JUTA
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WHAT IS IT ABOUT PERSONAL INFORMATION WHICH IS 'PUBLICLY AVAILABLE' OR 'IN THE PUBLIC DOMAIN'?

1. OVERVIEW

Every so often, a client will say, 'But that personal information is publicly available, so POPIA does not apply' … and unfortunately, one has to tell them that this statement is false. POPIA applies to all personal information (unless it is de-identified etc), whether it is 'publicly available' or not. There are exceptions relating to the 'direct collection rule' under POPIA for personal information that is 'either in or derived from a public record' or 'where the data subject has deliberately made the personal information public'. This article discusses how these exceptions work within what many consider 'publicly available information'.

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2. WHAT IS 'PUBLICLY AVAILABLE INFORMATION', EXACTLY?

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Many seem to think that any personal information available on the internet or a social media profile is 'publicly available', and therefore different rules apply from a data privacy perspective. POPIA does not offer a formal definition of 'publicly available information'. Instead, the closest way in which POPIA relaxes the rules concerning any 'publicly available information' is in section 12(2)(*a*) and (*b*) of POPIA. These provisions set out that responsible parties are exempt from the 'direct collection rule' concerning personal information 'either in or derived from a public record' or 'where the data subject has deliberately made the personal information public'. POPIA provides a specific definition of a 'public record' in its definitions section, which we already discuss in significant detail in Chapter 10. The exception of 'where the data subject has deliberately made the personal information public' is a little more nuanced and requires further examination.

3. HOW DO OTHER JURISDICTIONS DEFINE 'PUBLICLY AVAILABLE INFORMATION'?

We benchmarked how a few other jurisdictions define and deal with this issue. Many other jurisdictions do not separately deal with 'public records' (such as the Deeds' Registry, Companies and Intellectual Property Commission ('CIPC') records and court records) and other 'publicly available' information. New Zealand, for example, defines 'publicly available information' as 'any information which is contained in a publicly available publication' and provides that 'publicly available publication' includes things like 'books, magazines, newspapers, information posted publicly online and public registers'.

Canada, on the other hand, defines 'publicly available information' in the context of personal information as:

- personal information consisting of the name, address and telephone number of a subscriber that appears in a telephone directory that is available to the public, where the subscriber can refuse to have the personal information appear in the directory;
- personal information including the name, title, address and telephone number of an individual that appears in a professional or business directory, listing or notice that is available to the public, where the collection, use and disclosure of the personal information relate directly to the purpose for which the information appears in the directory, listing or notice;
- personal information that appears in a registry collected under a statutory authority and to which a right of public access is authorised by law, where the collection, use and disclosure of the personal information relate directly to the purpose for which the information appears in the registry;
- personal information that appears in a record or document of a judicial or quasi-judicial body, which is available to the public, where the collection, use and disclosure of the personal information relate directly to the purpose for which the information appears in the record or document; and
- personal information that appears in a publication, including a magazine, book or newspaper, in printed or electronic form, that is available to the public, where the individual has provided the information.

The various US states which have enacted data privacy legislation have taken a different route and have expressly excluded 'publicly available information' from their definitions of 'personal information'. In terms of the newly enacted California Privacy Rights Act, 'publicly available information' is defined as:

> *[I]nformation that is lawfully made available from federal, state, or local government records, or information that a business has a reasonable basis to believe is lawfully made available to the general public by the consumer or from widely distributed media, or by the consumer; or information made available by a person to whom the consumer has disclosed the information if the consumer has not restricted the information to a specific audience. 'Publicly available' does not mean biometric information collected by a business about a consumer without the consumer's knowledge.*

4. HOW CAN YOU USE POPIA'S EXCEPTIONS TO THE 'THIRD PARTY COLLECTION' RULE IN THIS CONTEXT?

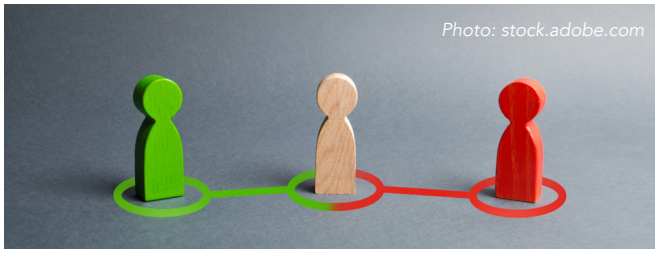
Photo: stock.adobe.com

While we have benchmarked various definitions of 'publicly available information', we must note that POPIA's section 12(2)(*b*) exemption only relates to 'where the data subject has deliberately made the personal information public'. This is a different standard, and therefore we have developed the below test to determine how to use it:

Please note: the answer to all three questions must be 'yes' for this exception to apply.

QUESTION TO ASK	FACTORS TO CONSIDER
Has the information been made public?	• Clear evidence exists that the data subject's personal information is available to the public or in the public domain. • If any protection mechanism prohibits the public from accessing personal information (e.g. a paywall), this personal information would not be considered 'publicly available' or 'available in the public domain'. For example, suppose you have to be 'friends' or 'connections' with a data subject on a social media website to see the personal information. In that case, this personal information will not be considered 'available in the public domain'.[1] • Personal information is also viewed as 'publicly available' if it is available in publications such as books, magazines, newspapers and online publications (e.g. 'News 24').[2] • Additionally, personal information can only be considered 'available in the public domain' if it is realistically accessible to a general public member at the time it was collected.
Was this information made public by the data subject themselves?	• If someone else published the personal information, this legal justification does not apply. For example, if the information was published on a company website without the data subject's knowledge. • The responsible party must be able to prove who published the personal information.
Did the data subject deliberately intend to make the information public?	• There must be evidence of an unmistakably deliberate affirmative action by the data subject to publicise the information. For example, the data subject published the information on their own social media account, on their own website they set up themselves, or in a newspaper article or media blog where the data subject is personally interviewed.[3]


Photo: Unsplash - Kimberly Farmer

5. FURTHER READING

You can read more about exceptions to the 'direct collection rule' under section 12 of POPIA in **Chapter 10**.

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