

# **PROCESSING OF PERSONAL INFORMATION DURING COVID19**

## **INTRODUCTION**

The Guidance Note from the Information Regulator - South Africa (herein after referred to as “the regulator”) on processing of Personal Information, in an attempt to curb and contain the spread of (Covid19), is brought in terms of POPIA<sup>1</sup>. The World Health Organization has declared the (Covid19) a Pandemic; countries around the world have declared a lockdown to try curb the spread of the virus. To try and stop the spread of the covid-19 the South African Government has issued Regulations in terms of section 27(2) of the Disaster Management Act<sup>2</sup> regulations. Section 10(8) of the Disaster Management Act also gives a relevant Minister the authority to issue and vary directions when and where necessary.

## **CONDITIONS FOR LAWFUL PROCESSING TO BE OBSERVED BY STATE DURING COVID-19 PANDEMIC**

The Regulator has issued this guideline to help guide Public and Private bodies on the limitation of the right to privacy when processing personal information of data subjects. The fact that Corona virus (Covid19) has now been declared a pandemic by WHO<sup>3</sup> constitutes extreme urgency for the relevant authority to take necessary measures in order to curb the spread of Covid19. This may include processing of personal information of other individuals without their consent. Such processing of information is necessary in order to trace those infected by the virus and will help reduce the spread of Covid19. The Constitution of South Africa guarantees privacy to each and every individual. Chapter 3 of (POPIA) deals with instances of limitation of the above-mentioned rights, where and when necessary.

## **RESPONSIBLE PARTIES MUST COMPLY WITH THE FOLLOWING REQUIREMENTS WHEN ACCESSING PERSONAL INFORMATION**

- **Accountability and Lawfulness of Processing**

A responsible party must be accountable when processing personal information of data subjects, and must do so in the most responsible manner possible during the lockdown in order to help fight the covid-19. The processing of information by the responsible party should be in line with the law and must be processed in the most lawful and responsible manner in order to be able to detect and contain the spread of the Covid-19.

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<sup>1</sup> Processing of Personal Information Act 4 of 2003

<sup>2</sup> Act 57 of 2002

<sup>3</sup> World Health Organisations

- **Collection for a specific purpose**

During the Covid-19 the collection of personal information of data subjects is limited to a specific purpose that purpose being the detection and the containment of the Covid-19. Responsible parties must process personal information of data subjects in the most reasonable and lawful manner that should be in line with its purpose which is the Covid-19.

- **Retention and restriction of records**

The responsible party must not retain records of Personal Information of data subjects for longer than they were authorised to do so. The responsible party must destroy all records of Personal Information as soon as they are no longer authorised to retain the record. The destruction of Personal Information must be done in such a manner that it cannot be reconstructed.

- **Quality of Information**

Responsible parties should always ensure that the processing of personal information of data subjects is done with precisions and care in order to avoid false information or invalid results. The quality of information plays a vital in detecting and containing the spread of the covid-19.

- **Documentation**

The responsible party must make sure all documents relating to detecting, containing and preventing of the spread of (Covid19) are up to order and not misleading.

- **Security measures on integrity and confidentiality of personal information**

The information regulator requires the responsible party to take all security measures to ensure there is no damage or loss to or unauthorised access of Personal Information that belongs to a data subject. Where there is a data breach in the system of the operator, the responsible party should report the data breach to the data subject and the Information Regulator as soon as possible. The responsible party should also ensure that it constantly verifies the safety protocols that it has implemented while also updating this safety protocol every now and then to make sure they are ready for any new threats.

- **Access to Personal Information**

A data subject has the right to confirm with a responsible party, whether or not a responsible has their personal information. The data subject is also obligated to present proof of identity when requesting its personal information from a data subject, the data subject will not be charged for this process.

### **Exceptions during lockdown period**

There is prohibition on the processing of special information, this information being race, sex life, religious belief and health. However according to section 26 of POPIA. The prohibition on processing personal information does not apply if the process is needed for defence of a right or obligation of law,

This processing has to happen with the consent of the data subject, however due to the Covid-19 there is an exception for Social Services, Healthcare institutions and Medical professionals to process special information where such is necessary for the proper treatment and wellbeing of a data subject.

### **Employment**

#### **Can the employer request specific information on the health status of an employee in the context of COVID-19?**

Yes, and this applies to many other countries around the world, one example would be Germany.

#### **Can the employer force an employee to undergo testing for the COVID-19 virus?**

Yes, Employers can force their workers to be tested for the Covid-19 in order to maintain a safe working environment for other employees, and help slow down the spread of the covid-19. An employee who refuses to be tested should be barred from the workplace and reported to the relevant authorities.

### **Consent**

Our law clearly states that no person who is suspected of being infected or is known to have been in contact with someone who is infected may refuse to give consent to a medical professional to test them, if found to carry the virus they may not refuse to be admitted to a hospital or even to taken to a quarantine site, with this being said testing for the Covid-19 is mandatory for everyone.

## **General**

**Does a person who has tested positive for COVID-19 have a duty to disclose his or her status?**

Yes, so that he/she protects other people from being infected, and that will help contain the spread of the Covid-19.

## **GERMAN DPA GUIDANCE ON EMPLOYEE DATA PROTECTION AND COVID-19**

### **Data Protection Authority recommendations on Data processing:**

Recommendations were made by the body of the Federal & State DPA<sup>4</sup> in Germany as well as the Conference of German Data Protection Authorities (DSK) that employers can collect personal data of employees in order to prevent the spreading of the virus at the workforce.

These recommendations suggest the lawfulness of processing personal information of data subjects. Personal information can be processed in order to track those who might have been exposed to Covid19.

Processing of personal information is lawful if it is strictly necessary to process such data. According to DSK's detailed guidance which was published on the website of the German Federal Data Protection Commissioner's office, employers can collect & process personal data of employees & visitors including health information, to determine whether they are infected or have been in contact with an infected person or they were in a high-risk area during the relevant period.

### **Legal basis of data processing:**

Where health information is processed, the relevant legal basis is the General Data Protection Regulation's employment & social protection legal basis (GDPR's). The consent of data subjects can only be considered as a legal basis for Covid-19 measures if the data subjects are informed about the data processing & can provide consent about the measures voluntarily.

The general duty to take care of the employer towards their employee apply in that the employer must ensure the protection of the health of all employees. As stated above, the data must be deleted when the original purpose for processing no longer applies.

### **Employee-Privacy as published by Federal Data Protection Commissioner:**

Employers can collect the private mobile numbers & email addresses of employees, as their use may be necessary to ensure the ongoing accessibility of those persons during the Covid-19 Pandemic, while also helping in tracking down of those who tested positive for the virus and want to flee.

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<sup>4</sup> Data Protection Authorities

## **THE IMPACT OF THE COVID-19 PANDEMIC ON THE CONVENTION 108 +**

As most countries have declared state of emergency, governments have resorted to a number of measures to help curb the spread of Covid-19, which include lawful processing of personal data. Convention 108 as well as the modernized "Convention 108+ set forth high standards for the protection of personal data. In accordance with Convention 108+, it is crucial that even in particular difficult situations, Data Protection principles are respected and therefore data subjects are made aware of their processing of personal data.

Personal data can be processed only if it is necessary to do so. One of the main data protection principles provided for by Convention 108+ is the principle of lawfulness, according to which processing of data can be carried out of either on the basis of the data subject's consent or some other legitimate basis laid by law. Disaster management can be classified as a legitimate legal basis of which personal information can be processed, in terms of Disaster Management Act<sup>5</sup>. Accordingly, data processing in an attempt to fight the spread of Covid-19 is legally justified.

## **CONCLUSION**

In South Africa POPIA has taken progressive steps similar to the German Data Protection Act (DPA) to advise private and public bodies to issue guidelines on processing personal information during Covid-19 pandemic. Limitation of the right to privacy is justified in that such right is limited in order to manage and contain the spread of Covid19. It is therefore necessary to process personal information of an individual without the consent as this will assist in the fight against Covid19. As much as this fundamental right is guaranteed by the Constitution it then follows that the Regulator is acted within the ambit of Law.

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<sup>5</sup> Act 57 of 2002 Regulations

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