

TELEMARKETING IN SOUTH AFRICA: NAVIGATING THE POPIA LANDSCAPE

1. OVERVIEW

The telemarketing sector in South Africa is currently undergoing significant regulatory scrutiny. The Information Regulator is taking a strong stance against direct marketers. We all know how annoying spam calls and emails can be, but what is and isn't allowed in terms of POPIA?



2. CLARIFYING ELECTRONIC COMMUNICATIONS UNDER POPIA



The Information Regulator is finalising a guidance note on direct marketing to provide clarity on compliance with POPIA. This guidance note is going to indicate that telephone calls are considered electronic communication under section 69 of POPIA despite some contention.

The definition of 'electronic communication' in POPIA contains 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 the recipient collects it.

While the first two elements apply to live telephone calls, the inclusion of the third element has sparked debate. The Information Regulator has fluctuated in their stance¹, suggesting that ultimately, this matter may require judicial clarification.

3. LATEST DEVELOPMENTS: FIRST ENFORCEMENT NOTICE RELATING TO DIRECT MARKETING



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On 21 February 2024, the first enforcement notice relating to direct marketing was sent to FT Rams Consulting. The main reasons for the notice were that the responsible party did not:

- stop sending direct marketing after the recipient opted out and
- did not obtain the recipient's consent before sending them electronic direct marketing.

The Information Regulator released a media statement shortly before the enforcement notice, which had some very interesting statements. Advocate Pansy Tlakula, the chairperson of the Information Regulator:

Our leniency regarding direct marketing through unsolicited electronic communications is going to be a thing of the past because responsible parties (public or private bodies) ignore the provisions of section 69 of POPIA and infringe on the rights of data subjects.²

A few things concern us about the Regulator's media statement.

Firstly, their inclusion of the telephone as an electronic communication. (Note FT Rams Consulting were emailing people, so why are telephone calls even mentioned!?)

This is what they said: 'In the Enforcement Notice, the Regulator has ordered FT Rams Consulting, among other things, to immediately stop sending unsolicited direct marketing messages by means of any electronic communication, including telephone, fax, SMS, email or automatic calling machine, to any data subject who has not consented, including the complainant.'

Secondly, the Regulator states that the responsible party must use the [prescribed form](#) to obtain consent. They said, 'FT Rams Consulting must use the form prescribed by the Regulator for this purpose. The use of this form is compulsory.'

One can criticise many things about this form (length, use of legalese, utter disregard for user-experience principles), but the current concern is about what is not on the form. The form gives the recipient options to consent to specific methods of communication. The options are fax, email, SMS, and 'other' that the recipient must specify. The telephone is not even on this list. Similarly, the telephone is not mentioned in section 69 of POPIA, where direct marketing by means of unsolicited electronic communication is regulated, while the other examples are mentioned.

Can you imagine the number of long, painful telephone calls you would receive if all responsible parties were to call you, read the 529 words contained in Form 4 just so that you can say no thank you, don't fax, email, SMS or 'other' me, please? Not to mention the thousands of jobs lost once everyone has opted out.

4. CONCLUSION

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As the Information Regulator clarifies the application of POPIA to electronic communications and takes decisive action against non-compliance, telemarketers and organisations processing personal information must understand and adhere to their legal obligations. The direct marketing guidance note is coming, and it is highly likely that it's going to end up in court for a declaratory order.



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5. FURTHER READING

You can read more about direct marketing and how POPIA defines electronic communication in [Chapter 16](#).

Watch the Information Regulator's interview [here](#)

The [enforcement notice](#) sent to FT Rams can be read