
DATA PROTECTION AND PRIVACY

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POPI COMPLIANCE: BACKGROUND CHECKS AND EMPLOYMENT REFERENCES

The introduction of the Protection of Personal Information Act, No 4 of 2013 (POPI) (not yet in force) will affect the position of a prospective employer in verifying the credentials of candidates. References would include those from past employers and, where appropriate, a background investigation into the criminal and credit history of the applicant.

Prospective employers

It is imperative that prospective employers who ask for references in respect of and do background checks on applicants for employment comply with, amongst others, the following provisions of POPI regulating personal information:

- S9 which provides that the processing must be lawful and be conducted in a reasonable manner which does not infringe the privacy of the candidate;
- S10 which provides that the purpose for which the information is processed is adequate, relevant and not excessive;
- S11 which provides that the candidate must consent to the processing;
- S12 (1) which provides that the collection of personal information must be directly from the candidate subject to the provisions of s12(2);
- S16 that requires the information (also from a background check or reference) to be complete, accurate and not misleading;
- S26 and 27 in respect of the limitation and exceptions regarding special personal information such as information concerning race, trade union membership, health, sex life or biometric information and criminal records, and
- S14 which provides that records of personal information (also that obtained in respect of applicants and their references) should not be retained any longer than is necessary for achieving the purpose for which the information was collected or subsequently processed.

Previous employers

The UK Information Commissioner's Office¹ sheds some light in its suggestions on how employers can process information lawfully and fairly when a previous employer is asked to provide a reference for a former employee:

- The employer should have a clear company policy stating who can give corporate references, in what circumstances and the policy that applies to the granting of access to references;
- The employer should make anyone who is likely to become a referee aware of this policy;
- The policy should specify a requirement that all those giving corporate references must be satisfied that the employee in fact wishes the reference to be provided;
- The employer should not provide confidential references about an employee unless the employer is sure that this is the employee's wish;

- As part of an exit policy or procedure the former employer should include on file a record of whether the employee wishes references to be provided after exit; and
- Previous employers of an employee should ensure that they do not retain any information of an employee unless it is essential to do so or required by law.

Conclusion (subject to compliance with the conditions for processing)

Although POPI allows for credential verification and references to be obtained by or given to employers, they should carefully consider what information to verify and the source, relevance and quality thereof. Obtaining the consent of the applicant for employment or the departing employee is very important. Using the contract of employment for purposes of consent will be a justification for the processing of information of former employees.

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¹The Information Commissioner's Office 'Employment Practice Code'. Available at www.ico.gov.uk [Accessed 12/03/2014]

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