



**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: T Boikanyo // J Jansen

DETAILS OF DATA SUBJECT	
Name(s) and surname/ registered name of data subject/complainant/aggrieved party:	Information Regulator (South Africa)
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@inforegulator.org.za
DETAILS OF RESPONSIBLE PARTY	
Name(s) and surname/ Registered name of responsible party:	WhatsApp LLC (<i>Represented by Covington & Burling (Pty) Ltd</i>)
Residential, postal or business address:	[REDACTED] [REDACTED] [REDACTED] Johannesburg Code (2001)
Contact number(s):	[REDACTED]
Fax number/ E-mail address:	[REDACTED] [REDACTED]

A. Please take notice that the Information Regulator (Regulator) after having considered the report in terms of section 91(3) of POPIA, hereby decides that the protection of personal information of the data subjects 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 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)

B. 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. Condition 1 – Accountability

Section 8 of POPIA

- 1.1. This condition provides that the accountability for compliance with the statutory conditions for lawful processing of personal information rests on the responsible party. Furthermore, accountability is not confined to the initial collection and processing of personal information, but rather all the conditions for the lawful processing of personal information.
- 1.2. This condition has two (2) elements namely:
 - i. responsibility by the responsible party for complying with POPIA; and
 - ii. the ability to demonstrate that compliance in terms of its compliance framework, which framework ought to consist, amongst others, of policies and procedures.
- 1.3. WhatsApp failed to demonstrate its compliance with section 8 of POPIA.

2. Condition 2 Processing Limitation

Section 9 of POPIA

- 2.1 Personal information must be processed lawfully and in a reasonable manner that does not infringe the privacy of data subjects.
- 2.2 WhatsApp's Revised Privacy Policy for the European Region provides various ways and reasons for which it processes personal information. Some examples given are as follows –
 - 2.2.1 to perform under contract;
 - 2.2.2 where consent has been given;
 - 2.2.3 to protect WhatsApp's vital interests or those of a third party;
 - 2.2.4 for legitimate interests, either of WhatsApp or of a third party; and
 - 2.2.5 for research, safety, security, and integrity/public interest.

- 2.3 However, the WhatsApp's Revised Privacy Policy applicable to Users of WhatsApp in South Africa does not contain the same or similar provisions (to those Privacy Policy of the European Region) – even though these are principles which are also entrenched in POPIA, for example personal information may only be processed if:
- 2.3.1 the data subject must have given consent;
 - 2.3.2 processing is necessary to carry out actions for the conclusion for performance of a contract to which the data subject is a party;
 - 2.3.3 processing protects a legitimate interest of the data subject or;
 - 2.3.4 processing is necessary for pursuing the legitimate interests of the responsible party or of a third party to whom the information supplied.
- 2.4 Further, the reasons for processing of personal information are only expressed in broad terms which does not provide enough information for a user in South Africa to determine the extent of limiting personal information processing, nor does it allow for the Regulator to determine compliance with the processing limitation condition. Consequently, WhatsApp does not demonstrate compliance with the processing limitation condition as far as lawfulness is concerned when considering the WhatsApp's Revised Privacy Policy.
- 2.5 In this premise, WhatsApp did not comply with section 9 of POPIA.

Section 11 of POPIA (Consent)

- 2.6 POPIA defines consent as any voluntary, specific and informed expression of will in terms of which permission is given for the processing of personal information.
- 2.7 It is important to note that where consent is given, it should be an informed, specific, and voluntary expression of a data subject's free will in terms of which they give permission to WhatsApp. As such, where WhatsApp forces its Users to accept certain terms and conditions or policy provisions without a lawful basis or other ground for lawful processing, such consent would be deemed invalid and any processing that is conducted pursuant to it would be in contravention of POPIA.

2.8 WhatsApp required its Users to accept the Revised Privacy Policy failing which, said Users would not have functionality of the platform. In other words, this appeared to be a form of obtaining consent and the consent was made a condition of the service by WhatsApp. This cannot be deemed as voluntarily given consent because any level of pressure to agree or disadvantage arising from a decision not to agree vitiates true consent. Consequently, our considered view is that WhatsApp's approach to obtaining consent amounted to coercion and is deemed invalid in terms of POPIA and any processing conducted pursuant to it is in contravention of POPIA.

2.9 In the circumstances, WhatsApp did not comply with section 11 of POPIA.

3. Condition 3 Purpose Specification

Section 13 of POPIA

3.1 Section 13 of POPIA requires that the collection of personal information must be for a specific, explicitly defined and lawful purpose related to a function or activity of the responsible party, in this instance the functions or activities of WhatsApp.

3.2 Users are entitled to know what information is collected, processed and reason for such and same should be reflected in the Revised Privacy Policy. WhatsApp did not explain the purposes in the Revised Privacy Policy and as such does not comply with section 13 of POPIA.

4. Condition 4 Further Processing Limitation

Section 15 of POPIA

4.1 Section 15(1) of POPIA provides that further processing of personal information must be in accordance or compatible with the purpose for which it was collected in terms of section 13.

- 4.2 WhatsApp shares personal information of its users with other companies (including Meta Companies) and third parties. This is clearly indicative of further processing activities by WhatsApp. If the new purpose is significantly different from the original purpose, then it is incompatible with the original purpose.
- 4.3 The legitimate interest justification does not validate the further processing of personal information for a purpose that is incompatible with the initial purpose of collection and as such WhatsApp did not comply with section 15 of POPIA.

5. Condition 6 Openness

Section 17

- 5.1 Section 17 of POPIA provides that a responsible party must maintain the documentation of all processing operations under its responsibility as referred to in section 14 or 51 of the Promotion of Access to Information Act 2 of 2000 (PAIA)
- 5.2 WhatsApp contends that the provisions of PAIA are not applicable to it, as in its view, PAIA does not apply to responsible parties not domiciled in South Africa.
- 5.3 It is the considered view of the Regulator that this interpretation of PAIA by WhatsApp is incorrect. WhatsApp is therefore required to maintain the documentation of the processing activities under its responsibility as referred to in section 51 of PAIA.

6. Condition 7 Security Safeguards

Section 19 – 22 of POPIA

- 6.1 Section 19 of POPIA sets out the measures to be taken to ensure the integrity and confidentiality of personal information and the duty of a responsible party to take appropriate reasonable, technical and organisational measures to prevent loss of damage to or unauthorised destruction of and unlawful access to or processing of personal information.

- 6.2 The above measures extend to any operator or anyone who may process personal information on behalf of a responsible party. This requires a responsible party to conclude an agreement with the operator to ensure that the operator establishes and maintains the security measures set out in section 19 of POPIA.
- 6.3 WhatsApp has failed to demonstrate that it has documented enterprise information security policies or issue specific security policies, which enforce the implementation of the measures it contends to have in place. WhatsApp failed to indicate to the Regulator whether there is any information security practices and procedures that it has adopted.
- 6.4 WhatsApp in its submission seems to contend that the Regulator should not have more information about its commercially sensitive and confidential security measures, as it could undermine the confidentiality and effectiveness of WhatsApp's security processes, and/or expose it (WhatsApp) to potential exploitation by malicious parties.
- 6.5 WhatsApp is essentially stating that it should be taken on its word that it has adequate safeguards in place without demonstrating this to the Regulator. This position is incorrect and misguided and as such WhatsApp has failed to demonstrate to the Regulator that it is maintaining appropriate safeguards against identified risks as per section 19(2)(a) and (b) of POPIA.
- 6.6 Consequently, WhatsApp has failed to comply with section 19 of POPIA.

C. THE RESPONSIBLE PARTY IS HEREBY ORDERED TO:

Take the following specified steps:

1. Condition 1 - Accountability

Section 8

WhatsApp must comply with all the conditions for the lawful processing of personal information and all measures which give effect to such compliance. It must also demonstrate its compliance with the conditions for the lawful processing of personal information in terms of POPIA.

Where personal information is processed to comply with a legal obligation or another lawful basis, WhatsApp must demonstrate that it clearly links that lawful basis to a specific processing activity and category of personal information processed.

In this regard WhatsApp is ordered to demonstrate that its Revised Privacy Policy complies with all the conditions for the lawful processing of personal information in POPIA and submit such Policy to the Regulator.

2. Condition 2 - Processing Limitation

Section 9 and 11

WhatsApp is ordered to ensure that its Revised Privacy Policy referred to above entrenches the conditions of lawfulness and consent stipulated in POPIA.

3. Condition 3 - Purpose Specification

Section 13

WhatsApp is ordered to ensure that its Revised Privacy Policy referred to above reflects the information that is collected, processed and the purpose for processing such information, in line with section 13 of POPIA and submit its Revised Privacy Policy to the Regulator.

The Revised Privacy Policy referred to above must include the purpose for processing device operation information, usage and log information, and device connection information.

4. Condition 4 - Further Processing Limitation

Section 15

WhatsApp is ordered ensure that its Revised Privacy Policy details that the personal information of its Users is only processed for the purpose for which it was originally collected (WhatsApp services). Furthermore, the Revised Privacy Policy must also ensure that the sharing of personal information of its Users with other companies including Meta companies and third parties complies with POPIA.

5. Condition 6 - Openness

Section 17

WhatsApp is ordered to maintain the documentation of the processing activities under its responsibility as referred to in section 51 of PAIA.

6. Condition 7 - Security Safeguards

Section 19

WhatsApp is ordered to ensure that its Enterprise Information Security Policy or issue Specific Information Security Policies that secure the integrity and confidentiality of personal information and has appropriate, reasonable, technical and organisational measures to prevent a loss of, damage or unauthorised destruction of personal information and unlawful access to or processing of personal information.

Furthermore, WhatsApp must develop and maintain a Register which identifies and mitigates against identified risks as per section 19(2)(a) and (b) of POPIA and submit to the Regulator a copy of such Register.

7. Additional Orders:

- 7.1 WhatsApp is ordered to undertake a detailed Personal Information Impact Assessment (PIIA) and submit such an assessment to the Regulator.
- 7.2 WhatsApp is ordered to ensure that it communicates with data subjects in a manner that is easy to understand and promotes transparency.
- 7.3 WhatsApp is ordered to implement the following enhancements -
 - i. The Data Subject Rights FAQ;
 - ii. The Service Providers FAQ;
 - iii. The Legal Bases FAQ;
 - iv. The Retention FAQ; and
 - v. The How to Delete Your Account FAQ.

D. TIME PERIODS

WhatsApp must provide a report to the Regulator on the implementation of all the directives listed in part **C** of this notice within sixty (60) days of receipt of this notice.

E. 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.

F. 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 10 SEPTEMBER 2024.



.....

**ADV. PANSY TLAKULA
CHAIRPERSON OF THE INFORMATION REGULATOR (SOUTH AFRICA)**