

IMPLICATIONS OF DATA PROTECTION LEGISLATION FOR RETIREMENT FUNDS



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- South African Law Reform Commission (SALRC) Project 124: Privacy and Data Protection
 - The Protection of Personal Information Draft Bill Discussion Paper 109 (Project 124)

- The Constitution, Section 14
- The Pension Funds Act, No. 24 of 1956 (PFA)
- The Promotion of Access to Information Act, No. 2 of 2000 (PAIA)
- The Electronic Communications and Transactions Act, No. 25 of 2002 (ECTA)
- The National Credit Act, No. 34 of 2005 (NCA)

Section 14: Right to Privacy

“Everyone has the right to privacy, which includes the right not to have

- *(a) their person or home searched;*
- *(b) their property searched;*
- *(c) their possessions seized; or*
- *(d) the privacy of their communications infringed.”*

- s7C(1) *“Direct, control and oversee ... in accordance with the applicable laws”*
- s7C(1)(b) *“act with due care, diligence and good faith”*
- s7D(b) *“proper control systems... by or on behalf of the board”*
- s7D(f) *“operation and administration comply with this Act ... and all other applicable laws”*

- #86 (Disclosure requirements) and #98 (General Guidelines on Boards of Pension Funds)? Not really.
- #130 (Good governance of retirement funds)
 - Principal 5: Internal controls and governance mechanisms
 - 38.1: Regular assessment of performance of persons and entities involved in operations
 - 38.3: Regular review of information processes and operational software
 - 38.5: Protection of confidential information of the fund

63. Mandatory protection of privacy of third party who is natural person.

- (1) ... must refuse a request for access to a record of the body if its disclosure would involve the unreasonable disclosure of personal information about a third party, including a deceased individual.
- (2) A record may not be refused in terms of [subsection \(1\)](#) insofar as it consists of information
 - (a) about an individual who has consented in terms of [section 72](#) or otherwise in writing to its disclosure to the requester concerned...
 - (c) that was given to the private body by the individual to whom it relates and the individual was informed by or on behalf of the private body, before it is given, that the information belongs to a class of information that would or might be made available to the public...
 - (e) about an individual who is deceased and the requester is—
 - (i) the individual's next of kin; or
 - (ii) making the request with the written consent...

64. Mandatory protection of commercial information of third party.

- (1) Subject to [subsection \(2\)](#), the head of a private body must refuse a request for access to a record of the body if the record contains
- (b) financial, commercial, scientific or technical information, other than trade secrets, of a third party, the disclosure of which would be likely to cause harm to the commercial or financial interests of that third party

65. Mandatory protection of certain confidential information of third party.

The head of a private body must refuse a request for access to a record of the body if its disclosure would constitute an action for breach of a duty of confidence owed to a third party in terms of an agreement.

50. Scope of protection of personal information

- (1) This Chapter only applies to personal information that has been obtained through electronic transactions.
- (2) A data controller may voluntarily subscribe to the principles outlined in [section 51](#) by recording such fact in any agreement with a data subject.
- (3) A data controller must subscribe to all the principles outlined in [section 51](#) and not merely to parts thereof.
- (4) The rights and obligations of the parties in respect of the breach of the principles outlined in [section 51](#) are governed by the terms of any agreement between them.

51. Principles for electronically collecting personal information

- (1) express written permission
- (2) necessary for lawful purpose
- (3) disclose in writing specific purpose
- (4) no other purpose
- (5) record of the personal information and the specific purpose
- (6) no disclosure to a third party
- (7) record of third party disclosure and purpose
- (8) delete or destroy obsolete personal information
- (9) anonymous statistical data freely tradable

Fund to comply with restrictions on sharing of credit information in relation to consumers (members) subject to credit arrangements

- Collection limitation - necessary or directly related to explicit lawful purpose, reasonably
- Data quality – directly from member with consent
- Purpose specification
- Use limitation – cap on retention
- Security safeguards – distribution compatible with purpose
- Openness
- Individual participation
- Accountability – member right to access and correct

- Information Protection Commission (IPC) to oversee data protection implementation
 - (European rather than American self-regulatory model)
 - Monitor compliance
 - Research and monitor development in information technology
 - Register of Data Collection
 - Resolve complaints or refer to industry regulator (FSB or PFA?)
 - Issue, amend or revoke codes of conduct
 - Review adjudicator's decisions under codes of conduct

Section 2: Personal Information is “information about an identifiable, natural person [including] 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... education, or the medical, criminal or employment history of the person or information relating to financial transactions”

Section 9(1) allows personal information to be processed where

- members' consent
- necessary for performance of a contract or agreement
- necessary for members' requested actions to be carried out
- compliance with legal obligation
- necessary to protect member interest
- necessary to uphold legitimate interest of processing party or third party recipient

No longer than necessary for achieving purpose for which information was collected or processed, subject to:

- overriding laws on retention
- member permission to retain otherwise
- retention in terms of contractual rights between parties
- processing party reasonably requires the record for ongoing purposes

Section 54(3) A code of conduct may apply to any one or more of the following

- Specified classes of information
- Specified classes of activity
- Specified industry or class of industries

Section 58(2)(b) A code must provide for the appointment of an independent adjudicator

- Reference to Constitution and right to privacy in principle
- Reference to specific Acts and enforcement mechanisms
- Rules to cover all requisite consent
- Fund / Administrator protocols for prescribed processes under relevant Act (eg inform member of third party request for personal information)
- Specific provisions for electronic transfer of data (per s51 of ECTA)
- Protocol for identifying necessary data and necessary lifespan of data
- Interrogating, monitoring, reviewing service provider and employer's data protection mechanisms
- Details of dispute resolution procedures
- Rules to deal with necessity and address reasonableness