



EFA DRAFT SUBMISSION ON THE DRAFT GUIDELINES ON THE REGISTRATION OF INFORMATION OFFICERS - AUGUST 2020

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Yellow highlight indicates a need for drafting clarification or missing information

SUBMISSION ON THE DRAFT GUIDELINES FOR THE REGISTRATION OF INFORMATION OFFICERS

INTRODUCTION

The EFSA aims to increase awareness, confidence and capability of the ecommerce industry in South Africa. EFSA represents:

- large and small e-Shop owners,
- brick and mortar stores that are including ecommerce as part of their omnichannel strategy,
- service providers to ecommerce (including platforms, payments, logistics, delivery, consultants, marketing and digital agencies)

The Information Regulator of South Africa (Regulator) has published [Draft Guidelines on the Registration of Information Officers](#) (Guidelines) on These draft Guidelines are informed by section 55(2) which requires that a Responsible Party should register its Information Officer with the Regulator before taking up his or her respective duties in terms of the Protection of Personal Information Act 4 of 2013 (POPIA) and the Promotion of Access to Information Act 2 of 2000 (PAIA). The Regulator has invited written comments on the draft Guidelines.

SUBMISSIONS

GUIDELINE 4

Guideline 4.1: In respect of the Obligations and Liabilities of the Information Officer, we are aware that Section 93(b)(ii) of POPIA empowers the Enforcement Committee to make any recommendation to the Regulator necessary or incidental to any action that should be taken against either a Responsible Party in terms of POPIA; or an Information Officer in terms of PAIA.

We request guidance on the enforcement actions that may be taken against an Information Officer in terms of POPIA by the Enforcement Committee.

Secondly, in South Africa, where POPIA compliance has not reached its maturity, the priority must be the training of Information Officers and growing the body of qualified Information Officers.

Would not the criminal liability (as referred to in Guideline 42) have the effect of deterring persons contemplating a career as an Information Officer?

Guideline 4.2: We understand that an Information Officer may be held criminally liable for various offences in respect of any breach of the provisions of PAIA. Whilst we note that these instances are listed under Guideline 4.2, we request that additional detailed guidance is produced by the Regulator to assist organisations and their Information Officers in applying the law properly and thus avoiding the criminal sanctions under PAIA.

Furthermore, and in accordance with s 40(1)(e)(ii) of POPIA, we submit that the Regulator should conduct research and report to Parliament on the impact and efficacy of the criminal liability provisions under PAIA in that criminal liability on Information Officers may have the effect of deterring organisations and any delegated Information Officers. **Deterring them from what?**

GUIDELINE 5

In respect of the Registration of Information Officers, we are aware that by virtue of their positions, Information **Officers are appointed automatically in terms of PAIA and POPIA. We are aware, furthermore that for a private body, the Information Officer is the Managing Director or Chief Executive Officer or the equivalent officer of the juristic person or any other person duly authorised by that officer or any person who is acting as such or any person duly authorised by such acting person. ***

We are aware that the Guidelines set out the requirements for the designation of a deputy Information Officer, which must be in writing. Deputy Information Officers must be afforded sufficient time, adequate resources and financial means in order to carry out their duties and should be an employee at a level of management or above.

We submit that further clarity is needed on whether Information Officers and Deputy Information Officers would need to be based in South Africa. In the context of a digital economy and responsible parties that have business operations **in various jurisdictions, responsible parties may appoint an “Africa Privacy Officer” or a “Regional Privacy Officer” with data protection oversight over several operational centres in several jurisdictions. ****

GUIDELINE 6

Guideline 6.1.3.1 provides for prior authorisations as an example of cooperation with the Information Regulator during the course of investigations. We submit that this Guideline requires further detail and clarity on how the requirements operate in practical terms for an Information Officer, and furthermore request clarity on the application of this clause in the context of investigations.

When considering the substantive content of Guideline 6.1.3.1, we note, with concern, potential prejudice to our members who engage in electronic commerce (which inherently involves the processing of unique identifiers in order to provide online services). Saying this, Guideline 6.1.3.1 (a), which concerns “the processing of any unique identifiers of data subjects”, departs from the provisions of s57(1)(a) of the POPIA which only require prior authorisation when processing unique identifiers:

“(i) for a purpose other than the one for which the identifier was specifically intended at collection; and

(ii) with the aim of linking the information together with information processed by other responsible parties”

It is therefore submitted that this departure ought to be addressed and resolved in that it creates confusion as to the responsibilities of Information Officers insofar as they pertain to the processing of unique identifiers by a Responsible Party.

GUIDELINE 7

We are concerned that the possible costs of compliance the PAIA and POPIA Acts will be beyond the financial means of micro and small business enterprises,, and that these costs may prevent start-up companies in the digital economy from establishing. Therefore we submit that the Guidelines should provide clarity on any exceptions and exemptions that may be granted to Information Officers of small ecommerce firms. Further, POPIA, in its universal application, imposes a substantial set of obligations for Information Officers which may create potential resource issues for smaller organisations.

We look forward to receive guidelines on the Regulator’s expectations from Information Officers of small ecommerce or digital economy firms.