

EDITORIAL

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POPI - Caught between a rock and hard place

In spite of the progress seen through the development of numerous governance codes and recommendations found within the likes of the King III Report for South Africa (2009), many companies still grapple with its recommendations, not least its implementation across public and private businesses. While King III remains an *aspirational code* which companies of all sizes are expected to apply, lack of its implementation within a company will not lead to legal action. However there may be nasty repercussions found within the supply chain, driven mostly by corporate businesses that practice self regulation and who are beginning to 'impose' its adoption for unsuspecting smaller businesses. That said, the same principles of King III's 'apply or explain' approach however will not apply with the looming Protection of Personal Information Bill of 2009 (POPI) which was introduced to Parliament on 25 August 2009.

"Generally speaking, companies and other organisations have made liberal use of the personal information of their customers and they have done very little to protect their customer's information. This has, for among other reasons, lead to the pending implementation of the new Act and will apply to all customer-centric driven companies reliant on customer's personal information", says Terry Booysen, CEO of the governance research company, CGF Research Institute (Pty) Ltd.

Once promulgated, the Act will give effect to the right of privacy, imposing strict measures upon public and private organisations to ensure that the personal information of an individual is *truly* safeguarded. Through this Act -- which mirrors many other international human rights treaties and data protection laws such as those found in Germany, Sweden, Australia and France -- eight Information Protection Principles will become applicable to companies and other organisations in South Africa who collect and or deal with information regarding the personal information of individuals.

"The implementation of this Act will have massive implications on all entities in South Africa. It is very difficult to envisage any entity that does not process some personal information of employees, customers, suppliers, service providers, investors or owners. That said, the impact will no doubt be most serious on entities who deal in significant volumes of personal information, such as entities in the financial sector and health industry," continues Dean Chivers, a Legal Director at Deloitte and subject matter expert of POPI.

In short, and on their own accord, these types of organisations will be required to implement the necessary policies and procedures to avoid the wrath of this Act. Commenting further, Kirby says an individual may object at any time and on reasonable grounds, to the processing of their personal information; and if unchecked by the offending organisation, could see the Information Regulator take drastic action against those violating the Act by applying to a court for a warrant to enter and search an organisation's premises. Naturally the knock-on implications for violating the Act may not only be the seizure of the organisation's equipment, but it could also include civil action for damages, reputational loss, diminished brand and loss of customer confidence, amongst other issues.

In the event where a company is found guilty of non compliance with POPI, a fine may be imposed upon the guilty individual and who can also be imprisoned for up to 12 months. To this end, it is also conceivable that a company may -- possibly unintentionally -- interfere with or obstruct the Information Regulator from an internal investigation which is a criminal offence, and this could lead to a fine or up to 10 years imprisonment.

“Clearly then, ‘ambush marketing’ and unsolicited sales pitches to customers for example, will need serious re-thinking to avoid costly penalties”, adds Booyesen. Careful planning will be required on the part of companies, under pinned by all its employees to ensure that the provisions of the newly expected Protection of Personal Information Act are indeed understood and applied throughout the organisation’s supply chain.

So while many organisations still see the governance codes and recommendations as a ‘nice-to-have’, with scant regard for its meaningful implementation, POPI will most certainly focus the attention of organisations and its executives when they are reported for violating the provisions of the Act – quite different to their response to King II and King III.

Quite expectedly, after its promulgation, organisations who disregard POPI will de facto be in contravention of the law and subject to possible lawsuits and class actions from affected customers. Of course it will become very important that organisations ensure that their business activities comply with the impending changes, and this will also include the mandatory appointment of an Information Protection Officer who is resident in the organisation and responsible for ensuring compliance with this monstrous piece of legislation. Both Booyesen and Chivers concur that many organisations will need to grit their teeth and steadily progress toward achieving compliance with this Act, as there certainly will not be an ‘apply or explain’ out clause, similar to the mindset some may have regarding King III and its implementation.

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