INFORMATION REGULATOR