JUTA
POPIA PORTAL

VETTING AND SCREENING
DATA SUBJECTS UNDER POPIA

1. OVERVIEW

Is it possible to 'vet' or 'screen' or dare we say 'profile' data subjects for their eligibility or suitability for certain goods and services under POPIA? This question has become increasingly important along with the concept of personalising interactions with consumers to drive revenue and growth. For example, a **2021 study published by McKinsey & Co.** found that companies that excel at personalisation generate 40% more revenue from those activities than average players. These are statistics that cannot be ignored, but to personalise goods and services for consumers, some level of 'profiling' needs to be conducted. The question here is, how does this gel with data privacy requirements under POPIA?
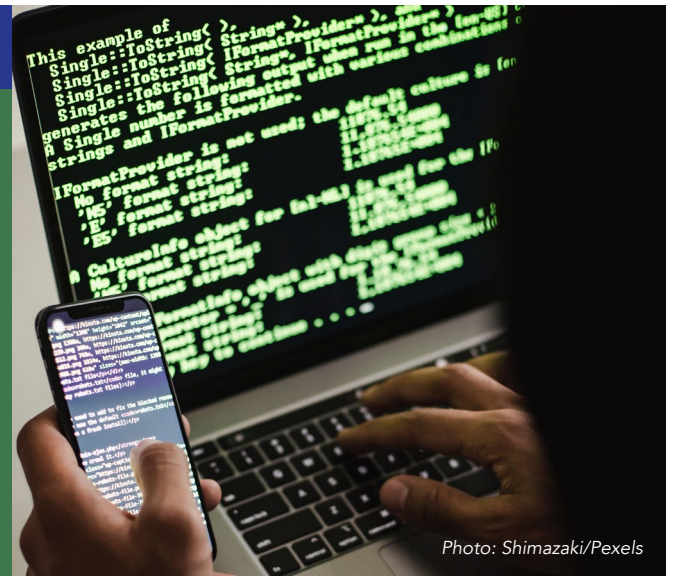

Photo: Shimazaki/Pexels

2. WHAT IS 'PROFILING' EXACTLY?

POPIA does not provide us with a definition of 'profiling'. HOWEVER, section 71(1) of POPIA includes a list of examples that would be considered 'profiling'. This includes profiles created to assess the data subject's 'performance at work, or his or her creditworthiness, reliability, location, health, personal preferences or conduct'.

The SA Law Reform Commission described profiling as a situation

'where information which relates to an individual is structured in such a way that it can begin to answer questions about that person, so as to put his or her private behaviour under surveillance'.

The SA Law Reform Commission perceived that a profiling process has two main components:
- profile generation: the process of inferring a profile; and
- profile application: the process of treating persons/entities in light of this profile.

'Treating' refers to when a responsible party makes a decision about the data subject based on this profile. For example, a responsible party would be 'treating' the data subject's profile when they found their decision about:

- whether the data subject is eligible for a particular product or service
- what certain products, services or types of marketing will best suit the data subject; and
- what kind of products or services to send the data subject, direct marketing, discounts or coupons, on the data subject's profile.

3. CAN YOU JUSTIFY PROFILING UNDER POPIA?

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Yes, you can. Responsible parties can use either section 11(1)(*f*) (the legitimate interest of the responsible party or another third party) or section 11(1)(*a*) (consent of the data subject) of POPIA as legal bases to justify their profiling activities.

A good litmus test for deciding which legal basis to use to justify your profiling activity is set out in **the ICO's Experian Enforcement Notice.** Here, Experian was doing profiling for direct marketing purposes, but the test can easily be applied to scenarios where the responsible party is profiling data subjects for other purposes.

The ICO held that if the profiling activity conducted for direct marketing purposes is not considered too 'intrusive', then the Controller (GDPR-speak for 'responsible party') can justify the processing activity based on their legitimate interest or the legitimate interest of another third party. If the profiling activity for direct marketing purposes is too intrusive, then the controller must obtain the data subject's consent to conduct the profiling activity. Factors a responsible party should consider when determining whether their profiling activity is 'intrusive' or not include:

- the qualities of the data being used (for example, if the responsible party uses modelled data – this is likely to be less intrusive than direct behavioural or location-based tracking – but the type of data modelled, including predicted wealth and family background, can still be intrusive)
- the amount of data concerning a data subject being used (intrusiveness can be cumulative, so the more attributes being predicted, the more likely the processing is to be intrusive); and
- the expectations of the data subject being profiled (feelings of intrusion are likely to increase where processing is surprising based either on the activity or the relationship with the controller).

If you want to read about a profiling activity which is DEFINITELY intrusive, you can read about **how back in 2012, Target was profiling shoppers to determine if they were pregnant or not and then sending shoppers coupons for baby clothes and cribs.**

4. AUTOMATED DECISION-MAKING VERSUS PROFILING

If your profiling activity amounts to an automated decision as defined in section 71(1) of POPIA, you will not be allowed to perform that profiling activity unless one of the exemptions detailed in section 71(2) applies. You can read more about these exemptions in Chapter 15.

So how do you know if your profiling activity amounts to an automated decision for the purposes of section 71 or not?

For profiling to be considered 'automated decision-making', the profiling must:

- result in legal consequences for the data subject or affect the data subject to a substantial degree; and
- be based solely on the automated processing of personal information (i.e. no human involvement).

Even if the profiling does not result in legal consequences, it will still count as 'automated decision-making' for section 71 of POPIA if it involves a decision which will affect the data subject 'to a substantial degree'.

What counts as 'significant' or 'substantial' may vary from data subject to data subject, depending on their unique circumstances. In the context of the GDPR, the **Article 29 Data Protection Working Party** has provided a series of examples of automated decision-making that may

5. WHAT DO YOU DO NOW?

Photo: Adrian Eegeci/Pexels

If you do conduct profiling activities, you need to consider the following issues to ensure your profiling activities are POPIA-compliant:

- What is your legal basis under POPIA for this profiling activity, legitimate interest or consent?

- If the legal basis you will use is the legitimate interest of the responsible party or third party (you need to do a Legitimate Interest Assessment – you can read more about Legitimate Interest Assessments in Chapter 2). This is to ensure you can rely on legitimate interest as a legal basis for your profiling activity.

- If the outcome of your Legitimate Interest Assessment is that you can rely on the legitimate interest of the responsible party or of a third party as the legal basis for your profiling activity, there is still one more step. You still need to determine if your profiling activity is 'intrusive' or not according to the criteria discussed above. If your profiling activity is considered 'intrusive', you must ask for the data subject's consent.

- You also need to check if your profiling activity is considered 'automated decision-making' for the purposes of section 71 of POPIA.

- If your profiling activity constitutes 'automated decision-making', you must check if you have a valid exemption in section 71(2) of POPIA to carry on with this activity.

Once you have determined what category your profiling activity falls into, you must also ensure that data subjects are properly informed about this activity in your privacy notice.

affect a data subject 'to a substantial degree' in their working paper 'Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679'.

These examples include decisions that:
- have a prolonged or permanent impact
- affect the behaviour and choices of data subjects
- lead to discrimination or exclusion of individuals
- affect a data subject's financial circumstances (e.g. their eligibility for credit)
- affect a data subject's access to health care
- deny a data subject an employment opportunity or put them at a serious disadvantage; and
- affect a data subject's access to education (e.g. university admission).

6. FURTHER READING

You can find out more about profiling and automated decision-making in **Chapter 15.** If you are interested in reading about profiling and automated decision-making in the context of behavioural advertising, ad-tracking and all things cookies, then look at Novation's white paper on these topics, **'Lifting the lid on POPIA: Answering your Adtech and Martech questions'.**