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TECHNOLOGY & SOURCING ALERT

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"EXAMINING" THE MEANING OF PERSONAL INFORMATION

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A ROYAL REMINDER FOR DIRECT MARKETERS

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"EXAMINING" THE MEANING OF PERSONAL INFORMATION

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Decisions of the Court of Justice for the European Union on matters relating to the EU Privacy Directive and the GDPR may serve as valuable indicators of the way in which POPIA is to be applied.

With data privacy in its infancy in South Africa, lawmakers need to look to foreign jurisdictions for guidance. This was the case in drafting POPIA and will continue to apply in respect of privacy enforcement. The provisions of Directive 95/46/EC (EU Privacy Directive) - which will soon be replaced by the General Data Protection Regulation 2016/679 (GDPR) - played a significant role in the development of POPIA. Although judgments by foreign courts will have no direct effect on the application of POPIA, it is accepted that our courts and the Information Regulator (established pursuant to POPIA) will look to foreign judgments for guidance. Decisions of the Court of Justice for the European Union (CJEU) on matters relating to the EU Privacy Directive and the GDPR may serve as valuable indicators of the way in which POPIA is to be applied.

In this context, the case of *Peter Nowak v Data Protection Commissioner* (Case C-434/16) is of interest. In summary, Peter Nowak, a trainee accountant, had failed an open book examination set by the Institute of Chartered Accountants of Ireland (CAI) on four separate occasions. After the fourth attempt in 2009 and a failed attempt at challenging the veracity of his result, Mr Nowak submitted a request to the CAI in terms of Irish data protection legislation to provide all 'personal data' relating to him and held by the CAI. The CAI responded by delivering 17 items but specifically excluded copies of the examination scripts which it advised did not constitute Mr Nowak's personal data. Mr Nowak challenged this response and eventually submitted a formal complaint to the Data Protection Commissioner (DPC) - being the data protection supervision body in Ireland. The DPC found that the examination script did not constitute personal data to which data protection legislation applies and accordingly that there had been no substantial contravention of the data protection legislation. One of the arguments put forward by the DPC was that if the examination scripts were, in fact, Mr Nowak's personal data, this would allow a candidate to request rectification of incorrect answers in terms of Article 12 of the EU Privacy Directive. Consequently, the DPC considered the complaint frivolous or vexatious and did not investigate or pursue the complaint further on this basis. Mr Nowak brought an action against the DPC's decision in the Irish courts.

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The CJEU dismissed the DPC's contention that the examination scripts did not constitute Mr Nowak's personal data.

The Irish SC requested the CJEU to make a preliminary ruling on whether the written answers to a professional examination, and the marker's comments in relation to those answers, constitute personal data under the EU Privacy Directive in such a manner so as to allow that candidate to request access to his own script in terms of Irish data protection legislation. In her opinion, the Advocate General of the CJEU, noted that, although the EU Privacy Directive will be replaced by the GDPR with effect from 25 May 2018, the GDPR will not affect the concept of personal data and therefore the preliminary ruling would also be important for the future application of EU data protection law.

Article 2(a) of the EU Privacy Directive defines personal data as "any information relating to an identified or identifiable natural person; an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity." Article 12 of the EU Privacy Directive requires member states to guarantee a data subject the right to access his/her personal data processed by a data controller and request rectification, erasure or blocking of data which is not processed in compliance with the EU Privacy Directive. This is transposed into Irish data protection legislation.

The CJEU, drawing credence to the aim of the EU legislature to assign a broad interpretation to the concept of 'personal data', dismissed the DPC's contention that the examination scripts did not constitute Mr Nowak's personal data on the following grounds:

- Mr Nowak's recorded answers are a reflection of his knowledge and ability and may be an indication of his intellect, thought processes, and judgement;
- information as to Mr. Nowak's handwriting, through which he could be identified, is contained in the script;
- the purpose of collecting the answers is to evaluate the candidate's suitability and ability in respect of the profession; and
- the use of that information to determine the success or failure will have an effect on the candidate's rights and interests (such as securing a future job).

In addition, the CJEU found that the examiner's comments reflect the examiner's opinion of the candidate's performance in the examination and thus, also constitute Mr Nowak's personal data. It held that, if, for example, written answers were not construed as personal data, this would mean that the professional body administering the examinations would

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In terms of POPIA, personal information is defined to include information relating to an identifiable, living, natural person and where applicable, an existing juristic person.

be under no obligation to ensure the protection against unlawful disclosure of such information. The CJEU also stated that while the rights of access and rectification encapsulated in Article 12 of the EU Privacy Directive may be asserted in respect of the written answers and comments thereto, this right of rectification cannot allow a candidate to correct answers which were incorrect. Such a right may, however, apply in instances where a mix-up in the examination scripts resulted in a different candidate's answers being ascribed to the concerned candidate or the script is missing a page so that the answers are incomplete. The data subject access request would thus be permissible, notwithstanding the existence of other legislation governing access to examination scripts.

A similar interpretation to that taken by the CJEU is likely to apply in South Africa. In terms of POPIA, personal information is defined to include information relating to an identifiable, living, natural person and where applicable, an existing juristic person. Examples of personal information are included in the definition, such as the personal opinions, views, or preferences of a person, education history and the views or opinions of another individual about the person. Accordingly, a candidate's answers to an examination and an examiner's evaluation of those answers would constitute the candidate's personal information in terms of the definition under POPIA.

Sections 23 and 24 of POPIA provide for rights of data subjects to request access to personal information held about them and furthermore, request rectification of inaccurate or misleading information or deletion of information which is obsolete, obtained unlawfully or is not relevant to the specified purpose. Although the right of access to information is already provided for in the Promotion of Access to Information Act, No 2 of 2000 (PAIA), once POPIA is fully effective, requests of requestors for access to their personal information will be made in terms of POPIA, and PAIA will regulate the right to access all other information. A responsible party may refuse to comply with a request for access to personal information on one of the grounds for refusal set out in PAIA (which differ for private and public bodies) including, in respect of private bodies:

- the protection of privacy of a third party natural person;
- the protection of commercial information of a third party;

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Organisations are encouraged to take steps towards POPIA compliance if they have not already done so.

- the protection of certain confidential information of a third party;
- the protection of safety of individuals, and protection of property;
- the protection of records privileged from production in legal proceedings;
- if it would reveal the commercial information of a private body; and
- the protection of research information of a third party, and protection of research information of the private body.

Once POPIA is fully effective, a data subject can refer a complaint to the Information Regulator alleging an interference with the data subject's personal information, which would include a breach of any of the conditions for lawful processing. The Information Regulator is empowered to take certain actions which may ultimately result in a fine, imprisonment and/or civil liability for the breaching party. Organisations are therefore encouraged to take steps towards POPIA compliance if they have not already done so. Furthermore, the extra-territorial application of the GDPR means that South African organisations that process personal data of data subjects residing in the EU (including where a South African organisation monitors the behaviour of EU data subjects or offers goods or services to EU data subjects) will also need to be compliant with the GDPR when it comes into effect on 25 May 2018.

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A ROYAL REMINDER FOR DIRECT MARKETERS

The Chairperson of the Information Regulator made a statement to the effect that direct marketers often ignore POPIA completely when communicating with members of the South African public.

The Protection of Personal Information Act, No 4 of 2013 (POPIA), once in full force and effect, will fundamentally change the way direct marketers communicate with the South African public – which notably includes the King of the Zulu nation.

While allegedly attending to meetings with ex-President Jacob Zuma, King Goodwill Zwelithini was inundated with direct marketing calls from a MiWay Insurance Company Limited (MiWay) sales representative. After the leaked audio recording of the resulting conversation between King Zwelithini and the MiWay sales representative caused a media frenzy, a media statement was released by the Information Regulator of South Africa (established under the now effective s39 of POPIA).

In its media statement, the Information Regulator utilised the media attention surrounding the audio recording to express its concerns about the fact that the personal information of King Zwelithini would effectively have been processed unlawfully by MiWay if the salient provisions of POPIA had already come into effect. Despite such salient provisions not yet being operative, the Information Regulator stated that it intends to "proactively engage" MiWay in order to assist them in bringing their processing activities in line with the provisions of POPIA. Furthermore, the Chairperson of the Information Regulator – Advocate Pansy Tlakula – made a statement to the effect that direct marketers often ignore POPIA completely when communicating with (and thereby processing the personal information of) members of the South African public.

Direct marketers need to reassess the manner in which they process personal information and ensure that they become compliant with POPIA before the Act comes into effect.

The evident consequence is that direct marketers need to reassess the manner in which they process personal information and ensure that they become compliant with POPIA before the Act comes into effect (noting that POPIA does allow for a one-year compliance grace period (which can be extended by up to three years by the Minister)).

Under POPIA, direct marketers (who will be "responsible parties" under POPIA) will be prohibited from processing personal information in the following circumstances:

- where the data subject in question has not provided the direct marketer with their consent to such processing;
- where the processing is not necessary to carry out actions for the conclusion or performance of a contract to which the relevant data subject is a party;
- where there is no obligation imposed by law on the direct marketer to process the relevant data subject's information;
- where processing is not in the legitimate interest of the relevant data subject; or
- where the processing is not necessary for the pursuit of the legitimate interests of the direct marketer or a third party to whom the information is supplied.

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In terms of s11(3)(b) of POPIA, if the personal information of a member of the South African public is processed for the purposes of direct marketing, the relevant data subject concerned will have the right to object.

Despite the above, in terms of s11(3)(b) of POPIA, if the personal information of a member of the South African public is processed for the purposes of direct marketing, the relevant data subject concerned will have the right to object to such processing. In such circumstances, the direct marketer will have to refrain from processing the relevant data subject's information from the moment that such objection is communicated to the direct marketer. Furthermore, where direct marketing is carried out by means of unsolicited electronic communications, including by way of automated calling machines, SMSs, facsimile machines or e-mails, the direct marketer will have to comply with the even more stringent rules set out in s69 of POPIA, in terms of which direct marketing by means of unsolicited electronic communications is prohibited unless:

- the relevant person is not a customer of the direct marketer and has consented to the processing of his/her personal information; or
- the relevant person is a customer of the direct marketer.

Further conditions also apply. Where the relevant person is not the customer of the direct marketer, the Act follows what is referred to as an "opt in" approach, in terms of which the direct marketer has to obtain the consent of the relevant person before sending a direct marking communication to such person. In this situation, the direct marketer may only approach the relevant person on one occasion in order to obtain the necessary consent (so as to prevent the relevant person being harassed for consent). Furthermore, the consent should not be obtained by way of duress or be of a general nature – it will specifically have to relate to the purpose for which it is obtained. In this regard, the draft Regulations relating to the Protection of Personal Information, 2017 contain a model form which may be used by a responsible party wishing to obtain the consent of a data subject for the processing of their personal information for purposes of direct marketing by means of any form of electronic communications. The form (which is still in draft format) requires, among other things, that:

- specific reference be made to s69 of POPIA;
- the data subject be made aware of what the terms "processing" and "personal information" mean in terms of POPIA, before being requested to give his/her consent;
- such consent must be in relation to specified:
  - goods and/or services; and
  - means of electronic communication (ie fax, email, SMS or other).

On the other hand, where the relevant person is a customer of the direct marketer, the Act follows what is referred to as an "opt out" approach, in terms of which the direct marketer must give the relevant customer the opportunity to object to the processing of his/her personal information. In this situation, the direct marketer may only send a direct marketing communication to the customer if:

- the direct marketer obtained the customer's contact details in the context of the sale of a product or service;

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Where a direct marketer does infringe POPIA, the affected data subject can lodge a complaint with the Information Regulator or institute a civil claim for damages.

- such contact details were obtained for the purpose of direct marketing in relation to the direct marketer's own products or services that are of a similar nature; and
- the customer is provided with a reasonable opportunity to object to the processing of his personal information. In this regard, the opportunity to object should be provided to the customer at the time when the personal information is collected and, if the customer has not objected to this at the time of collection, the direct marketer must provide such opportunity on every occasion when a direct marketing communication is sent to the customer.

The direct marketer will also have to comply with a general condition (regardless of whether the relevant party is the direct marketer's customer or not) before it sends a data subject a direct marketing communication: in terms of s69(4) of the Act, any direct marking communication must contain:

- details of the direct marketer; and
- an address or other contact details to which the relevant data subject (recipient) may send an objection to the processing of his personal information.

Under certain circumstances where a direct marketer does infringe POPIA, the affected data subject can lodge a complaint with the Information Regulator or institute a civil claim for damages, which may ultimately lead to the imposition of a hefty fine, imprisonment and/or civil liability for violating the Act.

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