

## Directive

17 March 2021.

Dear H2O|BWT Franchisees

### Protection of Personal Information Act (4 of 2013) ("POPI Act")

Every organisation dealing with personal information in South Africa, including H2O / BWT and every Franchisee, has until **1 July 2021** to comply with the POPI Act before the Information Regulator will implement fines and initiate prosecutions.

#### What is the POPI Act?

The POPI Act enables people to access and enforce their privacy rights on a day-to-day basis with its purpose being to protect people from harm by protecting their personal information. To this end, the POPI Act sets conditions for when it is lawful for someone to process someone else's personal information.

#### What is personal information?

Any information relating to an identifiable living natural person or identifiable existing juristic person. This includes:

- race gender, sex pregnancy, marital status national, ethnic or social origin, colour, sexual orientation, age
- physical or mental health, well being, disability, religion, conscience, belief, culture and birth
- education or medical, financial criminal or employment history
- correspondence sent by the person that is implicitly or explicitly of a private/confidential nature
- any identifying number, symbol, email address, physical address, telephone number, location information, online identifier or other particular assigned to the person
- biometric information (e.g. blood typing, fingerprints, DNA analysis, retinal scanning and voice recognition)
- personal opinions, views or preferences
- the views or opinions of another individual about the person
- the name of the 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

#### What does processing mean?

Any operation or activity or any set of operations, whether or not by automatic means, concerning personal information, including:

- the *collection, receipt*, recording, organisation, *collation, storage*, updating or modification, retrieval, alteration, consultation or use;
- dissemination by means of transmission, distribution or making available in any other form;
- merging, linking, as well as restriction, degradation, erasure or destruction of information

So essentially, it is anything to do with personal information as is a very broad term to include what every business does with personal information, which includes for both natural persons as well as juristic persons (e.g. companies, etc).

#### Who are the key role players?

The POPI Act identifies three role players, who can be natural or juristic persons, in the processing of personal information:

<b>The data subject:</b>	the person to whom the information relates
<b>The responsible party:</b>	the person who determines why and how to process such information and who is ultimately responsible for the lawful processing of the personal information
<b>The operator:</b>	a person who processes personal information on behalf of the responsible party in terms of a contract or mandate

#### Penalties and consequences of non-compliance?

The penalties in terms of the POPI Act for the failure of a responsible party to comply with the provisions of the POPI Act is a fine of between R1 million to R10 million or imprisonment of a period between 1 – 10 years, depending on the contravention, or both.

Other consequences include compensating the data subject for damages suffered, the potential **reputation damage** to your organisation and the loss of customers / clients.

#### Next steps?

1. Each Franchisee must appoint an **Information Officer** and draft a Data Protection Policy for your franchise
2. Each Franchisee must raise **awareness** within your franchise
3. Each Franchisee must conduct an assessment of your franchise to determine the **impact** of the POPI Act
4. Each Franchisee must **implement** the necessary changes to how your franchise processes personal information

These steps are necessary and required in order to protect the H2O / BWT reputation, goodwill and name and in order for any Franchisee to avoid incurring any of the penalties for non-compliance as set out above.

Please read and consider the attached legal advice from H2O / BWT's attorneys in respect of the requirements and conditions of the POPI Act.

Yours sincerely



Tony Marchesini  
Franchisor





Our ref: LCW1/0001

Your ref: POPIA

Date: 22 May 2019

Dear H2O/BWT Franchisees

Please see as follows general advice in respect of the Protection of Personal Information Act (4 of 2013) ("POPIA") and to what extent the provisions thereof have an impact on H2O / BWT and its transactions.

H2O / BWT has until 1 July 2021 to comply with POPIA before the Information Regulator will implement fines and initiate prosecutions. This period may be extended by the Minister to a maximum of 3 years by notice in the *Government Gazette* and may apply to different classes of information and bodies. However, an extension is unlikely given the length of time provided.

POPIA is based largely on the privacy law principles recognised in the European Union and OECD, upon which many privacy or protection of personal information regimes are based. The primary purpose of POPIA is to protect the processing of personal information by public and private bodies, giving effect to the constitutional right to privacy whilst balancing this right against other rights like the right of access to information.

POPIA has a broad definition of what information constitutes personal information, however, it only relates to identifiable living persons and where it is applicable, an identifiable, existing juristic person (e.g. company, close corporation). According to POPIA, "personal information" includes but is not limited to:

- information relating to the race, gender, sex, pregnancy, marital status, national, ethnic or social origin, colour, sexual orientation, age, physical or mental health, well-being, disability, religion, conscience, belief, culture, language and birth of the person;
- information relating to the education or the medical, financial, criminal or employment history of the person;

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**Also in Johannesburg.**

- any identifying number, symbol, e-mail address, physical address, telephone number, location information, online identifier or other particular assignment to the person;
- the biometric information of the person;
- the personal opinions, views or preferences of the person;
- correspondence sent by the person that is implicitly or explicitly of a private or confidential nature or further correspondence that would reveal the contents of the original correspondence;
- the views or opinions of another individual about the person; and
- the name of the 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.

As the definition of personal information is so wide, a lot of the information that H2O / BWT collects, receives, records, stores, disseminates, distributes or uses will constitute personal information. The following are factors for H2O / BWT to consider when processing personal information in terms of POPIA:

### 1. **Accountability**

H2O / BWT will be accountable for the personal information that it holds as it is regarded as the "responsible party" in terms of POPIA because it, *"alone or in conjunction with others, determines the purpose of and means for processing personal information"*. If H2O / BWT passes the personal information to a third party to process in terms of a contract or mandate and the third party is not under the direct authority of H2O / BWT, the third party will be regarded as an "operator" in terms of POPIA. H2O / BWT, however, will still remain responsible for the processing of the information. Therefore, H2O / BWT will be responsible for the personal information it stores and processes, even if such personal information is stored by a storage company.

POPIA requires that the responsible party must ensure, in terms of a written contract between the responsible party and the operator (e.g. a storage company), that the operator which processes the personal information for the responsible party establishes and maintains appropriate security measures. If the operator loses or misuses the personal information and there is an agreement in place, the responsible party will still be liable but the agreement could be used to mitigate the responsible party's risk, claim damages from the operator or soften the responsible party's case with the Information Regulator or the courts. Therefore, it is important that H2O / BWT identifies the personal information that it processes and that someone from H2O / BWT is appointed to safeguard the personal information in its control, known as the "Information Officer". The Information Officer must also oversee the implementation of POPIA and ensure compliance. POPIA also provides that deputy Information Officers must be appointed, if necessary, in order to assist the Information Officer to perform his/her duties and responsibilities in terms of POPIA.

No formal qualifications are required for an Information Officer but anybody who holds this position must familiarise themselves with the provisions of POPIA if they are to fulfil their duties properly. The Information Officer must be aware of the information security that is appropriate in respect of the information processed by the firm. Although most information today is stored electronically, the role of Information Officer should not be delegated to people responsible for information technology if they are neither the owners of information nor able to assess the importance of the information.





## 2. Processing limitations

H2O / BWT may only process personal information if the purpose for which it is collected is adequate, relevant and not excessive. This is intended to ensure that only personal information which is appropriate for the purpose it is being collected, is collected. It also relates to the nature of the processing which is being contemplated. This is likely to be viewed in a more relaxed light if the person has already consented to the processing of the personal information.

## 3. Consent

Personal information may be collected and processed if the person to whom the personal information relates or a competent person, where such person is a child (under 18 years of age), consents to the processing. In most cases, a parent or guardian will be regarded as a competent person, however, other people like a medical practitioner may be regarded as a competent person, in certain circumstances. All three elements (voluntary, specific and informed) must be valid for the consent to be considered valid.

Interestingly, there is no provision which requires the consent to be in writing. Therefore, if the party is given an opportunity to object to the processing of personal information and fails to do so, consent may be inferred from this omission. Although consent does not have to be in writing, it is recommended that H2O / BWT seeks to obtain written consent since H2O / BWT will be responsible for providing proof of the consent should it ever be disputed. It is also important to note that the party may withdraw his/her consent at any time. If the consent of the party cannot or has not been obtained, then the personal information may only be processed if the processing:

- is necessary to carry out actions for the conclusion or performance of a contract to which the person is a party
- complies with an obligation imposed by law on H2O / BWT;
- protects a legitimate interest of such person;
- is necessary for the proper performance of a public law duty by H2O / BWT; or
- is necessary for pursuing the legitimate interests of H2O / BWT or of a third party to whom the information is supplied.

Although it is possible for the personal information held by H2O / BWT to fall under the aforementioned exceptions (depending on the circumstances), it is recommended that H2O / BWT seeks to obtain written consent before processing any personal information in order to prevent a potential dispute.

## 4. Collection of personal information from a party

When collecting personal information, H2O / BWT must ensure that it is collected directly from the party. This may seem to be very strict but there are a number of exceptions which soften the impact of this provision. H2O / BWT is not obliged to collect personal information directly if:

- the information is contained in or derived from a public record or has been deliberately made public by the person;
- the party has consented to the collection of the information from another source;
- the legitimate interests of the party are not prejudiced;



- collection of the information from another source is necessary to avoid the prejudice to the maintenance of the law, to comply with an obligation imposed by law or to enforce legislation concerning the collection of revenue by SARS, conduct of court or tribunal proceedings, the interests of national security or the maintenance of the legitimate interests of H2O / BWT or of a third party to whom the information is supplied;
- compliance would prejudice a lawful purpose of the collection; or
- compliance is not reasonably practicable.

In the event that H2O / BWT collects personal information through electronic transactions, H2O / BWT must ensure that:

- it has the express written consent of the party for the collection, collation, processing or disclosure of any personal information unless H2O / BWT is required to do so by law;
- it does not electronically request, collect, collate, process or store personal information of the party which is not necessary for the lawful purpose for which such information is required;
- it has disclosed in writing to the party the specific purpose for which such personal information is being requested, collected, collated, processed or stored;
- it does not use such information for any other purpose other than the disclosed purpose without the express written permission from the party, unless required by law to do so;
- it keeps a record of the personal information and the specific purpose for which it was collected for as long as it is being used and for at least 1 year thereafter;
- it does not disclose any of the information to any third party unless it has the express written consent from the party to do so or is required by law;
- it keeps a record of any third party to whom the personal information was disclosed for as long as it is being used and for at least 1 year thereafter as well as the date and purpose for which it was disclosed; and
- it deletes or destroys all personal information which has become obsolete.

H2O / BWT can use such electronic personal information for the purpose of compiling profiles for statistical purposes and may trade with such profiles as long as it cannot be linked to any specific person by a third party.

## **5. Collection for specific purpose**

H2O / BWT must ensure that the personal information that it processes is collected for a specific, explicitly defined and lawful purpose. The purpose of the personal information influences every aspect of the processing of the information, the manner of its collection, periods of retention, further processing, disclosure to third parties and any further issues which may apply to the processing of the information. H2O / BWT must ensure, when collecting the information, that the person is aware of the purpose for which the information is being collected, unless one of the exceptions applies.

## **6. Retention of records**

It is important that H2O / BWT's records of personal information must not be retained for any longer than is necessary for achieving the purpose for which the information was collected or processed. H2O / BWT must not retain personal information any longer than is necessary, unless:

- retention of the record is required or authorised by law;
- H2O / BWT reasonably requires the record for lawful purposes related to its functions or activities;





- retention of the record is required by a contract between the parties thereto;
- the party has consented to the retention of the record; or
- the personal information is being used for historical, statistical or research purposes provided that H2O / BWT has established appropriate safeguards against the records being used for any other purposes.

These days, most organisations rely on electronic record retention. It is important that H2O / BWT categorizes the records that it retains and identifies the person/people responsible for ensuring that the retained records are appropriately safeguarded. In the event that the law requires any information or record to be retained, this requirement will be met if the record is in the form of a data message and such information is accessible so as to be usable, it is in the format in which it was generated, sent or received or can be accurately represented and the origin and destination of the data message and the date and time it was sent or received can be determined.

If H2O / BWT is no longer authorised to retain the record of the personal information, H2O / BWT must ensure that the personal information is destroyed, deleted or de-identified (parts of the information have been removed so that it can no longer be linked to a specific person e.g. male, aged 25) as soon as reasonably practicable. The destruction or deletion of the record must be done in such a way that it cannot be reconstructed in an intelligible form. There may be instances, however, where certain personal information may have to be retained, like in situations where people have requested not to be part of a particular mailing list even though they might have also requested to have their personal information destroyed. H2O / BWT must restrict the processing of personal information if:

- its accuracy is contested by the party to which the information relates, for a period enabling H2O / BWT to verify the accuracy of the information;
- H2O / BWT no longer needs the personal information for achieving the purpose for which the information was collected or subsequently processed, but it has to be maintained for the purposes of proof;
- the processing is unlawful and the party opposes its destruction or deletion and requests the restriction of its use instead; or
- the party requests to transmit the personal data into another automated processing system.

## **7. Further processing limitation**

If the further processing of personal information is incompatible with the purpose for which the personal information was first collected, then H2O / BWT may only process the information again if:

- the person has provided his/her consent;
- the information is publically available;
- further processing is necessary to avoid the prejudice to the maintenance of the law, to comply with an obligation imposed by law or to enforce legislation concerning the collection of revenue by SARS, conduct of court or tribunal proceedings or in the interests of national security;
- further processing is necessary to prevent or mitigate a serious and imminent threat to public health or safety or the life or health of the party or another individual;
- the information is used for historical, statistical or research purposes and the responsible party ensures that the further processing is carried out solely for such purposes and will not be published in an identifiable form; or
- the request for further processing has been granted by the Information Regulator.



## 8. Information quality

H2O / BWT must take reasonably practicable steps to ensure that the personal information is complete, accurate, not misleading and kept updated. In doing this, H2O / BWT must keep in mind the purpose for which the personal information is collected or further processed and it is important that all personal information processed at H2O / BWT must be treated as confidential.

## 9. Openness

If personal information is collected, H2O / BWT must take reasonably practicable steps to ensure that the party is aware of:

- the information being collected and where the information is not collected from the party, the source from which it is collected;
- the name and address of the responsible party;
- the purpose for which the information is being collected;
- whether or not the supply of the information by that person is voluntary or mandatory;
- the consequences of failure to provide the information;
- any particular law authorising or requiring the collection of the information;
- the fact that, where applicable, H2O / BWT intends to transfer the information to another country or international organisation and the level of protection afforded to the information by that country or international organisation;
- any further information such as the:
  - recipient or category of recipients of the information;
  - nature or category of the information;
  - existence of the right of access to and the right to rectify the information collected;
  - existence of the right to object to the processing of personal information; and
  - the right to lodge a complaint to the Information Regulator and contact details of the Information Regulator, which is necessary, having regard to the specific circumstances in which the information is or is not to be processed, to enable processing in respect of the person to be reasonable.

H2O / BWT must ensure that the person is aware of the factors listed above before the information is collected or as soon as reasonably practicable after it has been collected. However, it will not be necessary for H2O / BWT to do this if:

- the party has consented to the non-compliance;
- not informing the party of the details listed above would not prejudice the legitimate interests of the party;
- non-compliance is necessary to avoid prejudice to the maintenance of the law, to comply with an obligation imposed by law or to enforce legislation concerning the collection of revenue by SARS, for the conduct of proceedings in any court or tribunal or in the interests of national security;
- compliance would prejudice a lawful purpose of the collection;
- compliance is not reasonably practicable in the circumstances of the particular case; or
- the information will not be used in a form in which the party may be identified or be used for historical, statistical or research purposes.





## **10. Security safeguards**

It is important that H2O / BWT ensures that the integrity and confidentiality of the personal information that it holds is maintained. H2O / BWT must take reasonable measures to prevent all personal information that it controls from being lost, damaged or from being unlawfully accessed. In order to do this, H2O / BWT will need to identify the risks to the personal information in its possession and establish and maintain appropriate safeguards. H2O / BWT must put a variety of measures in place to make sure the information is handled properly and with great care. These measures must be stipulated in information security and electronic communications policies. For example:

- only authorised people have access to information;
- personal information must be communicated securely and deleted in the proper way (e.g. proper shredding and deleting of information, encryption, authorisations concepts, limiting physical access, using locked filing cabinets, marking documents, limiting access to databases etc.);
- a clean desk policy needs to be maintained; and
- no information must be stored on external hard drives etc.

Regular checks will need to be conducted in order to make sure that the safeguards are being effectively implemented and updated, if necessary. H2O / BWT will also need to consider the information security practices and procedures which may apply to it generally or be required in terms of specific industry or professional rules and regulations.

## **11. Information processed by a third party**

If H2O / BWT passes on personal information to a third party to process, H2O / BWT must ensure that the third party (the "operator") treats the personal information as confidential. An operator cannot process personal information without H2O / BWT's knowledge and express authorisation. H2O / BWT is also obliged to ensure that the operator establishes and maintains the standard of security measures required by POPIA. The processing of the personal information and the security safeguards required by H2O / BWT must be provided in a written agreement entered into between H2O / BWT and the operator. H2O / BWT is also obliged to ensure that an operator not domiciled in South Africa adheres to the laws governing the processing of the personal information.

## **12. Notification of security compromises**

If H2O / BWT has reasonable grounds to believe that the personal information of a party has been accessed or acquired by any unauthorised person, H2O / BWT must notify the Information Regulator and the person, unless the identity of such person cannot be established. This must be done as soon as reasonably possible, taking into account the needs of law enforcement or any measures reasonably necessary to determine the scope of the compromise and to restore the integrity of the responsible party's information system. However, if notifying the party may impede a criminal investigation, then the Information Regulator or a public body responsible for the prevention, detection or investigation of offences may determine that H2O / BWT must delay the notification of the party. When the party is notified about the unlawful access to the personal information, such notification must be in writing and mailed to the party's last known physical, postal or email address, placed in a prominent position on H2O / BWT's website, published in the news media or in any other way that the Information Regulator may direct.



Please note that there may also be additional contractual obligations regarding what H2O / BWT must do in the event of a data breach as set out in agreements with its suppliers, customers, and as set out in its privacy policy.

Failure to notify is a breach of POPIA and may, upon conviction of certain offences, lead to imprisonment, a fine, or both. Should there be other contractual obligations, H2O / BWT must ensure adherence thereto in addition to avoid a contractual breach. For this reason, we recommend H2O / BWT implement a comprehensive incident response plan ("Incident Response Plan"). This should set out what needs to be done by in the event of a data breach, including who is assigned to respond to the breach (likely the Information Officer), what the internal response times are, how H2O / BWT will communicate the breach to the Information Regulator and data subjects (e.g. customer) and any other reporting requirements (both internally and externally). An organisation can take out a cyber liability insurance policy to cover losses in respect of a data breach and may be something H2O / BWT can consider doing.

### **13. Correction of personal information**

A party may request H2O / BWT to correct or delete personal information about the party in its possession or under its control that is inaccurate, irrelevant, excessive, out of date, incomplete, misleading or has been unlawfully obtained. H2O / BWT must correct or delete or destroy the information as soon as reasonably practicable and notify the party of such action and provide the party with credible evidence proving that the information has been corrected, deleted or destroyed, whatever the case may be. If H2O / BWT corrects, deletes or destroys any information in such a way that the changed information has an impact on decisions that have been or will be taken in respect of the person in question, H2O / BWT must, if reasonably practicable, inform each person or body to whom the personal information has been disclosed of such changes.

It is also important to note that in terms of POPIA there is "special personal information", which is sensitive personal information that is of a more private nature than ordinary personal information. It consists of information concerning:

- religious or philosophical beliefs;
- race or ethnic origin;
- trade union membership;
- political persuasion;
- health or sex life;
- biometric information; or
- the criminal behaviour of a person.

H2O / BWT may not process special personal information unless:

- the person has consented to the processing;
- processing is necessary to comply with an obligation of international public law;
- processing is for historical, statistical or research purposes to the extent that the purpose serves a public interest and the processing is necessary for the purpose concerned; or it appears to be





impossible or would involve a disproportionate effort to ask for consent, and sufficient guarantees are provided for to ensure that the processing does not adversely affect the individual privacy of the person to a disproportionate extent;

- information has *deliberately* been made public by the party;
- the various specific exceptions in respect of the different categories of special personal information have been complied with; or
- the Information Regulator has authorised H2O / BWT to process the special personal information.

Please also note that in terms of POPIA, H2O / BWT may not transfer personal information about a person to a third party who is in a foreign country unless:

- such person consents to the transfer;
- the third party who is receiving the information is subject to a law or binding agreement which provide an adequate level of protection that effectively upholds principles for reasonable processing of the information that are substantially similar to the conditions for the lawful processing of personal information;
- the transfer is necessary for the performance of a contract between the person and H2O / BWT, or the implementation of pre-contractual measures taken in response to such party's request;
- the transfer is necessary for the conclusion or performance of a contract concluded in the interest of the party between H2O / BWT and a third party; or
- the transfer is for the benefit of the party and it is not reasonably practicable to obtain the consent of the person to that transfer and if it were reasonably practicable to obtain such consent, the person would be likely to give it.

Accordingly, for compliance it is critical that appropriate mechanisms and controls are established for identifying and protecting the information of third parties, where this is required. Accordingly, H2O / BWT must aware of the information that it holds which contains personal or confidential information about a third party or which may be subject to an agreement limiting the dissemination of such information. There may be instances, however, where access to such information may be justified. Establishing controls regulating or restricting access to third party information might be required by virtue of an agreement entered into between H2O / BWT and a third party.

There are also provisions in POPIA dealing with the processing of personal information of children, should you wish for me to provide you further information in this regard please let me know.

Our recommendation is for H2O / BWT to appoint an Information Officer as per the above if this has not happened already and this person should regularly check whether any notices or regulations have been published in terms of POPIA to ensure that H2O / BWT is compliant with these pieces of legislation as well as ensure compliance practically in respect of the above. We can assist the Information Officer in this regard. It is also important to note that in terms of Promotion of Access to Information Act (2 o 2000) ("PAIA"), all public and private bodies must have a person who ensures that the particular body complies with the Act and assists members of the public with making requests for records. Therefore, it makes sense for one person to be the H2O / BWT Information Officer in respect of both PAIA and POPIA.



Furthermore, please note that PAIA requires all private bodies to prepare a PAIA manual, please advise if you require our assistance or further information in this regard.

Our general advice is for clients to ensure that an Information Officer is appointed who will be responsible for managing compliance with POPIA. H2O / BWT will need to perform an evaluation of all existing contracts (either directly or via third party providers) to establish a record of what data/information is being stored and used by H2O / BWT in order to ensure that there is due compliance. Accordingly, there will need to be a detailed inventory compiled with such information. My understanding is that there is already a database of such information already compiled for the franchisees and that there is already an established history of data management so this task should not be too onerous. If there needs to still be a data audit conducted, once it is complete H2O / BWT can conduct a risk assessment to assess how best to protect and process such information and what practical steps need to be taken in order to ensure that the efficient system is put in place. For instance, factors for H2O / BWT to consider will be:

- a secure system which looks at how this information can be best stored and deleted if necessary;
- are there opt-in/opt-out options for data processing as H2O / BWT may need specific permission for certain data;
- has the person to whom the information relates been properly advised that H2O / BWT will be processing such data in a clear and understandable way for what purpose and the length of time;
- does the system allow for the person to be advised how they can request for the information to be corrected or deleted if necessary or how to lodge a complaint.

This exercise should also be conducted by all H2O / BWT franchisees and they should provide you with assurance that they are handling and protecting personal information in accordance with POPIA. The negative impact that H2O / BWT would receive from a social media perspective in the event of a data breach by one of the franchisees and is a situation B2O / BWT would want to avoid. It is important to note that in terms of section 19(1) of POPIA, an organisation's duty of care does not only apply to personal information in its possession, but also to personal information which is under its control.

Please note that the GDPR allows personal data/information to be processed where there is no consent, provided it can be justified as being necessary in order to perform in terms of a contract, to comply with a legal obligation, to protect the person's interests or H2O / BWT's legitimate interests, or it was necessary in terms of the public interest. Furthermore, if H2O / BWT needs to transfer this information to third countries it is possible but such third country will also need to be compliant with the GDPR principles and, if not, H2O / BWT can ensure protection with the third party with appropriate data protection clauses contractually.

In summary, we can assist the Information Officer with further practical assistance and information to ensure compliance with POPIA. Please do not hesitate to contact me should you have any queries or if you require an in depth discussion of any particular aspect of the above information.

Yours faithfully





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