

The Information Regulator  
JD House  
27 Stiemens Street  
Braamfontein  
2001  
Per email: [infoereg@justice.gov.za](mailto:infoereg@justice.gov.za)

Copy to: The Minister of Justice and Constitutional Development  
Momentum Centre  
319 Pretorius Street  
Pretoria  
Per email: [ZaneNdlovu@justice.gov.za](mailto:ZaneNdlovu@justice.gov.za); [BSarela@justice.gov.za](mailto:BSarela@justice.gov.za)

29 May 2021

Dear Madam / Sir,

**RE: REQUEST FOR EXTENTION OF COMPLIANCE WITH SECTION 57, IN TERMS OF  
SECTION 114 OF POPIA**

1. Business Unity South Africa (**BUSA**), with the support of its members, is addressing this letter to the Information Regulator (**Regulator**) in order to highlight a number of concerns raised by its members in the application of section 57(1) of the Protection of Personal Information Act, 2013 (**POPIA**), as well as various hurdles that may impede our members' compliance with POPIA. BUSA would like to use this letter as an opportunity to raise awareness of such compliance hurdles with the Regulator, as well as to provide further detail as to the impact that may follow from the identified issues, and to assist the Regulator by proposing a solution under section 114(2) of POPIA, which it hopes may mitigate the identified impacts.
2. Please kindly note that the Minister of Justice and Constitutional Development (the **Minister**) has been copied in this correspondence on the basis of the requirements of section 114(2) of POPIA which only allow for the Minister to grant any such extensions of the one year transitional period of POPIA. Given the short time period before the 1 July 2021 deadline, BUSA is of the view that it is important that the Minister is kept apprised of this request.
3. Before providing further detail on the abovementioned compliance hurdles, BUSA would like to make it clear that its members fully appreciate the importance of protecting personal information and support the implementation of POPIA on 1 July 2021. Accordingly, the BUSA members have made significant investments of time and money with a view to complying with

POPIA within this deadline. In addition, industry associations have had numerous engagements with the Regulator to ensure that their members are best placed to comply with the provisions of POPIA based on a common understanding and aligned interpretations of the provisions of POPIA. As the Regulator will be aware, some sectoral bodies who are members of BUSA have also submitted draft Codes of Conduct in terms of section 60 of POPIA to the Regulator. The detail provided in such draft codes evidence the transparency and commitment to compliance with POPIA by such members.

4. As is common with new legislation, BUSA members have experienced interpretational challenges with certain provisions of POPIA. Further detail in this regard is set out from paragraph 10 below. Apart from the interpretational challenges which have delayed POPIA compliance-related decision making amongst members, our members have also faced difficulties in utilising the systems and technology adopted by the Regulator for compliance with certain sections of POPIA. BUSA appreciates that the Regulator is working to resolve the technology related issues, but is of the view that the particular challenges regarding compliance with section 57 of POPIA are so significant and the impact on the public and economy is potentially so large that it warrants consideration of an extension (limited to compliance with section 57) of the one year period referred to in section 114(1) of POPIA by a further six months, with the remaining sections of POPIA coming into force on 1 July 2021. It is respectfully submitted that the Minister is empowered to consider such a request under section 114(2) of POPIA.
5. It is BUSA's view that such an extension will allow the Regulator to resolve its technical issues so that the public can submit section 57 applications and the Regulator would be in a position to aid our members with an aligned interpretation of the scope and ambit of section 57. Further, it would allow the Regulator appropriate and necessary time to properly consider (and to the extent necessary, investigate) all prior authorisation applications it may receive within the strict timelines under section 58 of POPIA.
6. We discuss the challenges faced to date in further detail in paragraphs 7 to 15 below, followed by a discussion of some proposed terms of the requested extension.

## General challenges

7. The application form for prior authorisation requires the details and signature of an information officer in circumstances where the Regulator only published a Guidance Note on Information Officers and Deputy Information Officers and the applicable form on 1 April 2021, a mere three months prior to the implementation of POPIA. In addition, the Regulator's platform for registration of information officers continues(d) to fail resulting in the non-registration of information officers. The Regulator provided the public with an email address for the submission of information officer registrations, however, it appears that the Regulator has stopped accepting registrations at this email address. Similarly, the platform created by the Regulator for on-line registrations has also crashed, leaving our members at risk of non-compliance with this provision and impacting the timelines for compliance with section 57 of POPIA.
8. The Regulator's platform for receiving applications for prior authorisation has also continuously failed, resulting in delays to applications and risking non-compliance or a halt on critical affected processing of personal information in accordance with section 57.
9. We also raise a concern that amendments to the regulations to the Promotion of Access to Information Act, 2000 (**PAIA**) are in a consultation stage and the POPIA regulations have not yet been promulgated. PAIA is linked to POPIA and it is necessary to align and coordinate such regulations.

## Interpretation challenges arising from section 57(1)(a) of POPIA

10. There has been a lack of consensus on the interpretation of the definition of the term 'unique identifier' in POPIA. The definition in POPIA reads as follows – *“any identifier that is assigned to a data subject and is used by a responsible party for the purposes of the operations of that responsible party and that uniquely identifies that data subject in relation to that responsible party”*. Initial interpretations by BUSA members were to the effect that this definition limits unique identifiers to those identifiers issued by the responsible party such as a policy or account number. This is especially applicable when the definition is read in the context of section 57(1) which requires consideration as to the purpose for which the *“identifier was specifically intended at collection.”* On this interpretation identifiers, such as identity numbers and mobile numbers, would not be considered unique identifiers as the responsible party did not issue such identifiers. However, the Regulator in its Guidance Note on Application for Prior

Authorisation (issued by the Regulator on 11 March 2021) (**Guidance Note**) adopted a wider definition in which the identifier need not have been issued by that particular responsible party. Within extremely short timelines, BUSA members therefore had to revisit their interpretation of section 57(1)(a) and the scope of processing activities for which BUSA members may be required to apply for prior authorisation has therefore increased dramatically.

11. There is also debate regarding what '*a purpose other than the one for which the identifier was specifically intended at collection*' means, given the variety of purposes which may potentially cover the lifespan of a relationship of the data subject with a responsible party and which may be identified in that responsible party's section 18 disclosure notice. A responsible party, when collecting a unique identifier, may have a multitude of business processes and requirements for which the identifier will be required, all of which are contemplated by the responsible party at collection and would be articulated in its privacy policy or notice.<sup>1</sup> BUSA members have adopted the position that for so long as the purposes are contemplated at the collection of the information and are disclosed to the data subject in a privacy notice or by way of the product or service terms and conditions, the processing of the personal information for those purposes does not require prior authorisation from the Regulator. The Guidance Note however, did not provide any further clarity on this matter.
12. Finally, as regards section 57(1)(a), there has been debate about whether the term 'other responsible parties' should extend to responsible parties operating as a group and using centralised systems, operations and procedures, particularly in circumstances where they operate as joint responsible parties. It is submitted that a purposive interpretation of POPIA requires the exclusion of entities within a group of entities who are otherwise separate responsible parties from the ambit of section 57(1)(a) as such processing does not introduce new risks nor is it unusual.

### **Interpretation challenges arising from section 57(1)(b)**

13. There has been some debate regarding whether the processing of information by BUSA members as responsible parties in compliance with other legislative provisions, particularly related to reporting on suspected or actual criminal behaviour or unlawful or objectionable

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<sup>1</sup> For example, when a financial services customer's personal information is collected at the inception of the business relationship, there are many lawful purposes for processing this personal information (inclusive of servicing the customer, communicating with the client, screening, maintenance of the relationship, reporting to regulators and the Financial Intelligence Centre, reporting to credit bureaux, assessing credit or insurance risk, dealing with complaints, and marketing, etc.) which follows after collection and which would be identified in the responsible party's privacy notice or terms and conditions.

conduct requires prior authorisation or is contemplated under the exemption in section 6(c)(ii) of POPIA. The Regulator has verbally adopted the view that prior authorisation would not be required in such circumstances, however, this has not been confirmed in writing.

14. Further, it is unclear what the term ‘third parties’ means in the context of section 57(1)(b) and such term has not been defined. It is unlikely that this term refers to operators as this defined term would have been used by the legislature. Furthermore, it is submitted that entities within a group using centralised systems, processes and procedures are not considered third parties.

#### **Interpretation challenges arising from section 57(1)(c)**

15. Although the term ‘credit reporting’ is not defined in POPIA, the Guidance Note provides the following definition- *“the processing of personal payment history, lending, and credit worthiness of a data subject by creating a credit report based on that information, and lenders or credit providers use credit reports along with other personal information to determine a data subject’s credit worthiness.”* The Guidance Note further states that ‘any credit bureau registered with the National Credit Regulator and any person processing personal information for credit reporting may apply for prior authorisation’. Unfortunately, these provisions of the Guidance Note are ambiguous and have led to further confusion as to which parties involved in the exchange of credit related information would need to obtain prior authorisation. We are aware that the Regulator has provided verbal feedback regarding this provision to the effect that it only applies to credit bureaux. Although this is a view supported by BUSA, its members will need confirmation of this by the Regulator in order to rely on this interpretation. As an alternative, if the Regulator is not in a position to provide such a confirmation, we request that the Regulator confirms in writing that any credit reporting practices by credit and data providers which are permitted or required by the National Credit Act 34 of 2005 and its subordinate legislation fall outside of the requirements of section 57(1).

#### **Timelines and economic impact**

16. On 1 April 2021, by notice in a Gazette, the Regulator determined that section 58(2) of POPIA will commence on 1 July 2021, the practical reality of which means that if prior authorisation applications are not made and favourable decisions granted before this date, then any processing of personal information which falls under section 57(1) of POPIA would need to

stop for around four weeks (and possibly up to thirteen weeks in the event the Regulator decides to conduct a more detailed investigation).

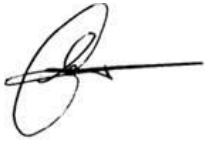
17. The impact of such a situation on the South African economy, which is already under pressure, is incalculable. In particular, such halting of processing in the banking, insurance and investment sectors which operate in highly regulated environments and play critical roles in the financial markets of South Africa may have unintended and destabilising consequences for the economy. As such, it is essential to ensure that the operations of BUSA members continue unaffected, particularly as it relates to compliance with other regulation and while the uncertainties and challenges discussed in the abovementioned paragraphs are resolved.
18. POPIA carries heavy penalties as well as criminal liability for non-compliance, which severe consequences, due to no fault of their own, may unfairly be applied to our members given the abovementioned compliance hurdles.

#### **Request for extension**

19. BUSA therefore requests that the Regulator approach the Minister, in terms of section 114(2) to consider an extension of the period of one year for a further period of six months, effective from 1 July 2021, on the following terms-
  - a. the challenges and uncertainties outlined in paragraphs 7 to 15 above are addressed and dealt with formally by the Regulator in consultation with the public as soon as possible;
  - b. responsible parties have a further six month period within which to consider the guidance issued by the Regulator under paragraph (a) above, and to submit any necessary section 57(1) applications within the extended period;
  - c. notwithstanding the extension requested, responsible parties are still required to comply with the other provisions of POPIA, which will come into effect on 1 July 2021.
20. Should the Regulator and/or the Minister not be amenable to granting the extension on the above terms which BUSA considers fair and appropriate, BUSA would like the opportunity to raise alternative approaches (for example, a limited six month extension based on compliance by a particular body (such as BUSA members) or a limited extension for a certain class of information (such as credit reporting information)).

21. Given the fast approaching deadline of 1 July 2021, and the severe impact on BUSA members, BUSA kindly requests that the Regulator provide a response to this request by 8 June 2021.

Yours faithfully.

A handwritten signature in black ink, appearing to be 'Cas Coovadia', with a long horizontal stroke extending to the right.

Cas Coovadia  
CEO: BUSA