

South Africa

## Guidance note on exemptions from the conditions for lawful processing of personal information, 2021

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## Guidance note on exemptions from the conditions for lawful processing of personal information, 2021

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## Guidance note on exemptions from the conditions for lawful processing of personal information, 2021

### 1. Definitions

Below are the definitions relevant to this Guidance Note. For a complete list of definitions, please refer to the Protection of Personal Information [Act 4 of 2013](#) (POPIA)

- 1.1 **“Data subject”** means the person to whom personal information relates;
- 1.2 **“De-Identify”**, in relation to personal information of a data subject, means to delete any information that—
  - (a) identifies the data subject;
  - (b) can be used or manipulated by a reasonably foreseeable method to identify the data subject; or
  - (c) can be linked by a reasonably foreseeable method to other information that identifies the data subject,
- 1.3 **“Processing”** means any operation or activity or any set of operations, whether or not by automatic means, concerning personal information, including—
  - (a) the collection, receipt, recording, organisation, collation, storage, updating or modification, retrieval, alteration, consultation or use;
  - (b) dissemination by means of transmission, distribution or making available in any other form; or
  - (c) merging, linking, as well as restriction, degradation, erasure or destruction of information;
- 1.4 **“Public body”** means—
  - (d) any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or
  - (e) any other functionary or institution when—
    - (i) exercising a power or performing a duty in terms of the [Constitution](#) or a provincial constitution; or
    - (j) exercising a public power or performing a public function in terms of any legislation;*[Please note: numbering as in original.]*
- 1.5 **“Relevant function”** for purposes of section 38(1) of POPIA, means any function—
  - (a) of a public body; or
  - (b) conferred on any person in terms of the law, which is performed with the view to protecting members of the public against—
    - i) financial loss due to dishonesty, malpractice or other seriously improper conduct by, or the unfitness or incompetence of, persons concerned in the provision of banking, insurance, investment or other financial services or in the management of bodies corporate; or
    - ii) dishonesty, malpractice or other seriously improper conduct by, or the unfitness or incompetence of, persons authorised to carry on any profession or other activity.
- 1.6 **“Responsible party”** means a public or private body or any other person which, alone or in conjunction with others, determines the purpose of and means for processing personal information;

## 2. Introduction

- 2.1 POPIA prescribes the eight (8) conditions for the lawful processing of personal information by or for a responsible party. These conditions are not applicable to the processing of personal information to the extent that such processing is exempted in terms of section 37 or 38, from one or more of the conditions concerned in relation to such processing.
- 2.2 Processing of personal information is not in breach of a condition for the processing of such information if the—
  - 2.2.1 Regulator grants an exemption in terms of section 37; or
  - 2.2.2 processing is in accordance with section 38.
- 2.3 In terms of section 37(1) of POPIA the Regulator may by notice in the *Gazette* grant an exemption to a responsible party to process certain personal information, even if that processing is in breach of a condition for the lawful processing of such information, or any measure that gives effect to such condition, if the Regulator is satisfied that the requirements that are stated therein are met.
- 2.4 In terms of section 38(1) of POPIA, personal information processed for the purpose of discharging a relevant function is exempt from sections 11(3) and (4), 12, 15 and 18 of POPIA in any case to the extent to which the application of those provisions to the personal information would be likely to prejudice the proper discharge of that function.

## 3. Purpose

- 3.1 The purpose of this Guidance Note is to provide guidance to the responsible parties who—
  - 3.1.1 intend to apply for exemption in terms of section 37 of POPIA; or
  - 3.1.2 are exempt from the processing of personal information in respect of certain functions in terms of section 38 of POPIA.
- 3.2 This document provides guidance only and the responsible parties are therefore required to ensure compliance with the relevant provisions of POPIA.

## 4. Exemptions from the conditions for lawful processing of personal information

### 4.1 General

- 4.1.1 Processing of personal information is not in breach of a condition for the processing of such information if the Regulator grants an exemption in terms of section 37 of POPIA or where processing is in accordance with section 38 of POPIA.
- 4.1.2 The exemptions are strictly applicable in instances provided for in sections 37 and 38 of POPIA. They should not be routinely relied on and should be considered on a case-by-case basis.
- 4.1.3 If an exemption is not applicable to the processing of personal information, the applicable conditions for lawful processing of personal information must be complied with.
- 4.1.4 The Regulator may impose reasonable conditions in respect of any exemption granted in terms of section 37 of POPIA.

### 4.2 Exemptions on applications

- 4.2.1 The Regulator may, in terms of section 37(1) and on application by a responsible party (using the attached exemption application form), grant an exemption from complying with a specific condition when processing personal information, even if such processing is in breach of any of the condition for the lawful processing of such information, or any measure that gives effect to such condition.

4.2.2 The responsible party applying for an exemption must satisfy the Regulator that either of the following requirements are met-

4.2.2.1 processing is in the public interest; or

4.2.2.2 processing involves a clear benefit to the data subject.

**4.2.3 Public interest**

4.2.3.1 The responsible party must satisfy the Regulator that:—

4.2.3.1.1 the processing of personal information in question is in the public interest; and

4.2.3.1.2 the public interest is so significant that it outweighs the data subject's right to the protection of its or his or her personal information.

4.2.3.2 POPIA does not define public interest but furnishes examples of what constitutes public interest, as stipulated in paragraph [4.2.3.4](#) below.

4.2.3.3 Public interest is a wide and diverse concept that cannot and should not be limited in its scope and application. The definition of what constitutes public interest varies across jurisdictions and should be assessed on a case-by-case basis. In its very basic formulation, public interest is the notion that an action or process or outcome widely and generally benefits the public at large (as opposed to a few or a single entity or person) and should be accepted, imposed or pursued in the spirit of equality and justice.

4.2.3.4 In terms of section 37(2) of POPIA, public interest includes the following:

4.2.3.4.1 the interests of national security;

- a) "National Security" is not specifically defined in any law in South Africa. However, section [198](#) of the [Constitution of the Republic of South Africa](#) prescribed principles which govern national security in the Republic.
- b) A responsible party who applies for an exemption from complying with a condition for lawful processing of personal information on the ground of national security should be guided by the following constitutional principles—
  - i) National security must reflect the resolve of South Africans, as individuals and as a nation, to live as equals, to live in peace and harmony, to be free from fear and want and to seek a better life.
  - ii) The resolve to live in peace and harmony precludes any South African citizen from participating in armed conflict, nationally or internationally, except as provided for in terms of the [Constitution](#) or national legislation.
  - iii) National security must be pursued in compliance with the law, including international law.
  - iv) National security is subject to the authority of Parliament and the national executive.
- c) The responsible party will not be exempted if the impact of compliance would be trivial or is not linked to national security (e.g. to avoid embarrassment). The responsible party must be able to show—
  - i) how compliance with the privacy rights of data subjects jeopardises national security;
  - ii) that processing the personal information of the data subject is in the public interest as it safeguards the national security;

- iii) that such public interest in the national security outweighs to a substantial degree the privacy rights of the data subject.

4.2.3.4.1 The prevention, detection and prosecution of offences;

4.2.3.4.2 Important economic and financial interests of a public body;

- a) A public body which intends investigating fraud and corruption that impacts its economic and financial interests may apply for exemption from any condition for lawful processing of processing of personal information.

4.2.3.4.3 Fostering compliance with legal provisions established in the interests referred to under paragraphs [4.2.3.4.2](#) and [4.2.3.4.3](#) above;

4.2.3.4.4 Historical, statistical or research activity; or

4.2.3.4.5 The special importance of the interest in freedom of expression:

#### 4.2.4 Clear benefit to the data subject

4.2.4.1 The responsible party should prove that:

4.2.4.1.1 the processing involves a clear benefit to the data subject or a third party; and

4.2.4.1.2 the clear benefit, referred to in paragraph [4.2.4.1.1](#) above, outweighs, to a substantial degree, any interference with the privacy of the data subject or third party that could result from such processing.

4.2.4.2 The responsible party must, in its application for an exemption—

4.2.4.2.1 provide adequate reasons why processing of personal information, in breach of any of the conditions for lawful processing of personal information, will be to the benefit of the data subject;

4.2.4.2.2 state the nature of the benefits to a data subject or a third party;

4.2.4.2.3 specify how the benefit to a data subject or a third party outweighs, to a substantial degree, any interference with the privacy of such data subject or third party.

4.2.5 An exemption in terms of section 37 of POPIA may not be a full exemption from all the conditions for the lawful processing of personal information but may only be granted for one or some of the conditions for the lawful processing of personal information.

4.2.6 In the event that the Regulator is satisfied that the application for exemption meets the requirements listed in paragraph [4.2.3](#) or [4.2.4](#) above, it may impose reasonable conditions in respect of any exemption granted and these conditions will be decided on a case-by-case basis. The conditions may include, for example, the requirement for a responsible party to implement certain appropriate, reasonable technical and organisational measures to secure the integrity and confidentiality of personal information.

4.2.7 Before submitting the exemption application, a responsible party must consider whether its processing falls under—

4.2.7.1 Exemptions provided for in section 37 of POPIA; or

4.2.7.2 Exemptions provided for in section 38 of POPIA, as detailed in paragraph [4.3](#) below.

4.2.8 A completed Exemption Application Form, attached hereto, may be submitted to the Regulator through the following channels—



4.2.8.1	Email:	<a href="mailto:exemptions.IR@justice.gov.za">exemptions.IR@justice.gov.za</a>
4.2.8.2	Postal:	P.O Box 31533 Braamfontein Johannesburg 2017
4.2.8.3	Hand delivery:	JD House 27 Stiemens Street Braamfontein Johannesburg 2001

4.2.9 Due to the current pandemic (Covid-19), the Regulator recommends that applications for exemptions in terms of section 37 of POPIA be submitted by email to limit the transmission of the virus. However, the Regulator will accept applications in accordance with paragraph 4.2.8.2 or 4.2.8.3 above.

4.2.10 Once the exemption application is received and recorded in the system of the Regulator, the responsible party will receive an acknowledgement email or letter with a reference number for the application. When submitting additional information to the application, the responsible party must include the allocated reference number to enable the Regulator to link the additional information to the existing application.

#### 4.3 Exemption in respect of certain functions

4.3.1 Section 38(1) of POPIA provides for an exemption from complying with sections 11(3) and (4), 12, 15 and 18 if the responsible party processes personal information for the purpose of discharging a relevant function.

4.3.2 A relevant function for the purpose of section 38(1) of POPIA means any function—

4.3.2.1 of a public body; or

4.3.2.2 conferred on any person in terms of the law.

4.3.3 The relevant function referred to in paragraph 4.3.2 above must be performed with the view to protect members of the public against—

4.3.3.1 financial loss due to dishonesty, malpractice or other seriously improper conduct by, or the unfitness or incompetence of, persons concerned in the provision of banking, insurance, investment or other financial services or in the management of bodies corporate; or

4.3.3.2 dishonesty, malpractice or other seriously improper conduct by, or the unfitness or incompetence of, persons authorised to carry on any profession or other activity.

4.3.4 The relevant function must comply with all the conditions for the lawful processing of personal information. However such function may be exempted from compliance with sections 11(3) and (4), 12, 15, and 18 of POPIA, in any case to the extent to which the application of these provisions to the personal information would be likely to prejudice the discharge of that function.

- 4.3.5 The exempted functions referred to in paragraph [4.3.4](#) above, only relate to the following conditions—
- 4.3.5.1 The data subject's right to object to the processing of personal information, in terms of section 11(3) and (4);
  - 4.3.5.2 The obligation to ensure that personal information is collected directly from the data subject, in terms of section 12;
  - 4.3.5.3 The requirement that further processing must be compatible with purpose of collection, in terms of section 15; and
  - 4.3.5.4 The requirement to notify data subject when collecting personal information, in terms of section 18.
- 4.3.6 The responsible party relying on any of the conditions referred to in paragraph [4.3.5](#) above, must document its reasons for relying on an exemption under section 38. Those reasons will be crucial when the Regulator investigates any complaint in terms section 74 of POPIA or conducts an assessment in terms of section 89 of POPIA.

## 5. Publication of an exemption notice

The Regulator will, upon granting an exemption, publish a notice in the *Gazette* in terms of section 37(1) of POPIA. The exemption granted by the Regulator only comes into operation on the date of publication in the *Gazette*.

## 6. Contact details

- 6.1. If after reading this Guide, the responsible party still requires help in completing the exemption application form, they may contact our Customer Service Centre on—
- Email: [exemptions.IR@justice.gov.za](mailto:exemptions.IR@justice.gov.za)
- 6.2. Please note that the Regulator's operating hours are from 08h30 am to 17h00 Monday to Friday only.

## Exemption application form

*NOTE: The personal information submitted herein shall be solely used for purposes of an exemption application submitted to the Information Regulator ("Regulator") in terms of section 37(1) of the Protection of Personal Information Act 04 of 2013 (POPIA).*

*All the information submitted herein shall be used for the purpose stated above, as mandated by POPIA. This Information may be disclosed to the public. The Regulator undertakes to secure the integrity and confidentiality of personal information in its possession or under its control by taking appropriate, reasonable technical and*

*organisational measures to prevent loss of, damage to or unauthorised destruction of personal information and unlawful access to or processing of personal information.*

### Part A – Responsible party

Type of Body	Public Body		Private Body	
Full Name of the Body (Registered Name) Trading Name				
Registration No, if any				
Full Name of Information Officer				
Information Officer's Registration Number				
Postal Address (Official)				
Physical Address (Official)				
Official Landline Number				
Official Cell Number				
Official Fax Number				
Official Email Address				

Website, if any	
-----------------	--

## Part B – Conditions for the lawful processing of personal information

*Please select the condition(s) for lawful processing of personal information from which you apply to be exempted*

<b>Accountability</b> -as referred to in section 8	
<b>Processing limitation</b> -as referred to in sections 9 to 12	
<b>Purpose specification</b> -as referred to in sections 13 and 14	
<b>Further processing limitation</b> -as referred to in section 15	
<b>Information quality</b> -as referred to in section 16	
<b>Openness</b> -as referred to in sections 17 and 18	
<b>Security safeguard</b> -as referred to in sections 19 to 22	
<b>Data subject participation</b> -as referred to in sections 23 to 25.	

**Part C – Provide reasons why it is necessary for the responsible party to process personal information in breach of the conditions for lawful processing of personal information**

<b>The public interest in the processing of personal information outweighs, to a substantial degree, any interference with the privacy of the data subject that could result from such processing.</b>			
<b>Select the applicable public interest</b>	a)	The interests of national security	
	b)	The prevention, detection and prosecution of offences	
	c)	Important economic and financial interests of a public body	
	d)	Fostering compliance with legal provisions established in the interests referred to under paragraphs (b) and (c) above	
	e)	Historical, statistical or research activity	
	f)	The special importance of the interest in freedom of expression	
<b>Specify any other public interest not specifically provided herein</b>			
<b>Please provide reasons how selected or specified public interest in the processing of personal information outweighs, to a substantial degree, any interference with</b>			

<p><b>the privacy of the data subject that could result from such processing.</b></p>	
<p><b>The processing involves a clear benefit to the data subject or a third party that outweighs, to a substantial degree, any interference with the privacy of the data subject or third party that could result from such processing.</b></p>	
<p><b>Please specify the nature of the clear benefits to a data subject or a third party.</b></p>	
<p><b>Please explain how the above-mentioned benefits to a data subject or a third party outweigh, to a substantial degree, any interference with the privacy of such data subject or third party.</b></p>	

### Part D – Declaration

I declare that the information contained herein is true, correct and accurate.

SIGNED and DATED at \_\_\_\_\_ on this the \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_

\_\_\_\_\_  
Information officer

### Part E

The following information is required for statistical purposes. Please choose a sector(s) that apply to your body.

Government			Public entities			Private body			Profession		
Item	Classification of Government	X	Item	Classification of a public entity	X	Item	Name of industry or sector	X	Item	Type of profession	X
1.	National Government		1.	Constitutional Entities		1	Education		1	Legal	
2.	Provincial Government		2.	Schedule 2 Public entity		2	Insurance		2	Built environment	
3.	Local Government		3.	Schedule 3A Public entity		3	Health facilities		3	Financial	
Legislature			4.	Schedule 3B Public entity		4	Telecommunications		4	Medical and Allied Health Services	
Parliament			5.	Schedule 3C Public entity		5	Pharmaceutical		Others, specify		
			Others, specify			6	Media and social media				
Gauteng Provincial Legislature						7	Retail/ Direct marketing				
Western Cape Provincial Legislature						8	Tourism		5.		

Northern Cape Provincial Legislature			9	Transportation, storage and logistics	
Limpopo Provincial Legislature			10	Manufacturing/ Production	
Northwest Provincial Legislature			11	Banks	
Free State Provincial Legislature			12	International organizations	
Mpumalanga Provincial Legislature			13	Real estate	
			14	Credit bureaus	
Eastern Cape Provincial Legislature			Others, specify		
Kwazulu-Natal Provincial Legislature					