



GLOBAL BUSINESS SOLUTIONS

future thinking, now



MEMORANDUM NOTE

A consideration of the PROTECTION OF PERSONAL INFORMATION BILL and the impact on the contract of employment

Application

The Protection of Personal Information Bill (or POPI as it has come to be known), applies to the processing of personal information entered into a record by or for a responsible party.

The Act uses the terms "*data subject*" (we would refer to this as an employee) and "*responsible party*" (for us this would be an employer). I shall use the terms "*employer*" and "*employee*". Both fall within the respective definitions as provided.

While the Bill makes provision for exclusions, none of them apply to the realm of employment.

Objective

Importantly, while its existence is meant to fortify the right of privacy, it is to be balanced with other rights such as the right to access of information. Further, its interpretation shall not prevent any other body from exercising its powers, duties and functions.

Some definitions

"Processing" is massively broad and would include anything that an employer could possibly do with regards to the personal information of an employee.

"Personal information" is also couched in the widest possible terms. It includes primary information (race, gender, sexual orientation) dimensions as well as secondary information (religious belief, political persuasion). Educational, medical, criminal, financial and employment history information is included in this definition. Contact details including ID, Biometrics as well as preferences and views are also listed. Finally confidential correspondence sent by the person is also included.

Principles

It is now fairly well known that the Bill is premised on a number of principles. They effectively represent the conditions which need to be met in order to process personal information lawfully.

They are as follows:

- Principle 1: Accountability
- Principle 2: Processing limitation
- Principle 3: Purpose specification
- Principle 4: Further processing limitation
- Principle 5: Information quality
- Principle 6: Openness

- Principle 7: Security Safeguards
- Principle 8: Data subject participation



It is my view that not every principle needs to be expressly reflected in the contract of employment. I refer to security safeguards at Principle 7 as an example. I will specifically only refer to those principles which I believe require some contractual consideration.

Processing limitation

- The employee needs to consent to the processing of their personal information. To this end I would recommend a clause in the contract that would attempt to list as much of what could typically be regarded as personal information within the employment context. This should be followed by a brief indication of what it means for information to be processed and when such an obligation to process information within the context of employment would arise. This may include necessary processing for the conclusion of a contract to which the employee is a party (Driver's license, qualifications etc.), any processing that is required by law (SARS, DOL, OHS, DTI) or to protect the legitimate interests of the responsible party (credit and criminal checks).
- Given the type of processing normally performed by an employer it may be worth inserting some phrases in appropriate clauses where personal information is listed and how it will be processed by an employer, and confirmed as follows:
 - "the employee confirms that the personal information provided by the employee to the employer does not infringe the employee's right to privacy."
 - "the employee further agrees that they understand what the employer requires their personal information for and agrees that such processing is adequate, relevant and proportionate."
- Personal information should be sourced from the employee unless it is:
 - Part of a public record
 - The employee has consented to it being sourced from another source
 - The other source would not prejudice a legitimate interest of the employee
 - Collection from another source is necessary inter alia to maintain the legitimate interests of the responsible party
 - Compliance would prejudice a lawful purpose

In my opinion this is an easy enough "fix" in the contract where one would include the consent of securing requisite information from another source other than the employee.

Purpose Specification

- The employer will need to specify as to what the information will be used for, and the employee has to be aware of it. (See above in terms of stating the reason for processing)
- The information must not be kept any longer than is necessary unless:
 - Required by law
 - Retention is required for lawful purposes related to the employers activities
 - Retention is required by contract
 - The employee has consented to the retention of the information
- This is an easy enough fix in terms of the contract



Openness

- The Bill specifies that an employer may only process information if it has notified the Regulator in terms of Chapter 6.
- The Regulator is a creature of statute which has obviously yet to be appointed.
- Chapter 6 provides exemptions to notification. Regrettably such exemptions will only be covered in a notice to be issued by the yet to be appointed regulator.
- It also goes on to say that the notification requirement does not apply to public registers set up by law or to information supplied to a public body pursuant to a legal obligation.
- Further, it does go on to say that no notification is necessary if the employer has a manual in terms of the Promotion of Access to Information Act. You may recall about 10 years ago there was a flurry of market activity. Since then everything has gone quiet.

Processing of Special Personal Information

- Information concerning the following is regarded as not being capable of being processed at all:
 - Religious, philosophical beliefs, race or ethnic origin, trade union membership, political opinions, health, sexual orientation or criminal behaviour
- Predictably there are certain exemptions.
- As far as race is concerned, the processing of information on race will be permissible for any reason relating to Employment Equity issues.
- Health or sexual orientation information can be processed by an employer in so far as it is necessary for an employer to comply with its legal obligations in this regard. Such exemptions must be accompanied by an undertaking of confidentiality.
- As far as information concerning criminal behaviour goes it appears as though criminal checks as performed in the recruitment phase will be acceptable.
- General exemption is granted if the consent of the employee is secured. This seems easy and straightforward enough.

Conclusion

I do not believe the task to be an onerous one in order to insert the applicable clauses in a contract so as to meet the requirements of POPI.

It must be borne in mind that what has been covered in this note is very specific to a portion of the Act. There is a considerable amount which covers marketing, communication and databases.

To ensure you comply with POPI, our experts at GBS can assist you in drafting the requisite clauses that you will need to have in your agreements. Go Well

Dave