

## 1. OVERVIEW

We discuss what Direct Marketing and Consent are, when it's necessary to obtain consent, when not to and what it should look like.



## 2. DIRECT MARKETING AND THE DREADED CONSENT

Everywhere we go, we are asked the same questions. Do we really have to use the terrible, horrible, no good, very bad form 4, to get consent for direct marketing? And do we then really have to get consent again from our current database?

**TO ANSWER THESE QUESTIONS, LET'S GO BACK TO SOME DIRECT MARKETING BASICS.**

### 2.1. WHAT IS DIRECT MARKETING?

According to Section 1 of POPIA, '[D]irect marketing means to approach a data subject, either in person or by mail or electronic communication, for the direct or indirect purpose of – (a) Promoting or offering to supply, in the ordinary course of business, any goods or services to the data subject; or (b) Requesting the data subject to make a donation of any kind for any reason.'

To qualify as direct marketing in terms of POPIA, the marketing message must:

- be directed at a particular data subject and not at the public in general as with advertising; and
- have the 'direct or indirect' purpose

of promoting or offering goods or services for supply or to request a donation

Not all communications with data subjects will constitute 'direct marketing'. Routine client service messages do not qualify as direct marketing.

### 2.2. EXAMPLES OF DIRECT MARKETING INCLUDE:

POPIA covers direct marketing sent through the following channels:

- Email
- SMS
- fax
- automatic calling machines
- push notifications
- direct messaging via social media
- advertising through social media platforms or display banners when a custom audience is targeted
- snail mail (includes messages



delivered by carrier pigeon, owl and raven)

- telemarketing; and
- any other channels that become available as technology evolves.

For marketers, one of the most important definitions in POPIA is 'electronic communication'. If direct marketing is done 'by means of electronic communication', the consent requirements in section 69 will apply. In POPIA 'electronic communication' is defined as any text, voice, sound or image message sent over an electronic communications network which is stored in the network or in the recipient's terminal equipment until it is collected by the recipient'.

Section 69(1) provides that electronic communication includes automatic calling machines, facsimile machines, SMSes or email.

The definition has three elements:

- any text, voice, sound or image message,
- sent over an electronic communications network,
- which is stored in the network or in the recipient's terminal equipment until it is collected by the recipient.

For section 69 to apply, all three elements of the definition of electronic communications network must apply. For example, it is not enough that a message is sent over an electronic communications network; the message must also be stored in the network until it is collected by the data subject. Once you have established that it is direct marketing you want to send out, your next step is to establish whether you need to get an opt-in consent from the person before you start marketing to them.

### 2.3. WHEN DO YOU NEED CONSENT AND WHAT MUST IT LOOK LIKE?

Section 69(1) distinguishes between unsolicited direct marketing and direct marketing that is sent to a data subject that is a customer of the responsible party. If you are contacting a person for the first time, you will need to obtain consent for any unsolicited marketing. In other words, where you want to contact a person for the first time with marketing communication which they didn't ask for, you must obtain consent before sending your marketing.

The consent must:

- be a **voluntary, specific**, and **informed** expression of will.
  - **Voluntary** means that the

consent must be a genuine choice.

- **Specific** and informed means that it must be clear what direct marketing the person is consenting to.
- **Expression of will** means that the person must give consent through a clear, unambiguous affirmative act. The use of pre-ticked opt-in boxes, or double negatives are not allowed.
- be an **opt-in**, which means that if the person does nothing (i.e. does not tick the box), that person will not receive marketing.
- contain the **identity and contact information of the marketer** as well as a person designated to act on behalf of the marketer (usually the information officer or the deputy information officer).
- contain the **full name** of the person who gives consent.
- be **signed** in person or electronically.
- include
  - the **date and location** where consent is given
  - the **goods or services** that will be marketed (in general terms or classes of goods)
  - the **method of communication** (e.g., email, SMS).

Some important good news: You don't need to use the Regulator's Form 4 word for word. Just make sure that the form you use is clear, understandable and substantially similar.

## 2.4. YOU WILL OFTEN NOT NEED CONSENT

There will be many instances when you don't need an opt-in consent. In general, if the person you want to market to has an existing relationship with you it won't be necessary to get consent. For instance, the person applied for your products or services already, they subscribed to your newsletter before, or they asked you for more information.

In terms of section 69(3) of POPIA, direct marketing consent is **not** required from a person if

- you collected the person's personal information while they were enquiring about or purchasing your goods or services,
- the person is told that their personal information would be used to send marketing communications,
- you only send marketing communication for your own goods or services, and those goods or services are similar to the ones the person contacted you about or purchased,
- the person is given an opportunity to unsubscribe at the time their information was collected (i.e., they were given an opportunity to opt-out), and
- the person can unsubscribe every time they receive marketing communications from you.

You need to comply with all the above requirements. If any of the requirements are not met, an opt-in consent must be obtained before marketing communications can be sent.

To avoid having to get an opt-in

consent, you need to comply with all the requirements we've listed, and you must be able to prove that you comply. This means that you need to know where you got the information in your database, the circumstances under which you got it, and what privacy notices or terms and conditions were in place at the time and that you have an ironclad unsubscribe process in place.

## 2.5. THE RISK-BASED APPROACH

Marketers who can't comply and provide proof of their compliance have some difficult decisions to make now that POPIA is in effect. Do you send an opt-in consent to your base and risk losing the subscribers that don't open the mail or don't respond? Or do you send a message with an opt-out and risk that the Regulator doesn't think it is good enough? To answer this, we are a fan of a risk-based approach. We suggest an exercise where we consider the following questions:

- When last did you market to the database? Will they be surprised to hear from you? Worse yet, will they think 'Who is this?' or 'Where did they get my information?' A surprised data subject is one who is more likely to complain to the Information Regulator. But, if your database is used to hearing from you, the risk is lower.
- How many unsubscribes do you get? If people like receiving your marketing, they also are unlikely to complain. If, however, you have high unsubscribe rates on your database, you might already be annoying them.
- Do you have a fool-proof unsubscribe process (and have

you tested it)? If a data subject doesn't want to hear from you, they will probably just unsubscribe. If they unsubscribe, but you do not process it and they hear from you again they will complain to the Information Regulator.

- How well is your database performing? What is your return on investment? How are those open-rates? How essential is direct marketing to your bottom line compared to other forms of marketing? No risk analysis is complete without knowing this. If you are not making money out of your direct marketing, why risk getting into trouble?

If your return on your direct marketing is great and your customers are loyal, maybe you can afford to take the risk. Give your legal adviser a biscuit or something, though; they will find this hard to handle.



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