



# Protection of Personal Information Act, 2013

## Direct Marketing Disclosures and Consent

Direct Marketing is one of the areas affected by POPIA in its entirety, both to the marketer as well as the consumer. POPIA differentiates between Direct Marketing by means of unsolicited electronic communications, and Direct Marketing in person or by mail or telephone. Several provisions in POPIA draw this distinction.

**"Direct Marketing"**, as defined in POPIA, means to approach a Data Subject, either in person or by mail or electronic communication, for the direct or indirect purpose of—

- > promoting or offering to supply, in the ordinary course of business, any goods or services to the Data Subject; or
- > requesting the Data Subject to make a donation of any kind for any reason.

**"Electronic Communication"**, on the other hand, 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".

### Processing Conditions

POPIA provides that the conditions for the lawful processing of Personal Information by or for a Responsible Party for the purpose of Direct Marketing, by any means, are reflected in the Processing Conditions, read with the requirements on Direct Marketing provisions in respect of Direct Marketing by means of unsolicited electronic communications.

### Rights of Data Subjects in respect of the Processing of their Personal Information

Further provisions relevant to Direct Marketing include provisions which provide that a Data Subject has the right to:

- > Have his/her/its Personal Information processed in accordance with the Processing Conditions, including the right to object (i.e. 'opt-out') to the processing of his/her/its Personal Information at any time for purposes of Direct Marketing, and the right not to have his/her/its Personal Information processed for purposes of Direct Marketing by means of unsolicited electronic communications, except for certain provisions;
- > Object, at any time, to the processing of Personal Information for purposes of direct marketing other than Direct Marketing by means of unsolicited electronic communications. If a Data Subject has so objected to the processing of Personal Information, the Responsible Party may no longer process the Personal Information.

### Direct Marketing Prohibitions

POPIA further provides that the processing of Personal Information of a Data Subject for the purpose of Direct Marketing by means of any form of electronic communication, including automatic calling machines (i.e. machines that are able to do automated calls without human intervention), facsimile machines, SMSs or e-mail is prohibited, unless the Data Subject has given his/her/ its consent to the processing, or is a customer of the Responsible Party on certain conditions.

### Consent from Data Subjects

POPIA determines that a Responsible Party may approach a Data Subject whose consent is required, *and who has not previously withheld such consent*, only once in the prescribed manner and form in order to request the consent of that Data Subject. The POPIA Regulations require that a Responsible Party must submit a request for written consent to that Data Subject on the prescribed form, which is included in your tailored CelaPOPI Toolkit [Document 16] POPIA Direct Marketing Authorisation. Consent may also be obtained via SMS, e-mail, standard mail, USSD (*Unstructured Supplementary Service Data*) Code or in any other acceptable form, in the prescribed format.

The POPIA Explanatory Memorandum provides the following:

Some forms of Direct Marketing are, or have the capacity to be, more intrusive than others. The general principle reflected in POPIA, in respect of Direct Marketing by means of unsolicited electronic communication, is that if a Data Subject does not consent to the processing of his/her/its Personal Information, or is not a customer of the Responsible Party, the Responsible Party will not be allowed to process the Personal Information of the Data

Subject. A Responsible Party will be allowed to contact a Data Subject only once in order to request the consent of the Data Subject concerned.

### **Processing of Personal Information of existing Customers or Clients**

POPIA specifically provides that a Responsible Party may only process the Personal Information of a Data Subject, who is an existing customer or client of the Responsible Party, if the Responsible Party has obtained the contact details of the Data Subject in the context of the sale of a product or service—

- > for the purpose of Direct Marketing of the Responsible Party's own similar products or services, and
- > if the Data Subject has been given a reasonable opportunity to object, free of charge and in a manner free of unnecessary formality, to such use of his/her/its electronic details at the time when the information was collected, as well as on the occasion of each communication with the Data Subject for the purpose of marketing, if the Data Subject has not initially refused such use.

### **Sender's Identity**

Section 69(4) of POPIA provides that any communication for the purpose of Direct Marketing must contain details of the identity of the sender or the person on whose behalf the communication has been sent, and an address or other contact details to which the recipient may send a request that such communications cease.