



## forestry, fisheries & the environment

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### QUESTIONS AND RESPONSES RELATING TO RELATIONSHIP BETWEEN THE ENVIRONMENTAL IMPACT ASSESSMENT REGULATIONS, 2014/ NATIONAL APPEAL REGULATIONS, 2014 AND THE PROTECTION OF PERSONAL INFORMATION ACT, 2013 (ACT NO. 14 OF 2013): COMPILED BY DIRECTORATE: LEGAL SUPPORT NEMA IN CONSULTATION WITH DIRECTORATE: CORPORATE LEGAL SUPPORT

Question Number	Question	Response
1.	During the appeal phase of the decision, the appellants (including I&APs) are required to submit their appeals to the respective competent authority/ies and share a copy of the lodged appeal with other registered I&APs. It is most likely that the appellants then request for the database from the EAP which contains names and contact details of the registered I&APs to do this. Could you please provide us with guidance on how we can go about processing these requests while complying with the POPI Act?	<p>Regulation 4 of the National Appeal Regulations, 2014 provides that: "An appellant must submit the appeal to the appeal administrator, and a copy of the appeal to the applicant, any registered interested and affected party and any organ of state with interest in the matter within 20 days from..."</p> <p>Regulation 4 of the National Appeal Regulations therefore imposes a legal obligation on an appellant to submit copies of the appeal to registered interested and affected parties (I&amp;APs), which can only be done if the appellant is provided with the details (often in the form of a register) of registered I&amp;APs.</p> <p>The definition of "personal information" in the POPIA includes: "(h) the name of the person if it appears with other personal information relating to the person or if the disclosure of the name itself would reveal information about the person;". Since the personal information to be provided to the appellant will include the names and contact details of registered I&amp;APs to enable them to be contacted and provided with a copy of the appeal it needs to be ensured that there is compliance with the POPIA when details of registered I&amp;APs are made available to an appellant.</p> <ul style="list-style-type: none"><li>• Section 3(3)(b) of POPIA provides that the POPIA must be interpreted in a manner that <b>does not prevent any public or private body from exercising or performing its powers, duties and functions in terms of the law</b> as far as such powers, duties and functions relate to the processing of personal information and such processing is in accordance with the POPIA or any other legislation, as referred to in section 3(2), that regulates the processing of personal information. The appellant has a legal duty to inform registered I&amp;APs of the appeal in terms of regulation 4 of the National Appeal Regulations to enable registered I&amp;APs to be provided with a copy of the appeal so that they can participate in the appeal process. Registered I&amp;APs must be provided with a copy of the appeal to enable them to submit responding statements (should they wish to do so), which responding statements inform the recommendation on the appeal and ultimately the decision made by the appeal authority. POPIA must therefore be interpreted in a manner that does not prevent the appellant from performing its duties under the National Appeal Regulations provided the processing is in accordance with POPIA and meets the requirements of the National Appeal Regulations.</li></ul>



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	<ul style="list-style-type: none"><li>• In terms of section 4 of POPIA, in order for personal information to be processed lawfully there needs to be compliance with the conditions for the processing of personal information, which are the conditions relating to accountability, processing limitation, purpose specification, further processing limitation, information quality, openness, security safeguards and data participation. All EAPs and appellants are therefore required to take note of these conditions and ensure they are adhered to with regard to the processing and keeping of personal information. Of relevance to the current question is the sections below:<ul style="list-style-type: none"><li>○ Section 9 of POPIA requires that personal information must be processed lawfully and in a reasonable manner that does not infringe the privacy of the data subject. The element of "lawfulness" requires from the responsible party not to act unlawfully in its collection or processing of personal information. The second element of "reasonableness" is perhaps more complex. In most instances, the foundation for determination of reasonableness will be the "Purpose Specification", meaning that personal information must be collected for a specific, explicitly defined and lawful purpose related to a function or activity of the responsible party, which in turn will inform the data subject's expectation as well as the responsible party's processing of personal information. The responsible party must therefore take into account the interests and reasonable expectations of data subjects, which in this case is that registered I&amp;APs should be able to be informed of and participate in appeal procedures. This requirement is therefore met as the personal information is processed lawfully and in a reasonable manner that does not infringe the privacy of the data subject.</li><li>○ Section 11(1)(a) of POPIA provides that personal information may only be processed if the data subject consents to the processing. Consent must be a voluntary, specific and informed expression of will in terms of which permission is given for the processing of personal information. Alternatively, in terms of section 11(1)(b) to (f) of POPIA processing of information may occur without the consent of the data subject but subject to specific purposes that include:<ul style="list-style-type: none"><li>• Section 11(1)(c) provides that personal information may only be processed if processing complies with <u>an obligation imposed by law</u> on the responsible party. As indicated above the processing of the personal information is required to give effect to regulation 4 of the National Appeal Regulations.</li><li>• Section 11(1)(d) provides that personal information may only be processed if processing <u>protects a legitimate interest of the data subject</u>. For the current scenario the processing of the personal information is done to give effect and protects the legitimate interest of the registered I&amp;APs to be informed of and be able to participate in appeal procedures, should they wish to do so.</li></ul></li></ul>In terms of this section the personal information may therefore be processed <b>without the consent of the data subject for the processing</b>.<ul style="list-style-type: none"><li>○ Section 12(1) of POPIA provides that personal information must be collected directly from the data subject except as otherwise provided for in subsection (2). Initially, at the invitation of the applicant/EAP, the commenting parties/ I&amp;APs submit their comments and names directly to the requester (applicant/EAP) and therefore there is compliance with</li></ul></li></ul>
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		<p>this requirement. Section 12(2)(b) provides that it is not necessary to comply with subsection 12(1), and to collect data directly from the data subject, if, amongst other things, <u>the data subject has consented to the collection of the information from other sources</u>. Alternatively, section 12(2)(c) provides that it is not necessary to comply with subsection (1) where the <u>collection of information from another source would not prejudice a legitimate interest</u> of the data subject. In the context of the appeal process it is reasonable to conclude that registered I&amp;APs, as a result of them having been registered as I&amp;APs, are regarded as being aware of, and in fact has a legitimate interest therein, that registers of I&amp;APs be made available to an appellant to enable registered I&amp;APs to be informed of and to participate in the appeal process. This in turn assists the appeal authority to make an informed decision on the appeal. Based on the afore-mentioned it is not necessary that the appellant receives the information and contact details of registered I&amp;APs directly from the registered I&amp;APs. It is furthermore not necessary that consent be obtained that the information of registered I&amp;APs be provided to the appellant.</p> <ul style="list-style-type: none"><li>○ Section 13(1) of POPIA requires that personal information must be collected for a specific, explicitly defined and lawful purpose relating to a function or activity of the responsible party. The purpose for which the information is collected by the appellant is specific, explicitly defined and lawful. It is collected to inform registered I&amp;APs of the appeal and to enable them to participate in the appeal procedures. There is therefore also compliance with this requirement.</li><li>○ Further processing limitation: Section 15 of POPIA provides that further processing of personal information must be in accordance or compatible with the purpose for which it was collected. Section 15(2) of the POPIA provides the factors that the responsible authority must take into account to determine whether the further processing is compatible with the purpose of collection. In this case the processing was the collection of the information for the purposes of the EA application directly from the registered I&amp;APs. The further processing is the provision of the information, by the applicant or EAP, to the appellant to enable the appellant to provide registered I&amp;APs with copies of the appeal. The purpose of the initial collection of the information of the registered I&amp;APs is to enable them to participate in the EIA process and to comment on all reports and plans submitted to such registered I&amp;APs during the public participation process as contemplated in the EIA Regulations and to enable them to bring to the attention of the proponent and/or applicant any issues which such party believes may be of significance to the consideration of the application [Regulation 43(1) of the EIA Regulations]. The purpose of the further processing of information, in this case, is compatible with the purpose for which the information of the registered I&amp;APs was collected, namely to ensure that registered I&amp;APs participate and remain informed of appeals submitted against decisions for which they were initially registered as I&amp;APs.</li><li>○ The requirements of section 18 of POPIA should also be noted. Section 18(1) of POPIA requires that if personal information is collected, the responsible party must take reasonably practicable steps to ensure that the data subject is aware of, amongst other things, the information being collected, the name and address of the responsible party (in</li></ul>
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	<p>this case the EAP and applicant), the purpose for which the information is collected, whether or not the supply of the information by the data subject is voluntary or mandatory, the consequence of the failure to provide the required information, any particular law authorising or requiring the collection of the information (EIA Regulations and National Appeal Regulations), further information such as the recipient of the information, as well as the existence of the right to object to the processing of the personal information. It is therefore necessary that the relevant information contemplated in section 18(1) be communicated by the applicant/EAP to potential I&amp;APs/ commenting parties at the outset of the EIA process. Should they then register as registered I&amp;APs they must also be informed what the consequences are of registering as a registered I&amp;AP, which will include that their information will be provided to appellants. Section 18(2) of POPIA requires that these steps must be taken, if the information is collected directly from the data subject, <u>before the data is collected</u>, unless the data subject is already aware of such information. <u>If the above steps are followed and the registered I&amp;APs are informed when their information is collected for purposes of the EIA process that such information may be required to be made available to an appellant in the case of an appeal, then the registered I&amp;APs/commenting parties will be duly informed of the reasons/purpose why the register of I&amp;APs are compiled, the name and address of the EAP and applicant, as well as that the information will be made available to appellants, in the case of an appeal.</u></p> <p>In view of the above it is not necessary that consent be obtained from the registered I&amp;APs before the register of I&amp;APs is made available to the appellant. It is however necessary that potential I&amp;APs be informed, from the outset of the EIA process, when public participation on the application is conducted, what the consequences will be if they register as registered I&amp;APs, e.g. that that their information will be used, and made available, for certain purposes, including for purposes of the appeal processes. If they register as registered I&amp;APs it needs to be confirmed with them what the consequences are of such registration. Please see the discussion on section 18 above, regarding the information to be made available.</p> <p>The Department is aware that for some of the EA applications that are already in process the requirements of the POPIA, and more specifically section 18 of POPIA, were not implemented as the processes commenced prior to the commencement of POPIA. Therefore, registered I&amp;APs were not informed at the outset of the EIA process that their information would be made available to appellants to enable them to be notified of, and participate in, the appeal process. In respect of these cases, the following are proposed and should be noted:</p> <ul style="list-style-type: none"><li>- It is a requirement, in terms of regulation 4(1) of the EIA Regulations that, after a competent authority (CA) has reached a decision on an application the CA must, in writing, and within 5 days of decision making, notify the applicant of the decision; provide reasons for the decision to the applicant and draw the attention of the applicant to the fact that an appeal may be lodged in terms of the National Appeal Regulations, if such appeal is available in the circumstances of the decision. <b>The applicant must thereafter, in writing, within 14 days of the date of the decision, ensure that all registered I&amp;APs are provided with access to the decision and reasons for the</b></li></ul>
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		<p><b><u>decision and furthermore draw the attention of all registered I&amp;APs to the fact that an appeal may be lodged against the decision in terms of the National Appeal Regulations.</u></b> This provides an opportunity for the applicant to, in the aforementioned notification to the registered I&amp;APs, indicate that their information will be made available to the appellant, in the case of an appeal, to ensure compliance with regulation 4 of the National Appeal Regulations and to enable them to object to this intended use of their personal information, in the unlikely event that they would wish to do so.</p> <ul style="list-style-type: none"><li>- It also needs to be noted that normally the EA/decisions on an EA application expressly instruct the holders/proponents to notify the registered I&amp;APs of the decision on the EA application in writing and within 14 days of the date of the decision. The instruction includes the requirement to notify registered I&amp;APs of the provisions regarding the submission of appeals that are contained in the National Appeal Regulations. Attention can, and is normally, also specifically drawn to Chapter 2 of the National Appeal Regulations that prescribe the appeal procedure to be followed. The decision normally also includes a requirement that an appellant submits copies of the appeal to the registered interested and affected parties.</li><li>- Where the EA process has already been concluded without registered I&amp;APs having been provided with the required information at the outset of the process, e.g. including that their personal information will be made available to the appellant, and where registered I&amp;APs were already notified of the decision on the EA application without them being made aware that their personal information will be provided to an appellant, in the case of an appeal, it is recommended that such registered I&amp;APs should be notified that the appellant has requested the register and that such will be made available to the appellant, in compliance with regulation 4 of the National Appeal Regulations. This could, for example, be done by e-mails sent to registered I&amp;APs. This will give the registered I&amp;APs the opportunity to object to their personal information being made available, in the unlikely event that they wish to do so. The short timeframe for the submission of an appeal and copies thereof to registered I&amp;APs (e.g. within 20 days from notification of the decision) is appreciated. Therefore, if any difficulties are experienced in notifying any of the registered I&amp;APs it is recommended that the register of I&amp;APs should still be made available to the appellant to enable the appellant to comply with the legal requirements of the National Appeal Regulations. Proof of any unsuccessful attempts to notify registered I&amp;APs should be kept on record.</li></ul> <p>For information purposes, it should be noted that the Department is aware of the difficulties experienced by some appellants who do not have resources to comply with regulation 4 and to deliver copies of appeals to all registered I&amp;APs and therefore the Department is in the process of looking into the matter and considering amendments to regulation 4 of the National Appeal Regulations.</p>
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<p>2.</p>	<p>In some instances EAs contain the requirement that the holder must, within 7 days of the submission of the audit reports to the competent authority, notify all potential and registered interested and affected parties of the submission and make the report available to anyone on request and on a publicly accessible website (if applicable). We are therefore as EAPs required to make the I&amp;APs database/register available to another EAP as the EAP who will send out the audit reports on behalf of the holder is, in many cases, not the same EAP that prepared the initial register of interested and affected parties on behalf of the holder. What are the requirements in this regard? The audit condition contained in the EA referred to is quoted below for ease of reference.</p> <p><b>“Auditing</b></p> <p>14. In terms of Regulation 34 of the NEMA EIA Regulations, 2014, the holder must conduct environmental audits to determine compliance with the conditions of the Environmental Authorisation, the EMPr and submit Environmental Audit Reports to the Competent Authority. The Environmental Audit Report must be prepared by an independent person, that is not the ECO and must contain</p>	<p>The last paragraph of condition 14 mentioned in the query is a reiteration of the requirements of regulation 34(6) of the EIA Regulations. Regulation 34(6) requires that within 7 days of the submission of an environmental audit report to the competent authority, the holder of an environmental authorisation must notify <u>all potential and registered interested and affected parties</u> of the submission of the report and make the report immediately available to anyone on request and on a publicly accessible website, where the holder has such a website.</p> <p>This regulation therefore requires two different groups of persons to be notified, being the registered I&amp;APs (whose name would be in the register of I&amp;APs), and other potential interested and affected parties identified after the initial EA process has been completed, e.g. where neighbouring properties have new owners who were not involved in the process before.</p> <p>It should be noted that it is the <u>holder</u> that is required, in terms of the above condition and the EIA Regulations, to notify all potential and registered I&amp;APs of the submission of the audit report.</p> <p>Regulation 24(2)(a) of the EIA Regulations requires that the audits be prepared by an <u>independent person with relevant environmental expertise</u>. The EIA Regulations do not require that an EAP compile an environmental audit report. However, in practise it is often possible that an EAP compile the environmental audit reports and/or submit such on behalf of the holder to the CA and notify the registered I&amp;APs of the audit reports. In order to meet the independence requirement a second and different EAP, than the EAP that was responsible for the management of the environmental authorisation application process, may need to be appointed by the holder of the EA to prepare the audit reports and/or submit the audit reports to the relevant CA. The question is therefore, what is the position and the relevance of the POPIA where the second EAP/independent person that prepared the audit report, needs to obtain the register of I&amp;APs and/or information of potential interested and affected parties from the holder or the EAP that was responsible for the management of the EA application in order to be able to send out the notifications? The holder may require multiple individuals to manage the application and thereafter to comply with the audit requirement and this leads to an exchange of information.</p> <p>The same POPIA principles and sections are applicable in this case as explained in relation to question 1 above, with the changes required by the context. As the personal information is made available to the second EAP/independent person to comply with an obligation imposed by the law consent is not a requirement for the information to be made available to such second independent person/ EAP. The requirements of section 18 of POPIA need to be given effect to. As such the potential I&amp;APs/ commenting parties need to be notified early on in the EA application process, during public participation on the application, that if they register as I&amp;APs their information would be made available to a second EAP/ independent person so that they can be notified of the submission of the environmental audit reports. Once they have registered, they should also be</p>
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	<p>all the information required in Appendix 7 of the NEMA EIA Regulations, 2014.</p> <p>The holder must undertake an environmental audit and submit an Environmental Audit Report to the competent authority once a year during the construction phase and a final environmental audit report within three months after the development is completed.</p> <p>The holder must, within 7 days of the submission of each of the above-mentioned reports to the competent authority, notify all potential and registered I&amp;APs of the submission and make the report available to anyone on request and on a publicly accessible website (if applicable)."</p>	<p>notified of the consequences of their registration, e.g. including that their information may be made available to a second EAP/independent party so that they can be notified of audit reports.</p> <p>Where EA applications are already at an advanced stage and the above notification was not done it should be noted that it is a requirement, in terms of regulation 4(1) of the EIA Regulations that, after a CA has reached a decision on an application the CA must, in writing, and within 5 days of making / issuing the decision, provide the applicant with the decision; provide reasons for the decision to the applicant and draw the attention of the applicant to the fact that an appeal may be lodged in terms of the National Appeal Regulation, if such appeal is available in the circumstances of the decision. <b>The applicant must thereafter, in writing, within 14 days of the date of the decision, ensure that all registered I&amp;APs are provided with the decision and reasons for the decision and furthermore draw the attention of all registered I&amp;APs to the fact that an appeal may be lodged against the decision in terms of the National Appeal Regulations.</b> This provides an opportunity for the applicant to, in the aforementioned notification to the registered I&amp;APs, indicate that the registered I&amp;APs personal information will be made available to the second EAP/independent person so that they can be notified of the submission of the environmental audit report, to ensure compliance with regulation 34(6) of the EIA Regulations which would enable the I&amp;AP to object should they wish to.</p> <p>For those scenarios where the EA has already been issued without the requisite notification having been made, it is recommended that the potential and registered I&amp;APs should be notified, by the holder or the EAP who was initially responsible for the management of the EA process, that the I&amp;APs personal information will be provided to the second EAP/ independent person for purposes of such potential and registered I&amp;APs being notified of the environmental audit reports.</p> <p>In instances where it is not possible to timeously get hold of any potential or registered I&amp;APs it is recommended that the information of potential and registered I&amp;APs must still be made available to the person undertaking the audit (acting on behalf of the holder) to enable the holder to comply with the legal requirements of the EIA Regulations. Proof of the unsuccessful attempts to notify registered I&amp;APs should be kept on record.</p>
3.	<p>EAPs have previously, with draft reports that were circulated to interested and affected parties for comments, included lists of I&amp;APs. Although a list of I&amp;APs is not a legal requirement it was done because commenting parties often enquired from EAPs regarding who the registered I&amp;APs/commenting parties</p>	<p>POPIA defines: <b>"data subject"</b> means the <b>person</b> to whom personal information relates;"</p> <p>POPIA defines <b>"person"</b> means a natural person or a juristic person;"</p> <p>POPIA further defines <b>"personal information"</b> as follows:</p> <p><b>"personal information"</b> means information relating to an identifiable, living, natural person, and where it is applicable, <b>an identifiable, existing juristic person</b>, including, but not limited to-</p>



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	<p>are. It was therefore included. The previous analysis that was distributed on the EIA Regulations and the Protection of Personal Information Act, 2014 (Act No. 4 of 2013) (POPIA) clarified that this cannot be done, unless the written consent has been obtained from I&amp;APs. The question raised is whether the same principle is applicable to state departments and municipalities. They are normally also I&amp;APs. In the past the I&amp;APs list included contact persons' names and email addresses and usually also postal addresses. <b>May the names and contact details of officials of Government Departments be shown in document for distribution during the public commenting period? The enquirer has heard that government officials' names and contact details are not private because it is usually available on the internet.</b> However, it was noticed that in some official letters the contact details – such as email address – are not shown anymore.</p>	<ul style="list-style-type: none"> <li>(a) information relating to the race, gender, sex, pregnancy, marital status, national, ethnic or social origin, colour, sexual orientation, age, physical or mental health, well-being, disability, religion, conscience, belief, culture, language and birth of the person;</li> <li>(b) information relating to the education or the medical, financial, criminal or employment history of the person;</li> <li>(c) any identifying number, symbol, <b>e-mail address, physical address, telephone number, location information</b>, online identifier or other particular assignment to the <b>person</b>;</li> <li>(d) the biometric information of the person;</li> <li>(e) the personal opinions, views or preferences of the person;</li> <li>(f) correspondence sent by the person that is implicitly or explicitly of a private or confidential nature or further correspondence that would reveal the contents of the original correspondence;</li> <li>(g) the views or opinions of another individual about the person; and</li> <li>(h) <b>the name of the person if it appears with other personal information relating to the person or if the disclosure of the name itself would reveal information about the person;</b>”.</li> </ul> <p>In <i>Holeni v The Land and Agricultural Development Bank of South Africa</i> (266/08) [2009] ZASCA 9 (17 March 2009) it was stated:</p> <p><i>“Thus, in terms of the rule of interpretation that the same words must be similarly interpreted in different parts of an act, the reference to ‘the State’ in section 11 must also be to the state as government and as a juristic person in its own right, unless there are indications to the contrary.”.</i></p> <p>Since the State (government departments) is a juristic person, it falls within the definition of “person”, which results in information identifying the government departments or officials working in the government departments to be considered “personal information”. The same applies to municipalities and municipal officials.</p> <p>There is no legal obligation contained in the EIA Regulations to make the names and contact details of officials of Government Departments and municipalities available during the public commenting period although it is understood that this is done in practice for various reasons.</p> <p>However, despite the above, it should be noted that the names of public servants and their official contact details, when communicating with the public as part of the performance of their public service duties, are regarded as part of the feedback mechanism provided for by the Public Service Charter. The Public Service Charter is a social contract, commitment and agreement between the State and public servants. It is a written and signed document which sets out the State’s and public</p>
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		<p>servants' roles and responsibilities. For instance, Article 6.4 of the Charter commits the State to develop a feedback mechanism that will allow the public to compliment or raise complaints about the conduct and attitudes of public servants and the quality, timeliness, and efficacy of the services they provide. Article 7.11 recognises the public's right of access to information, excluding information that is specifically protected by law. In addition, the Public Service Code of Conduct also require public servants to recognise the public's right of access to information, excluding information that is specifically protected by law. Government officials are employed to perform certain functions in terms of their official capacity.</p> <p>Kindly note that, similarly, the Local Government Service Charter, in paragraph 6.11 also recognizes the public's right to access to information, excluding information that is specifically protected by law. Paragraph 5.4 provides for a feedback mechanism that will allow the public to compliment or raise complaints about municipal employees. Municipal officials are employed to perform certain functions in their official capacity.</p> <p>Officials' contact details and names of public servants are regarded as tools of service for purposes of rendering a public service. The names and official contact details of public officials, including municipal officials, may therefore be made available.</p> <p>The names and contact details (personal information) of government officials is processed in <u>their capacity as employees</u>. The employment contract, employer's policies and procedures and the nature of the office of data subjects should make provision for processing in this manner and compliance with section 18 of POPIA.</p> <p><b>There is therefore no reason why the names and contact details of government and municipal officials cannot be made available without specifically obtaining their consent to do so.</b></p>
4.	Does the same, as outlined in the previous correspondence regarding the POPIA also apply to organs of state and state departments, when they are commenting in their official capacity?	<p>Please refer to 3. above with regard to government departments and municipalities. With regard to organs of state please note the following:</p> <p>The Constitution of the Republic of South Africa defines:</p> <p><b>“organ of state” means:-</b></p> <p>(a) any department of state or administration in the national, provincial or local sphere of government; or</p> <p>(b) any other functionary or institution:-</p> <p>(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or</p> <p>(ii) exercising a public power or performing a public function in terms of any legislation,</p>



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	<p><i>but does not include a court or a judicial officer;”</i></p> <p>The definition of organ of state, as provided for in the Constitution, therefore includes <b>departments of state or administration in the national, provincial or local sphere of government</b>. The response to question 3 already provides the clarity in this regard.</p> <p>The definition of organ of state also includes <b>any other functionary or institution exercising a power for performing a function in terms of the Constitution or a provincial constitution, or exercising a public power or performing a public function in terms of any legislation</b>. The definition of organ of state therefore does not only include departments of state or administration in the national, provincial or local sphere of government. <b>It also includes for example constitutional institutions such as the South African Human Rights Commission, public entities such as Eskom, government business enterprises and universities</b>. This last-mentioned category of organs of state are not covered by the Public Service Charter and the Municipal Service Charter.</p> <p>As indicated in paragraph 3 above, the definition of personal information includes information relating to <b>an identifiable, existing juristic person</b>.</p> <p>One will need to look at section 11(1)(b) – (f) of the POPIA to determine whether personal information may be processed without consent.</p> <p>Section 11(1) of POPIA provides as follows in this regard:</p> <p>“11(1) Personal information may only be processed if-</p> <ul style="list-style-type: none"><li>(a) the data subject or a competent person where the data subject is a child <b>consents to the processing;</b></li><li>(b) processing is necessary to carry out actions for the conclusion or performance of a contract to which the data subject is party;</li><li>(c) processing complies with an obligation imposed by law on the responsible party;</li><li>(d) processing protects a legitimate interest of the data subject;</li><li>(e) processing is necessary for the proper performance of a public law duty by a public body; or</li><li>(f) processing is necessary for pursuing the legitimate interests of the responsible party or of a third party to whom the information is supplied.”</li></ul>
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		<p>Where data is processed to comply with an obligation in terms of law then such processing would not require consent of the data subject.</p> <p>Where processing is necessary to carry out actions for the conclusion or performance of a contract to which the data subject is party in terms of section 11(1)(b) then consent of the data subject would not be required. <b>If the names and contact details (personal information) of officials of non-government organs of state is processed in their capacity as employees and the employment contract, employer's policies and procedures and the nature of the office of data subjects make provision for processing in this manner and compliance with section 18 of POPIA, then one would not require consent.</b> One will need to consider on a case by case basis whether section 11(1)(b) is relevant.</p> <p>Where processing protects the legitimate interest of the data subject (e.g. to appeal or be informed of audit reports) consent would not be required.</p> <p>Where section 11(1)(b) – (f) is not applicable, consent will be required for the processing of the personal information in the case of organs of state that are not national or provincial government or municipal officials.</p> <p>Note should however also be taken of section 12 of the POPIA. Section 12(1) provides that personal information must be collected directly from the data subject, except as otherwise provided for in subsection (2). Section 12(2)(a) then provides that it is not necessary to comply with subsection (1) if the information is contained in or derived from a public record or <b>has been deliberately made public by the data subject</b>. In those instances where the information of an official of an organ of state has been deliberately made public by the data subject such information is not regarded as personal information and POPIA is not applicable. This would for example be the case where an official of Eskom's name and contact details are available on Eskom's website or the internet.</p>
5.	Previously during the report's public review and comment period, we have received requests from I&APs to provide them with I&AP registers and the email correspondence we have received so that they can check if the relevant stakeholders have been registered for the project and assist in their commenting on the reports. May you	<p>One will need to look at section 11(1)(b) – (f) of POPIA to determine whether there are any grounds for processing without obtaining consent from the data subject. Upon consideration of paragraphs 11(1)(b)-(f), none of the grounds are regarded relevant for processing the personal information without the consent of the requester. In line with our previous communication distributed on the applicability of the POPIA to the EIA Regulations and <b>whether registers of I&amp;APs/ information in comments and responses documents can be made available publicly (Annexure A)</b>: The information cannot be provided as requested, unless the registered I&amp;APs have granted their written consent that such may be made available as we could not find a ground for processing without consent in the POPIA that would be applicable to this scenario.</p> <p>As indicated in 3. and 4. above, the information of government and municipal officials can be made available.</p>



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	please clarify how we need to process these requests as well considering the POPIA?	
6.	<p>(1) It is understood that all personal information regarding I&amp;APs must be "removed/ censored" from the copies of the draft reports made available to the public so as not to share anyone's personal information.</p> <p>(2) However, what should be done regarding the <b>information of the client (and other parties involved in the development) that is present throughout the DBAR and appendices, should this be censored to the public as well?</b></p>	<p>(1) With regard to the <u>first statement</u> that personal information regarding I&amp;APs must be removed from copies of the draft reports made available to the public, this is correct unless consent has been obtained from the I&amp;APs – as per Annexure 1, which was previously distributed. According to the POPI Act, if a data subject had consented to their information being processed, there is no need to remove personal information when its processing is still within the purpose of consent. The reason for obtaining this consent at the beginning of the process is to deal with later uncertainties and also to confirm the purpose for which the record is created at beginning with I&amp;APs. If I&amp;APs were informed at the beginning of the process that the draft reports, including their information, will be published for public consultation and their consent obtained, their consent will include publication and thus there will be no need to remove and censor any information. <u>If intentions are clearly communicated to participants at the beginning, you only need their consent at that time and thereafter your duty will be to adhere to what they agreed to.</u> Consent must be a voluntary, specific and informed expression of will in terms of which permission is given for the processing of personal information.</p> <p>(2) The same position is applicable with regard to the <u>second statement</u> regarding what should be done regarding information of the client and other parties involved in the development. The client and other parties involved will need to provide their voluntary, specific and informed consent at the beginning of the process to enable their information to be made available in the draft reports, unless one of the grounds for processing without consent in section 11 of the POPIA is relevant.</p> <p>There are some instances where section 11(1)(c) would be applicable as the inclusion of the information would be a legal requirement. In those cases, consent is not required. These include:</p> <ul style="list-style-type: none"> <li>- In terms of the EIA Regulations, the BAR, SR and EIR (EIA reports) are required to include, amongst other things, <b>details of the EAP who prepared the report; the expertise and curriculum vitae of the EAP</b>; a description of the proposed activity; a motivation for the preferred site, activity and technology alternative;</li> <li>- The content requirements of the environmental management programme (EMPr) includes, amongst other things, <b>the details of the EAP, expertise and CV of the EAP</b>, a detailed description of the aspects of the activity that are covered by the EMPr; description of the impact management actions and outcomes; an <b>indication of the details of the persons who will be responsible for the impact management actions</b>;</li> <li>- Specialist reports must, amongst other things, include <b>details of the specialist who prepared the report, the expertise and curriculum vitae of the specialist, declaration of independence by the specialist</b>;</li> </ul>



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		<p>Section 11(1)(b) furthermore provides that personal information may be processed where processing is <b>necessary to carry out actions for the conclusion or performance of a contract to which the data subject is party</b>. Therefore, where any parties involved in the development have signed a contract(s) in terms of which the personal information may be processed and the making available of the information is necessary for the carrying out of actions for the conclusion or performance of the contract then the information can be made available without consent. This could be applicable in the case of contracts entered into between the EAP, specialists and the applicant, etc. depending on the wording and content of the specific contracts.</p> <p>One would therefore need to look at section 11(1) of POPIA and determine whether any of the grounds for processing without consent are applicable in terms of section 11(1)(b) – (f). If not, consent is required in terms of POPIA for the processing.</p> <p>Section 18 should be complied with when personal information is obtained irrespective of whether consent is required in terms of section 11(1) of POPIA or not.</p> <p>Where information of the client and other parties involved in the development is already freely available on the internet because of their profession (e.g. on the website of the EAP or specialist), such information can be made available without requiring consent. Section 12(1) provides that personal information must be collected directly from the data subject, except as otherwise provided for in subsection (2). Section 12(2)(a) then provides that it is not necessary to comply with subsection (1) if the information is contained in or derived from a public record or <b>has been deliberately made public by the data subject</b>. Information that has been made publicly available is not regarded as personal information and therefore POPIA is not applicable to such information.</p>
7.	General comment	<p>Compliance with the requirements of section 18 of the POPIA need to be ensured during the initial steps in the EIA process, when notice is given of the application/ proposed application to all potential I&amp;APs in terms of regulation 41(2) of the EIA Regulations. This notice must include a notification to all potential I&amp;APs that, if they register as an I&amp;AP their personal information will be made available to an appellant in the case of an appeal, and an applicant/EAP/independent person for purposes of being informed and given access to an audit report, to ensure compliance with section 18 of the POPIA. This information may be made available in terms of section 11(1)(c) and 11(1)(d) of the POPIA, without requiring consent. All the other requirements of section 18 of POPIA should also be complied with in this notification process.</p> <p><b>“18. Notification to data subject when collecting personal information</b></p> <p>(1) If personal information is collected, the responsible party must take reasonably practicable steps to ensure that the data subject is aware of-</p>





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		<p>(a) the information being collected and where the information is not collected from the data subject, the source from which it is collected;</p> <p>(b) the name and address of the responsible party;</p> <p>(c) <b>the purpose for which the information is being collected;</b></p> <p>(d) whether or not the supply of the information by that data subject is voluntary or mandatory;</p> <p>(e) the consequences of failure to provide the information;</p> <p>(f) <b>any particular law authorising or requiring the collection of the information;</b></p> <p>(g) the fact that, where applicable, the responsible party intends to transfer the information to a third country or international organisation and the level of protection afforded to the information by that third country or international organisation;</p> <p>(h) any further information such as the-</p> <p>(i) <b>recipient or category of recipients of the information;</b></p> <p>(ii) nature or category of the information;</p> <p>(iii) existence of the right of access to and the right to rectify the information collected;</p> <p>(iv) <b>existence of the right to object to the processing of personal information as referred to in section 11(3); and</b></p> <p>(v) right to lodge a complaint to the Information Regulator and the contact details of the Information Regulator, which is necessary, having regard to the specific circumstances in which the information is or is not to be processed, to enable processing in respect of the data subject to be reasonable.</p> <p>(2) The steps referred to in subsection (1) must be taken-</p> <p>(a) if the personal information is collected directly from the data subject, <b>before the information is collected</b>, unless the data subject is already aware of the information referred to in that subsection; or</p> <p>(b) in any other case, before the information is collected or as soon as reasonably practicable after it has been collected.”.</p> <p>For those instances where none of the grounds in section 11(1)(b) – (f) of the POPIA are relevant for processing the personal information without the consent of the requester, such consent will be required for the processing of the information. If the applicant/EAP wants to, for example, be able to make the register of registered I&amp;APs available to registered I&amp;APs during the public consultation process, which is not a legal requirement, the notification process can be utilised to request and obtain written consent from registered I&amp;APs that their information may be made available as such.</p>
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		<p>The above notification and obtaining of consent at an early stage of the EIA process would prevent delays later on in the process. It should be clearly communicated what the personal information will be used for, and that the usage will not be limited to the EIA process itself but will also be utilised in appeal processes, and to communicate and make audit reports available.</p> <p>Note should also be taken of section 12 of the POPIA. Section 12(1) provides that personal information must be collected directly from the data subject, except as otherwise provided for in subsection (2). Section 12(2)(a) then provides that it is not necessary to comply with subsection (1) if the information is contained in or derived from a public record or <b>has been deliberately made public by the data subject</b>. Information that has been made publicly available is not regarded as personal information and the requirements of POPIA is therefore not applicable to such information. This would, for example, be the case where an official of Eskom or an EAP's name and contact details are available on Eskom's website or the professional website of the EAP.</p>
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Senior Legal Administration Officer: Legal Support NEMA

S S Janse van Rensburg

Date: 2022/04/08

Director: Legal Support NEMA

A van Reenen CONCUR

Date: 2022/04/08

Senior Legal Administration Officer: Corporate Legal Support

N November

Date: 2022/04/08