

7 November 2017

**For attention: Ms M Mphelo  
Office of the Information Regulator**

Email:  
[infoegcomments@justice.gov.za](mailto:infoegcomments@justice.gov.za)

Dear Madam,

**SAICA SUBMISSION ON THE DRAFT REGULATIONS RELATING TO THE  
PROTECTION OF PERSONAL INFORMATION**

In response to your request for comments on the Draft Regulations relating to the Protection of Personal Information please find comments prepared by The South African Institute of Chartered Accountants (SAICA).

We thank you for the opportunity to provide comments on this document and we would like to urge the department to engage with us, should you wish to discuss the comments.

Yours sincerely,

Juanita Steenekamp  
Project Director: Non-IFRS Reporting

**THE SAICA COMMENT LETTER IS ORGANISED AS FOLLOWS:**

Section 1: General discussion

Section 2: Detail comments relating to individual sections of the Regulations

**Section 1: General discussions**

The specifications in the Draft Regulations referring to the manner that information must be submitted and where data subjects must respond by submitting information and forms via registered post, facsimile, electronic mail or personal delivery.

We notice that the definition of “submit” also includes “personal delivery”. Several references are however also made to the serving of documents. Whilst we are mindful that the serving of documents should be afforded its ordinary meaning, this additional method of personal delivery should be distinguished from the personal delivery of documents as envisaged in the definition of “submit”. It may be useful for the public (at whom protection is largely aimed) to understand the difference and to also include a definition of “serve”. This will also prevent confusion between the different delivery methods of forms and other types of documents referred to in the Act.

The Draft Regulations does not allow for the use of any other methods of feedback to be submitted, such as digital platforms, websites and cellphone technologies. Technology is fast changing and the Regulations need to allow for the use of new technologies.

Not all sections in the main Act have corresponding Regulations. We attach the list of these sections in the detailed comments included in this letter. We recommend that these are issued for comment as soon as practically possible to promote legal certainty.

The below table sets out the remaining sections in the main Act that authorise the issue of Regulations, but to which sections we cannot link to the draft Regulations.

Section 23(1): Access to personal information	(b) Request from a responsible party the record or a description of the personal information about the data subject ..... (ii) at a <b>prescribe fee (if any)</b>
Section 45(1) : Conflict of interest	(1) If any member of the Regulator or any person appointed by the Regulator in terms of this Act has a material interest in any matter which could conflict with the proper performance of his or her duties in terms of this Act or the Promotion of Access to Information Act, he or she must disclose that interest, <b>as prescribed</b> , as soon as practicable after the relevant facts came to his or her knowledge.
Section 32 and 112(2)(c): Authorisation concerning data subject’s health	(6) More detailed rules <b>may be prescribed</b> concerning the application of subsection (1) (b) and (f).

Section 52: Funds	(1) Funds of the Regulator consist of- (a) such sums of money that Parliament appropriates annually, for the use of the Regulator as may be necessary for the proper exercise, performance and discharge, by the Regulator, of its powers, duties and functions under this Act and the Promotion of Access to Information Act; and (b) <b>fees as may be prescribed</b> in terms of section 111(1).
Section 65: Guidelines about Code of Conduct	(1) The Regulator <b>may provide written guidelines</b> - (a) To assist bodies to develop codes of conduct or to apply approved codes of conduct; (b) Relating to making and dealing with complaints under approved codes of conduct; and (c) About matters
Section 92: Matters referred to the Enforcement Committee	(2) The Regulator <b>may prescribe</b> the procedures to be followed by the Enforcement Committee, including, .....
Section 111: Fees	(1) The Minister may, subject to section 113 and after consultation with the Regulator, <b>prescribe fees</b> to be paid to data subjects....
Section 112: Regulations	(2)The Regulator may, subject to section 113, <b>make regulations</b> relating to- (m) matters incidental to the imposition of administrative fines as referred to in section 109.

## **Section 2: Detail comments relating to individual sections of the Regulations**

<b>Regulations</b>	<b>Section</b>	<b>Section extract</b>	<b>Issue and suggestion</b>
R1	Definition of submit	The definition of submit states that “submit means submit by – (a) registered post; (b) electronic mail; (c) facsimilie; or (d) personal delivery;”	The definition does not take into account where information is submitted via automated or online portals or future technology.
R2	Manner of objection to the processing of personal information	“2(1) A data subject may object in writing on a form which corresponds substantially with Form 1 to the Annexure...”	The sentence states that a data subject MAY object on a form that substantially corresponds with Form 1, this is not clear on how responsible parties’ forms can differ from Form 1. We request that the Regulator clarify the meaning of “substantially” in paragraph 1. We also question whether this includes web forms or online portals which responsible parties make available to data subjects (their customers or non-customers, for example) for them to object to the processing of their personal information.
R4(1)(c)	Duties and responsibilities of the information officers	“(c) preliminary assessments are conducted”	Draft Regulation 4(1)(c) states that the information officer must ensure that preliminary assessments are conducted. This term is not defined or prescribed and it is not clear what the assessment entails and to what extent. One can only presume that this refers to a risk assessment and it is recommended that the term is clarified or defined.
R4(1)(d)(v)	Duties and responsibilities of the information	“a general description allowing preliminary assessment of the suitability of information security	The information officer has a duty to include a description of information security measures in the PAIA manual, we would caution on requiring too much information as this information

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	officers	measures to be implemented and monitored by the responsible party”	would then be publicly available to would-be hackers or cyber criminals.
R6	Consent for direct marketing	<p>“A responsible party may request a data subject’s consent in writing on a form which corresponds substantially with form 4 to the Annexure for the processing of personal information...”</p> <p>Section 69(20(b) of the POPIA states that the data subject’s approval must be obtained in the prescribed manner</p>	<p>The sentence states that a responsible party MAY request a data subject’s consent on a form that corresponds, this seems to indicate that responsible parties can also utilise another method.</p> <p>Section 69(20(b) of the POPIA states that the data subject’s approval must be obtained in the prescribed manner.</p> <p>The proposed Regulation 6 does not provide guidelines as to the meaning of the terms used in the definition to constitute valid consent. The responsible party bears the burden of proof that valid consent was obtained from the data subject but it fails to provide the meaning of the terms used in the definition to enable just and equitable interpretation of what constitutes valid consent. In most cases, there will be unequal bargaining powers between the data subject and the responsible party this will always affect the data subject’s genuine and free choice to grant the consent.</p> <p>The digital age warrants that efficient and cost-effective additional methods to obtain valid consent but the Draft Regulations reduce the methods of obtaining valid consent only to a written statement corresponding substantially with Form 4. The proposed Regulation 6 does not take in to account verbal consent where the data subject has been records expressing ones intention to provide the consent subject to the number of questions to establish that the definition requirements have been satisfied objectively. Privacy law generally acceptable principles indicate that verbal and a clear affirmative action can be other methods to obtain valid consent in digital platforms like websites. The proposed Regulation 6 does not provide the process and</p>

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			<p>procedure for the data subject to withdraw the consent obtained by the responsible party using Form 4.</p> <p>The proposed Regulation 6 further does not provide guidelines where there is third party disclosure of the personal information, as to whether will the consent obtain using Form 4, also applies to the third parties, or they will have to obtain separate consent.</p>
R8(8)	Conciliation certificate	Draft Regulation (8) (8) issued in terms of section 76, states that the section 76 conciliation certificate must be published on the website of the Regulator.	<p>Section 76 of the Act states that:  <i>“The Regulator must, as soon as is reasonably practicable, advise <b>the complainant and the responsible party to whom the complaint relates</b> of the course of action that the Regulator proposes to adopt under subsection (1).”</i></p> <p>The conciliation certificate sets out the course of action contemplated by the Regulator in terms of section 76. The Regulator is authorised to advise only the complainant and the responsible party of the course of action. The main Act does not allow the Regulator to advise the public of such course of action by publishing the certificate on its website. We propose that Regulation 8(8) is deleted.</p>
R9(2)	Pre-investigation proceedings of the Regulator	Reasonable period	Regulation 9(2) does not provide for the “ <i>reasonable period</i> ” referred to in Section 79(b)(ii) of the Act within which the relevant responsible party can submit a written response. The relevant form only makes provision for a return date. There should be some clarity provided on what will constitute a reasonable period for the submission of written responses. It is not inconceivable that a responsible party could challenge this process if they allege that they had insufficient time to draft or compile a response and consult on its contents before the return date on the form.

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Form 2	Reference to Regulation 3(2)	Regulation 3(2) refers to assistance to be provided when Form 2 is completed	Reference to be amended to refer to Regulation 3(1)
Form 5	Reference to "body"	Section 74 states:  <i>"(1) Any person may submit a complaint to the Regulator in the prescribed manner and form alleging interference with the protection of the personal information of a data subject. (2)A responsible party or data subject may, in terms of section 63(3), submit a complaint to the Regulator in the prescribed manner and form if he, she or it is aggrieved by the determination of an adjudicator."</i>	Draft Form 5 (l) makes provision for the complaint to be lodged against a body or responsible party. There is no authority in the corresponding section and in the context of section 74 to increase the scope to other "bodies" other than the responsible party.
Form 7	Reference to Regulation 8(8)	Regulation 8(8) deals with the publication of the conciliation certificate and not the specification	Reference to be amended to refer to Regulation 8(7)
Form 16	Reference to Regulation 11(1)	Regulation 11(1) and (2) deals with the notification	Reference to be amended to refer to Regulation 11(1) and (2)
Form 17	Reference to Regulation 11(2)	Regulation 11(2) refers to form 16	Reference to be amended to refer to Regulation 11(3)