

POPIA Information Regulator update and FAQ session webinar

8 November 2021

FAQ Executive Summary

No	Question	Answer
1.	PAIA Manual exemption: If you are a CC?	<p>A CC is regarded as a company, so you need to measure against the non-exempt criteria provided in the Exemption notice.</p> <p><u>Let's look at the definitions in the applicable acts:</u></p> <p><i>"private body" as defined in PAIA means—</i></p> <ul style="list-style-type: none"> <i>(a) a natural person who carries or has carried on any trade, business or profession, but only in such capacity;</i> <i>(b) a partnership which carries or has carried on any trade, business or profession;</i> <i>(c) any former or existing juristic person,</i> <p><i>but excludes a public body</i></p> <p>The exemption applies to ALL PRIVATE BODIES and Companies not listed in the Schedule</p> <p><i>"private company" as defined in the Companies Act means a profit company that-</i></p> <ul style="list-style-type: none"> <i>(a) is not a public, personal liability, or state-owned company; and</i> <i>(b) [Para. (a) substituted by s. 1 of Act 3/2011]</i> <i>(c) satisfies the criteria set out in section 8(2)(b);</i> <p><i>"profit company" means a company incorporated for the purpose of financial gain for its shareholders;</i></p> <p><i>"public company" means a profit company that is not a state-owned company, a private company or a personal liability company;</i></p> <p><i>"non-profit company" means a company-</i></p> <ul style="list-style-type: none"> <i>(a) incorporated for a public benefit or other object as required by item 1(1) of Schedule 1; and</i> <i>(b) the income and property of which are not distributable to its incorporators, members, directors, officers or persons related to any of them except to the extent permitted by item 1(3) of Schedule 1;</i> <p><i>As per section 8(2)(b) A profit company is-</i></p> <ul style="list-style-type: none"> <i>(a) a state-owned company; or</i> <i>(b) a private company if-</i> <ul style="list-style-type: none"> <i>(i) it is not a state-owned company; and</i> <i>(ii) its Memorandum of Incorporation-</i> <ul style="list-style-type: none"> <i>(aa) prohibits it from offering any of its securities to the public; and</i> <i>(bb) restricts the transferability of its securities;</i> <i>(c) a personal liability company if-</i> <ul style="list-style-type: none"> <i>(i) it meets the criteria for a private company; and</i> <i>(ii) its Memorandum of Incorporation states that it is a personal liability company; or</i> <i>(d) a public company, in any other case.</i>
2.	We are a Non Profit COMPANY. we have less than 10 employees, less than R10m turnover. Are we exempt from having a PAIA manual until 30 Dec 21?	<p>Yes, our POPIA specialist has confirmed that NPCs are considered private bodies under POPIA.</p> <p><i>See response in question above</i></p>

3.	if not a Pty Ltd but a sole proprietor would they be exempt from compiling PAIA Manual?	Yes, because they are a private body (as per PAIA) Remember that they are only exempt until 31 December 2021
4.	Does this exempt trusts then?	There have been debates whether or not Trusts fall under private body in terms of POPIA, but all current interpretations of POPIA confirm that a trust is regarded as a private body. Therefore, it would be exempt – in line with the conditions in the exemption notice (i.e. the sectors, number of employees and turnover). GDPR requires a Trust to comply to the privacy regulations.
5.	Is the private body and company not defined by two diff acts?	Yes, it is. “Private Body” is defined in the PAIA “company” is defined in the Companies Act means a juristic person incorporated in terms of this Act, a domesticated company, or a juristic person that, immediately before the effective date- (a) was registered in terms of the- (i) Companies Act, 1973 (Act No. 61 of 1973), other than as an external company as defined in that Act; or (ii) Close Corporations Act, 1984 (Act No. 69 of 1984), if it has subsequently been converted in terms of Schedule 2; (b) was in existence and recognised as an „existing company“ in terms of the Companies Act, 1973 (Act No. 61 of 1973); or (c) was deregistered in terms of the Companies Act, 1973 (Act No. 61 of 1973), and has subsequently been re-registered in terms of this Act;
6.	Re Retention periods - if you have a policy of say destroying documentation every 5 years unless required by any law to keep it for longer, what happens if somebody like eg SARS comes and asks for that information?	As you are the party drawing up your policy it is recommended that you include terms that work for you and your requirements with bodies such as SARS. <i>Suggestion: Insert the words “or Regulations and Best Practice” after LAW</i>
7.	Do you have a disclosure note for our emails with regards to POPIA ?	Our POPIA specialist has provided the following sample Disclaimer The information contained in this communication from the sender is confidential. It is intended solely for use by the recipient and those authorised to receive it. If you are not the intended recipient, you are hereby notified that any disclosure, copying, distribution or taking action in relation of the contents of this information is strictly prohibited and may be unlawful.
8.	What if we do have information that is very old but by now we have no idea what happened to the person it belonged to or do not have any current contact information to inform them?	It might actually be considered information that you no longer need. First determine if it is still information you want to keep (could you need it in the future e.g. for SARS?). If not, then delete / destroy it. Not being able to trace the client would fall under “reasonable and practical” measures.
9.	In the case of dormant entities - must they also comply with PAIA and POPIA?	I don’t think so – the definition of a POPIA Private Body states that it is “a natural person who carries or has carried on any trade, business or profession”. If the entity is dormant, then it has not carried on any trade, business or profession and would therefore not be regarded as a Private Body for POPIA. Not sure about PAIA...

10.	If SARS request client information from us, must they complete the usual PAIA application form??	No, some regulatory bodies do not need to apply for disclosure w.r.t. PAIA – refer to the exclusions
11.	You mentioned that clients are suddenly appointing "scanners" and digital backup service providers. My question is: Does this act make it compulsory to go digital? Or is it just that you have to comply with the rules (eg backups, local servers, access, control, etc) if and when you do?	<p>POPIA <u>does not</u> stipulate that your information should be digitized. So, you don't have to go digital. The perception is out there that it is easier to keep digital records safe – possibly because it is not physically seen...</p> <p>You are still allowed to have paper-based records, but you need to keep them secure, so your physical safeguards become very important.</p> <p>And the Act requires you to treat special information differently from other information, i.e. it must be kept significantly more secure and restrict access to the special information.</p> <p>This implies that you need to start classifying information, and put relevant safeguards in place.</p> <p><i>As long as you can prove that the information officer has audited the safeguards, the Information Regulator should be happy...</i></p>
12.	When you are collecting CVs for recruitment purposes, and you want to keep some "good" CVs for future positions – are you allowed to keep these CVs? Even if the candidate was unsuccessful in the current job application?	Yes, you are allowed to keep these CVs. It is important, however, that you communicate to the unsuccessful candidate that you will be keeping their CV for possible future positions.
13.	Do we, as accountants and tax practitioners, need explicit consent from the clients to share their information with government institutions (e.g. SARS, UIF, CIPC, etc.) or with banks when asked to?	<p>Yes, you need specific consent from your clients to share their information.</p> <p>This might be documented in your engagement letter when you set out the services that you will provide to your client, or you can obtain specific consent from your client via e.g. e-mail, etc.</p> <p>Should a government institution ask you for information, then you DO NOT need to obtain consent from your client.</p> <p><i>Refer to Section 11 of POPIA</i></p>
14.	Do we need to list our suppliers as well as our clients and when first we engaged with them?	No, it is not a requirement. BUT it will benefit you when you have an audit. So, it is advisable to insert a supplier's list (on a spreadsheet) in your compliance framework. You may also include information on when contracts with these suppliers are reviewed and updated.
15.	If your information can still be sold to third parties what does it help to go through all this POPIA regulations?	POPIA is coming into effect exactly for the purpose of protecting your information. Your information may only be sold with your consent and most of the consent is included in the fine print of terms and conditions. Do not sign unless you fully understand what is asked of you.
16.	Re repeat customers: If you put all possible services in your engagement letter and the customer consents to it (even though a specific service may or may not be done for them), will that count as consent should you change your service?	<p>Yes, it is a good idea to insert this into your engagement letter</p> <p>Perhaps state that "at any point in time, these are the services provided to you and you consent to"</p> <p>However, should you want to add on a new / unrelated service, you will need to request consent for it.</p>
17.	So, if my information is sold to a third party but they do not have my consent? Are they holding my info legally?	If you indeed did not give Vodacom consent to sell or "market" your information then yes, your rights were infringed upon.

	I consented to vodacom but they sold it to BlueLabel? I have not consented to Blue Label	BlueLabel may have purchased the data under the assumption that consent was received from you the data subject, i.e. "do you consent to info being shared for marketing purposes?"
18.	If books are done on online packages like Xero or Quickbooks. Information is on a third parties platform. What type of consent do we get from the client?	<p>@Magdalena: You are now required to have written SLAs (Service Level Agreements) with these 3rd parties, as they are facilitating your processing of your clients' information.</p> <p>Your engagement letter should stipulate which third parties may have access to their information and it would help to state that each third party is bound to non-disclosure through your agreement with them. But make sure you have read the agreement and that indeed a clause to this effect exists.</p>
19.	What if a client requests you to delete your information on them, but later a legal matter arise in where you need it to defend maybe your case?	<p>It is very important to justify WHY you cannot delete information POPIA & PAIA are both important here</p> <p>Perhaps you could inform your client that the information is safe and updated, and will be kept to comply with whatever regulations require you to keep it. So, it is a question of really educating your client on this!</p>
20.	What if a client refuses to register for POPIA? Despite informing them to do so	<p>Then there is little you can do about it, because you cannot enforce it.</p> <p>You would need to consider your ethical responsibilities in terms of NOCLAR (Non-compliance with laws and regulations) and report the non-compliance to the appropriate party (as set out in your Code of Conduct).</p>