



Media breakfast briefing address

29 June 2022

Adv Pansy Tlakula: Chairperson of the Information Regulator

Programme Director, all media present, the Members of the Information Regulator, Adv Collen Weapond, Adv Lebogang Stroom Nzama, Mr Mfana Gwala and Ms Alison Tilley, our CEO Mr Mosalanyane Mosala (*in absentia*), and all the Executives, a very good morning to you and to everyone who may be joining us virtually.

I greet you today during the month where we commemorated Youth Month when we remember the youth of 1976 who fought the injustices of the then education system. We celebrate and commemorate Pride Month, during which we recognise years of struggle for fundamental human rights and the ongoing quest for equal justice under the law for the Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, and Asexual (LGBTQIA) community.

The Information Regulator grounds itself firmly as an organisation that is people-orientated and, as such, is an ally in efforts for the realisation of human rights for the vulnerable, marginalised and disadvantaged communities.

We have just returned from Mexico after participating in the thirteenth (13th) International Conference of Information Commissioners (the ICIC), where we had robust engagements on the right of access to information and how the global efforts can advance this right and bring it to its full realisation.

The ICIC connects Information Commissioners, Ombudspersons, and other bodies overseeing the implementation of Access to Information legislation. Its Executive Committee includes Albania, Kenya, the USA, Brazil, Chile and Bermuda. South Africa, through the Information Regulator, is an active member of this executive committee of the ICIC.

It was also at the 13th ICIC that the executive committee of the African Network of Information Commissioners (ANIC) was elected, with South Africa as the chairperson of the Network.

Other members of the ANIC executive committee are Tunisia (Deputy Chair), Kenya (Treasurer) and Ghana.

As you may know, embedded in our mission statement is our aspiration to be a world-class organisation. Being part of these global platforms allows us to position ourselves and South Africa as one of the leading countries in law and practice regarding the protection of personal information and access to information.

We remind the public that we have a dual mandate as the Regulator: we ensure the protection of personal information as outlined in the Protection of Personal Information Act 4 of 2013 (commonly called POPIA) and ensure effective access to information as outlined in the Promotion of Access to Information Act 2 of 2000 (PAIA).

It is evident that the POPIA has grabbed the public's attention, and rightfully so because it is a new law; however, we encourage the public also to exercise their right of access to information held by state or private institutions, and should they be denied access they must lodge a complaint with us.

In a couple of days, it will be a year since the enforcement powers came into effect. This is a milestone for the Regulator. These powers give the Regulator the means to secure the rights of data subjects (to whom the personal information relates) and requestors of information. The Regulator can conduct investigations on complaints if the personal information of data subjects had been violated and there has been interference due to unlawful processing of their personal information in terms of PAIA or where the requestors have been unjustifiably denied access to information.

The Regulator has, since July 2021, received and pre-investigated over 700 complaints from data subjects. Most complaints received relate to direct marketing, which is a grave concern and an indication that responsible parties are not complying with POPIA's sections 69, which relates to Direct marketing by means of unsolicited electronic communication, and section 11 on Consent, Justification, and Objection.

The Regulator is concerned that South Africans continue to be bombarded with unsolicited direct marketing messages that do not comply with the provisions of section 69 of POPIA. This section prohibits direct marketing by means of unsolicited electronic communications, including automatic calling machines, facsimile machines, SMSs or e-mail unless the data subject has given their consent to the processing or is a customer of the responsible party.

There is a debate whether a telephone call constitutes an electronic communication in terms of the definition of electronic communication in POPIA, which is defined as 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. The Regulator intends to draft a Guidance Note on the interpretation of section 69 of POPIA and will engage relevant stakeholders in this regard. However, section 69 is clear in so far as the requirements for direct marketing through unsolicited electronic communication are concerned. Such processing is prohibited unless:

- The data subject has given their consent to such processing or is a customer of the responsible party. Consent is defined in POPIA as voluntary, specific and expression of will in terms of which permission is given for the processing of personal information. This means that requesting a data subject to simply opt-out does not constitute consent within the meaning of POPIA.
- The data subject must be contacted only once for the purpose of obtaining their consent. The responsible party must obtain the contact details of the data subject lawfully for the purpose of contacting them to obtain their consent. This means that the responsible party must have derived the contact details of a data subject from a public record or a data subject must have made their contact details deliberately public. Purchasing contact details of data subjects from data brokers is unlawful.
- A data subject who was previously contacted and withheld their consent cannot be contacted again.
- Any communication for direct marketing must contain the identity of the sender or the person on whose behalf the communication has been sent and an address or contact details to which a data subject can send a request that the communication must stop.

The Regulator has received a notification from the National Credit Regulator regarding the report about entities engaging in the sale of personal information (such as consumers' names and surnames; identity numbers; contact numbers; credit scores; and consumer debt review statuses) belonging to consumers. As the Regulator, we are warning responsible parties that continue to trade in personal information that this is in violation of POPIA, and we will not tolerate it. We are sending an unequivocal message to players in the credit granting and direct marketing sectors of our economy: this must stop.

We say to those that offer to sell these lists and those that buy them, **DO NOT ALLOW YOURSELF TO BE THE FIRST EXAMPLE OF THE REGULATOR'S BITE.**

As a result of the above, the Regulator has commenced a systemic investigation into the allegations of the unlawful sale of personal information of data subjects. The Regulator would like to thank the Chief Executive Officer of the NCR, Ms Nomsa Motshegare, for bringing this valuable information to our attention.

Ladies and gentlemen

As a country, we are experiencing an alarming rate of security compromises (data breaches), and we have recorded over 330 reports from July last year. In instances wherein there is a security compromise, or the Regulator believes that certain processing does not comply with any of the conditions for lawful processing of personal information, the Regulator has the power to conduct its own initiative assessment. The own-initiative assessments that the Regulator is conducting involve WhatsApp, TransUnion, the Department of Justice and Constitutional Development. All these assessments are at an advanced stage.

Due to the prevalence of security compromises, the Regulator has decided to establish a dedicated Security Compromise Unit, which will conduct extensive investigations or assessments into the security compromises suffered or experienced and issue reports with findings and recommendations. These reports are, in terms of section 91(3) of POPIA, deemed to be Enforcement Notices.

As alluded to earlier, the Regulator has a dual mandate, and it has also been a year since we took over the regulatory functions on PAIA. The Regulator has completed its targeted compliance assessments on 15 municipalities across the country (8 metropolitan and seven district municipalities). The above-mentioned assessment focused on some of the PAIA compliance matters, including the following issues-

- Whether Municipalities have updated their PAIA Manual and made it available in at least three (3) official languages, as well as making such manual on the website of the Municipality and at the head office for inspection during normal business hours.
- The assessment focused on whether the municipality manager has designated or Delegated Deputy Information Officer(s)

Our assessment found that 100% of the municipalities assessed do not have valid PAIA Manuals.

The right of access to information is one of the most significant rights in our constitution, in that one cannot exercise any other rights without information. The Regulator has received a complaint from Hardwick Trading (Pty) Ltd, alleging that its request for access to records relating to the payment of the license fees and copyright royalties was refused by Risa Audio-visual licensing NPC (RAV). RAV is a collecting agency which collects license fees and copyright royalties and pays over this amount to record labels and musicians.

One of the important complaints in which an investigation is at an advanced stage is a complaint that relates to the rights of the community of Bethelsdorp in the Eastern Cape. The complainant is Bethelsdorp Claimholders Trust (which is a trust formed by the community of Bethelsdorp) against Mission Soutpan (Pty) Ltd and Swartkops Seesout (Pty) Ltd.

In this complaint, the community of Bethelsdorp alleged that their request for access to records (i.e. the list of payments made to the board (representing the interested community) from 1984 to date) has been refused and that they require the records for the purpose of exercising their right (amongst others) to benefit from the revenue of saltpan, as prescribed in the Bethelsdorp Settlement Act, 34 of 1921.

Since the Information Regulator started handling PAIA complaints, we have had cases that had positive outcomes. We regard it as a positive outcome because the case demonstrated the power of accessing information in order to protect, exercise or access other rights. In this case, we resolved a complaint from Knight Practice Administrators who were the beneficiaries of a deceased policyholder's life cover policy. The life cover policy had been taken out with Momentum Life.

After the passing of the policyholder, the complainant (Knight Practice Administrators) lodged a claim on the life cover policy. The claim was initially rejected because it was alleged that the deceased policyholder had misrepresented and/or did not disclose certain information. The life insurer argued that had the policyholder given full disclosure about themselves, the insurer would not have issued the life cover policy.

Upon receipt of the rejection letter, the complainant submitted a PAIA request, which request was rejected on the following grounds:

- that the decision contains confidential medical records of the policyholder.
- the complainant is not the policyholder nor the appointed executor of the deceased estate.
- the complainant did not confirm the rights that it seeks to exercise or be protected.

After the Regulator's intervention, the complainant's life cover claim was settled by Momentum, and as a result, the complainant's right to benefit from the policy was protected.

The Regulator has recently tabled its strategic plan in Parliament, and we outlined our priorities for this term. We seek to conduct robust educational and awareness programmes to advance the public's understanding of POPIA and PAIA with a particular focus on disadvantaged communities; to ensure better management of the complaints process, and increase human resource capacity to serve the public efficiently.

In conclusion, the first five years of the Regulator have been the years dedicated to forming the institutional framework for the Regulator. The next five years will be devoted to actively demonstrating that the Regulator is a shield that protects, the torchbearer that promotes and the hand that assists in protecting personal information and promoting access to information.

I thank you all for attending

Thank you