

Submission on behalf of South African History Archive

on

***Draft* PROTECTION OF PERSONAL INFORMATION ACT, 2013 (ACT
NO. 4 OF 2013): REGULATIONS RELATING TO THE PROTECTION OF
PERSONAL INFORMATION, 2017**

to

The Information Regulator

7 November 2017

Purpose of document

Background

1. The South African History Archive (SAHA) is an independent human rights archive dedicated to documenting, supporting and promoting greater awareness of past and contemporary struggles for justice through archival practices and outreach, and the utilisation of access to information laws.
2. Through one of its two core programmes, the Freedom of Information Programme (FOIP), SAHA has, since 2001, been seeking to use PAIA to extend the boundaries of freedom of information and to build up an archive of materials released under the Act for public use. As well as servicing a traditional academic and research community (both domestically and internationally), our organisation positions notions of accessible archive and records as central components of the human rights and governance culture, discourse and practice. In this regard, SAHA promotes awareness about, and tests the parameters of, South Africa's access to information legislation, and ensures its archive is made available to communities and constituencies that ordinarily would not access these materials.
3. The work of SAHA, both as an access to information organisation and as an archive, necessarily gives rise to work with and in relation to personal information and the protection of personal information.
4. The Information Regulator has issued an invitation calling for comments on the draft Protection of Personal Information Act, 2013 (act no. 4 of 2013): Regulations Relating to the Protection of Personal Information, 2017. SAHA submits the following proposals to the Information Regulator for consideration:

Substantive comments

5. Regulation 4 makes no provision for any exempt categories of private bodies, in the way that current Regulations under the Promotion of Access to Information Act, 2000 (PAIA) does. SAHA proposes that the Regulator consider whether there is any need to exclude any categories of private bodies, such as smaller businesses and non-profit entities, from the requirement to have a manual.
6. Regulation 4(g) simply requires that awareness sessions take place, there is no indication as to regularity (either with respect to frequency or the number of sessions). SAHA proposes that the Regulator consider providing some indication as to how frequently such awareness sessions should be held.
7. Regulation 4(2) provides that copies of the manual must be made accessible at not more than R3.50 per page. We note that this figure is substantially higher than the cost per page of accessing copies of records under PAIA, and propose that the Regulator consider whether the proposed cost should not be aligned more closely to costs under PAIA. We further propose that a clause be added to forbid charging for copies of a manual in circumstances where the provisions in regulation 4(1)(e) are not complied with.
8. Regulation 8(4)(b) makes provision for notification, within a reasonable time period of a conciliation meeting, of that meeting. SAHA proposes that the Regulator amend to prescribe a reasonable period, such as, for instance, 10 business days.
9. Regulations 10(2)(e), (f) and (g) make provision for the Regulator to issue various notices with respect to court appeals to the Information Regulator's enforcement notices. The parties

to which the Regulator would have to give notice in terms of these provisions would be affected by the litigation and as such would have to be notified of the litigation in terms of court processes. As such the Regulator should consider whether further notice would not be superfluous.

10. Regulation 6 and Form 4:

10.1. Should be amended slightly to make clear the requirement in section 69 of the Protection of Personal Information Act, 2013 (POPIA) that responsible parties may request a data subject's information *only once*; and

10.2. Should be amended slightly to clearly exclude "tacit consent" – that is to say, a failure to respond to a request for consent should under no circumstances be viewed as consent.

11. Regulation 9(2) makes no provision for a reasonable timeframe for the provision of written responses. SAHA proposes that this section be amended to prescribe a reasonable timeframe, such as, for example, 21 calendar days from date of provision of notice.

12. Form 1 and Form 2 require of a data subject to fill in within section B detail about the Responsible Party to which they will submit the form. We submit that it is unnecessary for the data subject to provide the responsible party with their own contact details, and that sourcing such details places an unnecessary burden on the data subject.

13. Form 9 makes no provision for reasons for the decision that there has been no interference with a data subject's personal information. The Regulator may want to consider amending so that data subjects will understand the reasons for these decisions.

Notes on typographical errors

14. Regulation 8(4):

14.1. In the first line the word "sub-regulation" is missing a "-"; and

14.2. In the second line in the phrase "Regulator must, as soon as it practically possible" the word "it" should be deleted.

15. Unlike the other provisions in the draft regulations, regulation 11(2) makes no reference to the section POPIA it aims to give further effect to. SAHA therefore proposes in the insertion of the words "in terms of section 89 of the Act" after the phrase "A request for an assessment" but prior to the phrase "must be submitted to the Regulator".

16. Form 5 Part II B in the section asking for "Name and surname" erroneously notes "*if it is a public or private body*" – it should note "*if a natural person*".

17. Form 7 has floating commas on the left hand side.

18. Form 11:

18.1. In part "A." at the second tick box in the phrase "duty to notify security" the word "of" should be added after "notify" but before "security".

18.2. In part "B." at the third tick box, in the phrase "To stop the processing" the word "the" should be deleted.

18.3. In the last line should be clear the appeal should be to the High Court.

19. Form 12:

- 19.1. The sentence in the line just above section “C.” is incomplete.
- 19.2. In the last line should be clear the appeal should be to the High Court.
20. Form 16 under section “7.” in the phrase “Have to right to” the first “to” should be replaced with “the”.
21. Form 17 at the last tick box, in the phrase “wishes to confirm that it wishes” the second “wishes” should be replaced with “will”.

Conclusion

22. We thank the Information Regulator for the opportunity to comment on these draft Regulations. Should further written or oral submissions on these issues be required, SAHA would be happy to assist. Please contact Toerien van Wyk on the details below.

Prepared on behalf of SAHA by Toerien van Wyk, Co-Director of SAHA, with input from Imraan Abdullah, Research Officer in the Freedom of Information Programme at SAHA
For more information, please contact:
Toerien van Wyk
E-mail: toerien@saha.org.za
Phone: 011 718 2560