

POPIA Explained – Part 12

By Lize de la Harpe, legal adviser

In the last edition we discussed the requirements for the Retention of Records.

In this edition we will take a closer at the requirements for the Transfer of personal information to a foreign country in the context of POPIA.

Let's recap

It's important to remember that the principles governing the processing of personal information applies to the transfer of personal information to third parties in countries outside South Africa.

In part 6 (*copy attached*) we discussed Condition 6, being Openness. As explained, responsible parties must be transparent about their reasons for obtaining personal information and must ensure that what they do with the information is in line with the reasonable expectations of the data subject.

As such, section 18 (notification to data subject) states that responsible parties must take reasonably practicable steps to ensure the data subject is aware of the fact that (*inter alia*) the fact that the responsible party intends to transfer the information to a foreign country (or international organization) and the level of protection afforded to the information by that foreign country or international organization.

Section 72 – transfer of personal information outside the Republic

Section 72 regulates the transfer of personal information to a foreign country.

Section 72(1)(a) states that a responsible person in the Republic may not transfer personal information about a data subject to a third party who is in a foreign country unless the third party (who is the recipient of the information) is subject to a law, binding corporate rules or a binding agreement which provides an adequate level of protection that effectively upholds the principles for reasonable processing of the information that are substantially similar to the Conditions for the lawful processing of personal information and includes provisions that are substantially similar to section 72 relating to the further transfer of personal information from the recipient to a third party

who is in a foreign country.

What happens when the foreign country does not have an adequate level of protection?

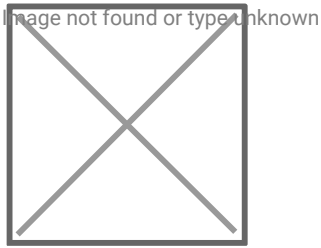
All is not lost. If a foreign country (outside South Africa) does not have an adequate level of protection in respect of the personal information transferred (**i.e.: does not meet the requirements of section 72(1)(a) as discussed above*), the transfer will still be possible if:

- a. the data subject has consented to the transfer (**after being informed of any potential risks*); or
 - the transfer is necessary for the performance of a contract between the data subject and the responsible party, or for the implementation of pre-contractual measures taken in response to the data subject's request; or
 - the transfer is necessary for the conclusion or performance of a contract concluded (in the data subject's interest) between the responsible party and a third party; or
 - the transfer is for the benefit of the data subject, and:
 - i. it is not reasonably practical to obtain the consent of the data subject to that transfer; and
 - ii. if it were reasonably practical to obtain such consent, the data subject would be likely to give it.

Conclusion

It is clear from the above that POPIA sets out very specific conditions as to *when* personal information *may* be transferred to a foreign country. Each business should therefore carefully consider the countries to which it typically transfers personal information, ascertain whether or not these countries in fact have laws (or binding corporate rules or a binding agreement) that provides an adequate level of protection of such personal information, and if NOT, whether any of the other exceptions as set in section 72(1) (as discussed above) will apply.

We have now discussed the transfer of personal information to a foreign country in detail – in the next edition we will take a closer look at the role of the Information Officer.



Lize de la Harpe

Lize de la Harpe obtained an LLB degree in 2005 from the University of Stellenbosch, whereafter she completed her articles and was admitted as an attorney in the Cape High Court. During 2008 she completed a Postgraduate Diploma in Financial Planning (CFP) from the University of the Free State. Lize joined Glacier in June 2012 as the legal adviser and principal officer. Prior to joining Glacier, she worked as legal counsel in the investment cluster at Momentum for four years.

This document is intended for use by clients, alongside their financial intermediaries. The information in this document is provided for information purposes only and should not be construed as the rendering of advice to clients. Although we have taken reasonable steps to ensure the accuracy of the information, neither Sanlam nor any of its subsidiaries accept any liability whatsoever for any direct, indirect or consequential loss arising from the use of, or reliance in any manner on the information provided in this document. For professional advice, please speak to your financial intermediary.

Glacier Financial Solutions (Pty) Ltd.

A member of the Sanlam Group

Private Bag X5 | Tyger Valley 7536 | Email client.services@glacier.co.za | Tel +27 21 917 9002 / 0860 452 364 | Fax +27 21 947 9210 | Web www.glacier.co.za | Reg No 1999/025360/07

Licensed Financial Services Provider | Glacier Financial Solutions (Pty) Ltd. is also a Licensed Discretionary Financial Services Provider FSP 770, trading as Glacier Invest | Sanlam Multi-Manager International (Pty) Ltd. | A member of the Sanlam Group

Private Bag X8 | Tyger Valley 7536 | Tel +27 21 950 2600 | Fax +27 21 950 2126 | Web www.smmi.com |*Reg No 2002/030939/07

Licensed Discretionary Financial Services Provider, acting as Juristic Representative under the Glacier Financial Solutions FSP 770

Glacier International is a division of Sanlam Life Insurance Limited

Sanlam Life Insurance Ltd. | Email life@sanlam.co.za | Tel + 27 21 916 5000 / 0860 726 526 | Fax +27 21 947 9440

Reg No 1998/021121/06 | Licensed Financial Services Provider