DLA CLIFFE DEKKER HOFMEYR

DATA PROTECTION AND PRIVACY ALERT

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CONFIDENTIALITY OF MEDICAL RECORDS

Information about a person's health and health care is generally considered to be highly sensitive and personal, therefore deserving of the strongest protection under the law.

South African healthcare legislation and codes of conduct do account for this protection. Even though the right to privacy is not absolute and may be disclosed under certain restrictive circumstances, personal health information contained in medical records is worthy of protection in terms of South African healthcare legislation and the Constitution.

The Health Professions Act, No 56 of 1974 (HPA), imposes guidelines and prescribes standards of competence on healthcare providers, including via the mandatory guidelines imposed by the Health Professions Council of South Africa (HPCSA) (a body established pursuant to the HPA) in terms of which medical practitioners may only disclose patient information with the express consent of a patient or when required:

- in terms of statutory provisions;
- at the instruction of a court or law; or
- where justified in the public interest.

The HPCSA also imposes guidelines relating to storage, confidentiality and protection of patient information. In addition, the National Health Act, No 61 of 2003 (Health Act) specifically protects the privacy and confidentiality of patient records (which includes information pertaining to a patient's health status, treatment or stay in a health establishment) and provides, in particular, that such information may only be disclosed if the patient consents to disclosure in writing, or a court order or law justifies such disclosure, or where non-disclosure of such information represents a serious threat to public health. Certain limited exemptions do exist. The Health Act also prescribes rules and principles governing access to patient information and methods for protection of patient information. Failure to comply with certain provisions of the Health Act may result in the imposition of the criminal sanctions it prescribes. Various other legislation may apply to healthcare records, including, without limitation, the Occupational Health and Safety Act, No 85 of 1993, the Children's Act, No 38 of 2005, the Promotion of Access to Information Act, No 54 of 2002 and the Choice on Termination of Pregnancy Act, No 92 of 1996.

Although no comprehensive data privacy legislation is currently in force in South Africa, the Protection of Personal Information Bill (Bill) has been tabled and is currently in its seventh working draft. The Bill, when promulgated, will have a significant impact on data privacy, including in respect of personal healthcare information. The current Bill defines 'personal information' widely and specifically includes information relating to the 'medical history of a person'. In addition, 'special personal information' as contemplated under Part B of the current draft of the Bill includes information concerning a person's 'health'. The Bill prohibits the processing of special personal information. A limited number of exemptions do exist, including, without limitation, where the data subject has consented to the processing of health related information and, specifically with regard to special personal information concerning a person's health, the processing of personal information

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by certain prescribed data processors, including (without limitation) medical professionals, healthcare institutions or social services (if such information is required for the proper treatment and care of a person), insurance companies, medical aid schemes, medical aid scheme administrators and managed healthcare organisations, who may process health care information if it is necessary for assessing risk to be insured or covered by a medical aid scheme; the performance of an insurance or medical aid agreement or enforcement of any contractual rights and obligations. Such data processors/ responsible parties will however need to follow and comply with the processing conditions imposed by the Bill, including concerning patient consent, security of information and data subjects' rights to have access to and request correction of personal information.

In addition, health care information may only be processed where the processing is subject to an obligation of confidentiality by virtue of office, employment, profession, legal provision or as may be established by a written agreement between the responsible party and the person to whom the health care information relates. Notice of any breach of the security resulting in unauthorised disclosure of health information will, in terms of the Bill, have to be reported to the data subject in accordance with the provisions of the Bill. Although the Bill is not yet promulgated, its core principles are unlikely to change significantly. Although the Bill does provide for a one year compliance period, participants in the healthcare industry will, if they have not already done so, need to revisit and consider their processes and procedures to ensure that they are able to comply with the Bill.

It is essential for organisations to implement awareness campaigns to ensure that staff and managers have a good understanding of their obligations under the Bill and applicable laws. It is to be noted that non-compliance with the provisions of the Bill may result in a civil damages claim or criminal prosecution resulting in a fine or imprisonment.

Simone Gill and Mariska van Zweel

SOCIAL NETWORK – IF YOU DARE!

The recent LinkedIn security breach that caused users passwords to be leaked once again illustrates the necessity of ensuring that adequate, appropriate security safeguards and measures are implemented to prevent unauthorised disclosure of personal information.

According to various media reports, security experts allege that, despite LinkedIn's user statement that personal information will be secured in accordance with industry standards and technology, LinkedIn failed to follow an industry standard for encryption of user passwords.

The issues surrounding security of personal information are particularly relevant when considering the provisions of the Protection of Personal Information Bill (Bill), which is intended to regulate data protection and privacy in South Africa. The Bill, when promulgated, will impose a number of stringent obligations on all persons who process personal information in any manner (defined under the Bill to include the collection, receipt, recordal, organisation, collation, storage, updating, alteration or modification, retrieval, consultation, use, dissemination, distribution, merging, link, erasure or destruction of personal information), including that such persons take appropriate measures to ensure that the integrity and confidentiality of personal information is maintained, including by taking, "appropriate, reasonable, technical and organisational measures", to prevent loss or unauthorised destruction of, damage to and unlawful processing of personal information, including by identifying all reasonably foreseeable risks relating thereto. The measures taken are to be verified regularly to ensure that the safeguards are effectively implemented and continually updated in response to new risks or any identified deficiencies in previously implemented safeguards.

It is essential that all persons who process personal information in any manner embark on awareness workshops and detailed due diligence exercises to assess their level of compliance with the Bill and determine which steps are to be taken to ensure compliance, failing which they may find themselves falling foul of the obligations imposed by the Bill, which may result in criminal sanction and/or civil liability once it is promulgated.

Simone Gill and Mariska van Zweel

DLA CLIFFE DEKKER HOFMEYR

CONTACT US

For more information about our Data Protection and Privacy and services, please contact:

Nick Altini
Director
National Practice Head
Competition
T +27 (0)11 562 1079
E nick.altini@dlacdh.com

Preeta Bhagattjee
Director
National Practice Head
Technology, Media and
Telecommunications
T +27 (0)11 562 1038
E ben.strauss@dlacdh.co

Simone Gill
Director
Technology, Media and
Telecommunications
T +27 (0)11 562 1249
E simone.gill@dlacdh.com

Gillian Lumb
Director
Regional Practice Head
Employment
T +27 (0)21 481 6315
E gillian.lumb@dlacdh.com

Aadil Patel
Director
National Practice Head
Employment
T +27 (0)11 562 1107
E aadil.patel@dlacdh.com

Brigit Rubinstein
Director
Dispute Resolution
T +27 (0)21 481 6308
E brigit.rubinstein@dlacdh.com

Faan Coetzee
Consultant
Employment
T +27 (0)11 562 1600
E faan.coetzee@dlacdh.com

BBBEE STATUS: LEVEL THREE CONTRIBUTOR

JOHANNESBURG

1 Protea Place Sandton Johannesburg 2196, Private Bag X40 Benmore 2010 South Africa
Dx 154 Randburg and Dx 42 Johannesburg

T +27 (0)11 562 1000 **F** +27 (0)11 562 1111 **E** jhb@dlacdh.com

CAPE TOWN

11 Buitengracht Street Cape Town 8001, PO Box 695 Cape Town 8000 South Africa
Dx 5 Cape Town

T +27 (0)21 481 6300 **F** +27 (0)21 481 6388 **E** ctn@dlacdh.com

www.cliffedekkerhofmeyr.com