

Altgen Recruitment (Pty) Ltd

Matter Code:	ALT-001
Our Ref:	Stansfield
Your Ref:	Sean Gibson
Date:	25 February 2021

Via email: sean@altgen.co.za

Dear Sean

LEGAL OPINION ON PROCESSING OF JOB APPLICANTS' PERSONAL DATA

1. We confirm our instructions to provide an opinion to Altgen Recruitment (Pty) Ltd (**"the Company"**) on the legal considerations in relation to posting job opportunities on behalf of clients and processing the personal data of job applicants, addressing particularly the following –
 - 1.1 the rights of job applicants;
 - 1.2 the obligations of recruitment agents;
 - 1.3 the obligations of clients, and
 - 1.4 the industry practice of posting job opportunities by job title only, not identifying the prospective employer/s, and sending the job applicants' data to clients without informing the candidates.
2. We deal with these issues herein-below.

RELEVANT LEGISLATION

3. The point of departure is the Constitution of the Republic of South Africa, which protects the right to privacy.¹ Section 36 of the Constitution stipulates that the rights contained in the Bill of Rights may only be limited in terms of a law of general application and to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom.
4. The Protection of Personal Information Act No. 4 of 2013 (**"the POPI Act"**) is such law of general application and provides guidance on what would be a justifiable imitation of the right to privacy. The POPI Act was enacted in 2013, but the bulk of the sections only took effect on 1 July 2020 as per Presidential Proclamation. One of these, section 114(1), allows a grace period of 12 months to be fully compliant with the Act. Therefore, all entities must be fully compliant with the provisions of the POPI Act by 1 July 2021. The reason for the grace period is to provide the "responsible party" reasonable opportunity to put compliance processes in place. The responsible party is *"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
5. In its preamble, the POPI Act broadens the definition of the right to privacy to include *"a right to protection against the unlawful collection, retention, dissemination and use of personal information"*. The POPI Act defines personal information as "information relating to an

¹ The Constitution of the Republic of South Africa, Bill of Rights, Section 14

² The Protection of Personal Information Act No. 4 of 2013 published in Government Gazette No. 37067 of 26 November 2013, Section 1, Definitions

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identifiable, living, natural person, and where it is applicable, an identifiable, existing juristic person”.³ This includes *inter alia* following –

- 5.1 contact details such as email addresses, telephone numbers and physical addresses,
 - 5.2 demographic information such as age, sex, race and ethnicity
 - 5.3 information relating to the education or medical, financial, criminal, or employment history of a person,
 - 5.4 biometric information such as fingerprints,
 - 5.5 the personal opinions, views, or preferences of a person,
 - 5.6 the views or opinions of another individual about a person,
 - 5.7 private correspondence sent by a person or further correspondence that would reveal the contents of the original correspondence,
 - 5.8 the name of a person if it appears with other personal information relating to the person or if the disclosure of the name itself would reveal information about the person, and
 - 5.9 video footage of the person that has been recorded, processed and stored via camera surveillance systems.
6. Processing means “anything that can be done with the Personal Information including collection, usage, storage, dissemination, modification, or destruction”.⁴
7. Pursuant to section 11(1) of the POPI Act, personal information may only be processed when –
- (a) *the data subject or a competent person where the data subject is a child consents to the processing;*
 - (b) *processing is necessary to carry out actions for the conclusion or performance of a contract to which the data subject is a party;*
 - (c) *processing complies with an obligation imposed by law on the responsible party;*
 - (d) *processing protects a legitimate interest of the data subject;*
 - (e) *processing is necessary for the proper performance of a public law duty by a public body; or*
 - (f) *processing is necessary for pursuing the legitimate interests of the responsible party or of a third party to whom the information is supplied.”*
8. The POPI Act proceeds to state that the responsible party bears the burden of proof for the data subject’s consent and that the data subject may withdraw his/her consent as referred to in section 11(1)(a).⁵

³ The Protection of Personal Information Act No. 4 of 2013 published in Government Gazette No. 37067 of 26 November 2013, Section 1, Definitions

⁴ The Protection of Personal Information Act No. 4 of 2013 published in Government Gazette No. 37067 of 26 November 2013, Section 1, Definitions

⁵ The Protection of Personal Information Act No. 4 of 2013 published in Government Gazette No. 37067 of 26 November 2013, Sections 11(1)(a) and 11(2)(b)

9. The POPI Act furthermore states that a data subject may object, at any time, to the processing of personal information in terms of sections 11(1)(d) to (f) and that when a data subject lodges such an objection, the responsible party may longer process the personal information.⁶
10. Pursuant to section 13 of the POPI Act –
 - “(1) *Personal information must be collected for a specific, explicitly defined and lawful purpose related to a function or activity of the responsible party; or*
 - (2) *Steps must be taken in accordance with section 18(1) to ensure that the data subject is aware of the purpose of the collection of the information unless the provisions of section 18(4) are applicable.*”
11. Section 18(1) of the POPI Act provides that when personal information is collected from a data subject, the responsible party must take reasonably practicable steps to ensure that the data subject is aware of *inter alia* the name and address of the responsible party and the purpose for which information is being collected.
12. Section 18(4)(a) of the POPI Act exempts the responsible party from complying with section 18(1), should the data subject consent to the non-compliance.
13. Pursuant to section 73(a) of the POPI Act, any breach under Chapter 3, including that of sections 11, 13 and 18 is deemed interference with personal information of a data subject.
14. Section 74(1) of the POPI Act allows any person alleging interference with the personal information of a data subject to submit a complaint to the Regulator. Upon receiving such a complaint, the Regulator may take any action it deems fit, including a full investigation of the complaint, which may culminate in an enforcement notice pursuant to section 95 of the POPI Act. Such enforcement notice could require the responsible party to do either or both of –
 - “(a) *To take specified steps within a period specified in the notice, or to refrain from taking such steps; or*
 - (b) *to stop processing personal information specified in the notice, or to stop processing personal information for a purpose or in a manner specified in the notice within a period specified in the notice.*”
15. A responsible party which fails to comply with an enforcement notice is guilty of an offence under the POPI Act and liable to imprisonment for a period of not exceeding 10 years, or to both a fine and such imprisonment.⁷

ADVICE

16. Reflecting on above, there is no question that recruitment companies are responsible parties as defined in the POPI Act and that they process the personal information of job applicants. As such, they are fully responsible for collecting and protecting candidate data and processing it in a lawful manner. The two most relevant legal bases for recruitment companies to process the personal data of job applicants are consent, as provided for in section 11(1)(a), and legitimate interest, as provided for in 11(1)(f).
17. In recruitment, obtaining consent means allowing job applicants to have complete control over whether they choose to share their personal data with you, what they share with you and what you may do with the data they share. If recruitment companies use consent as their legal basis for processing data, they will need to have a clear privacy policy and updated terms on their

⁶ The Protection of Personal Information Act No. 4 of 2013 published in Government Gazette No. 37067 of 26 November 2013, Sections 11(3)(a) and 11(4)

⁷ The Protection of Personal Information Act No. 4 of 2013 published in Government Gazette No. 37067 of 26 November 2013, Sections 103(1) and 107(a)

website that contains the reasons why require job applicants' their consent, and what you plan to use job applicants' data for. This will include the *inter alia* –

- 17.1 Why you will be storing your job applicants' information.
- 17.2 What you plan to use it for.
- 17.3 If you will be sharing their data with third parties (and who they are).
- 17.4 That job applicants have the right to be forgotten and removed from your database at any time.
18. To use legitimate interest as a legal basis, recruitment companies need to show that they are using job applicants' personal information in a way someone would reasonably expect them to do and demonstrate a valid justification for processing job applicants' personal data. To determine whether legitimate interest exists as a legal basis, the following questions can be asked –
 - 18.1 What is the legitimate interest you have to process the data?
 - 18.2 Can you show that processing the data is necessary to achieve what you need to do?
 - 18.3 Could processing the data affect the rights or freedom of the person?
19. In recruitment, the reason for using legitimate interest could be quite simple: you will have a legitimate interest in processing a candidate's data in order that you may assist them in finding a job, and an interest processing company data to help them find candidates.
20. Should recruitment companies rely on legitimate interest as their legal basis for processing the personal data of job applicants, the privacy statement on their website would need to include the following –
 - 20.1 A statement saying that they are relying on legitimate interest as their legal basis for processing job applicants' personal information.
 - 20.2 What the legitimate interest is.
 - 20.3 That job applicants have the right to be forgotten and removed from their database at any time.
21. Whether recruitment companies use consent or legitimate interest as their basis for processing the personal information of data subjects, they remain the responsible party and as such incur all relevant obligations under the POPI Act and potential penalties for failure to discharge such obligations.
22. The clients of recruitment companies, on the other hand, do not incur any direct obligations under the POPI Act, except where an argument can be made that the recruitment company processes personal information on their behalf as "operator", which is defined in the POPI Act as "*a person who processes personal information for a responsible party in terms of a contract or mandate, without coming under the direct authority of that party*". A factual analysis of the relationship and agreement between the client company and recruitment company is required to determine whether the client company is a third party or in fact the responsible party. Be that as it may, the job applicant's Constitutional right to privacy prevails and personal data must be treated with the necessary care.
23. On a *prima facie* analysis, the industry practice of posting job opportunities by job title only, not identifying the prospective employer/s, and sending the job applicants' data to clients without informing the candidates, does not pass muster under the POPI Act. The basis for lawfully

processing job applicants' personal data is not articulated in such advertisements. As from 1 July 2021 such a practice would be open to challenge by any party in terms of the rules of the Information Regulator.

24. Please feel free to discuss further with us any aspect of the advice furnished herein.

Yours sincerely



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