



WHY POPIA APPLIES TO THE SAPS



ACFE[®]

Association of Certified Fraud Examiners

South Africa Chapter

1. BACKGROUND

At our stakeholder engagements on the POPIA Guideline, we stated that the South African Police Service (SAPS) may not be subject to the Protection of Personal Information Act 4 of 2013 (POPIA) due to the exemption in section 6 of the Act.

Since then, the Information Regulator (IR) issued an enforcement notice against the SAPS for violating the privacy of eight Krugersdorp rape victims. This indicates that the IR is of the view that the SAPS is subject to POPIA.

The purpose of this communication is to:

- give guidance on the interpretation of the section 6 exemption;
- provide information about the enforcement action against the SAPS; and
- explain what the implications are for fraud examiners.

2. THE WORDING OF THE SECTION 6 EXEMPTION

Section 6 (1)(c) of POPIA provides that POPIA ‘does not apply to the processing of personal information by or on behalf of a public body’ such as the SAPS if the purpose of the processing is ‘the prevention and detection, including assistance in the identification of the proceeds of unlawful activities and the combating of money laundering activities, investigation or proof of offences, the prosecution of offenders or the execution of sentences or security measures’. However, the section also provides that the exemption only applies ‘to the extent that adequate safeguards have been established in legislation for the protection of such personal information.’

Until recently, we did not know whether the IR considered the privacy protection in the legislation that governs the SAPS to be ‘adequate’. However, by issuing this enforcement action, the IR indicated that they did not regard the privacy protection in the SAPS legislation as adequate.

3. WHAT HAPPENED IN THE SAPS NON-COMPLIANCE CASE

3.1. The SAPS leaked the personal information of eight data subjects

On 28 July 2022, eight women that were part of a production crew for a music video were raped by a mob of twenty men in West Village, Krugersdorp. The nature of the violations and the personal information of the eight victims, such as their names, ages, and residential addresses, were allegedly leaked by SAPS officials in a WhatsApp message which disregarded the data subject rights of the eight victims.

3.2. The IR issued an information notice

After the IR was informed that the victims' personal information was shared via WhatsApp, an investigation into the possible violation of POPIA by members of the SAPS was initiated by issuing an information notice in terms of POPIA. The notice required the SAPS to provide the IR with certain information, including the message that was circulated, the names of the persons that received the message, and a report from the Information Officer of SAPS stating why the processing of the data subjects' personal information complied with the processing conditions of POPIA.

3.3. The IR issued summons

The SAPS had to provide the information to the IR by 15 August 2022 but requested an extension. The SAPS was granted an extension until 24 August 2022. However, on 24 August 2022, the SAPS did not provide all the outstanding information nor indicate when it would do so. The IR subsequently [issued a summons](#) for the information. We see this as an important demonstration of the powers of the IR and an indication that the IR will not tolerate a failure to respond to an information notice.

3.4. The IR issued an enforcement notice

After the IR completed its investigation and received recommendations from the POPIA Enforcement Committee, the IR issued an enforcement notice against the SAPS that ordered it to:

- notify the data subjects of the security compromise which relates to their personal information within 31 days from the Information Regulator's notice;
- publish an apology to the data subjects, prominently in major national weekly newspapers and social media platforms such as Facebook and Twitter, for the unlawful processing of their personal information;
- investigate the conduct of the SAPS members who were responsible for the unlawful processing of the personal information of the data subjects; and
- include training on POPIA in all the SAPS training programs.

We are not in possession of the enforcement notice, but the IR's decision was set out in an IR [press briefing](#) on 5 April 2023. The IR also issued a [media statement](#).

Enforcement notices are serious. Failure to comply may lead to criminal prosecution or an administrative fine of up to R10 million. If the SAPS decided not to comply with the enforcement notices, it would have had to challenge the notice in the High Court. However, it would appear that the SAPS decided to comply with the notice as on 3 May 2023, it [published an apology](#) as directed by the IR.

3.5. A LinkedIn post confirmed that SAPS must comply with POPIA during criminal investigations

In a [LinkedIn post](#) comment section, Peter Hill said: ‘The exclusion only applies if there are adequate safeguards established in the legislation. The fact there was no effective safeguard in the SAPS Act means there can be no exclusion. Law enforcement, NIS, DoD all need to detail the safeguards they have in place in their respective legislation for an exclusion to exist.’

The Chairperson of the IR, Adv Pansy Tlakula, responded to this comment by saying, ‘Mr. Hill is correct.’

4. WHAT ARE THE IMPLICATIONS FOR FRAUD EXAMINERS

Although we are not in possession of the IR’s enforcement notice, we can deduce that the IR found the safeguards imposed by current legislation inadequate and that the SAPS is thus not exempt from POPIA. This means that fraud examiners acting on behalf of SAPS or another public body doing criminal investigations must also comply with POPIA.

As you know, the ACFE SA is developing a POPIA Guideline to assist fraud examiners to comply with POPIA. All ACFE SA members will be given an opportunity to comment on the POPIA Guideline and will be invited to further stakeholder engagement sessions.

Should you have any questions about this case or this communication, please do not hesitate to contact Minette Niemann (ACFE SA Legal Officer) at minette@acfesa.co.za