

Driver Information Bureau

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Dear Sir

DRIVER INFORMATION BUREAU - DRIVER DATABASE

- 1 We have been asked to provide an assessment on the risks associated with the development of a driver database in the heavy freight industry wherein personal information of truck drivers is stored for access by truck driver employers within the same industry. Such database will be for the exclusive use by the DIB and any such person whom the DIB has given authority to use the database.
- 2 You have instructed us to pay particular attention to possible infringements to the driver's constitutional rights in the event where such driver's personal information is processed on the database for access by potential employers.
- 3 This opinion sets out the position applicable not only to the DIB processing such information on the database, but also to persons who will be providing this information to the DIB. This means that the transport companies, providing information to the DIB for use on the database, will be subject to the provisions of POPI as set out below.
- 4 Section 14 of the Constitution provides that everyone has the right to privacy which includes the right not to have-
 - 4.1 their person/home searched;
 - 4.2 their possessions seized; or
 - 4.3 the privacy of their communications infringed.
- 5 This section, not only entitles everyone to privacy, but protects this right against infringement in such a way that no one should be subjected to arbitrary interference with this right.

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- 6 Many cases have been brought before the Constitutional Court in an attempt to define this right, and the following definition has been accepted and applied by judges:

"Privacy is an individual condition of life characterised by exclusion from the public and publicity. This condition embraces all those personal facts which the person concerned has deemed to be excluded from the knowledge of outsiders and in respect of which he has the will that they be kept private."

- 7 In accordance with this definition a legal subject personally determines the private nature of the facts, he must therefore exhibit the will or desire that these facts should be kept private.
- 8 Protection of information generally limits the ability of people to gain, publish, disclose or use information about others without their consent. This means that individuals have control over who has access to the flow of information about them. Generally speaking, no person has to tolerate information concerning him being collected and/or distributed, therefore any unauthorised collection or storage of personal information would be considered to be in principle, against public policy and thus wrongful.
- 9 The Protection of Personal Information Act 4 of 2013 ("POPI") has been enacted to give effect to the constitutional right to privacy by safeguarding personal information processed by a responsible party. POPI has been enacted to facilitate the manner in which personal information is processed whilst still advancing the right of access to information. Personal Information is widely defined in terms of POPI to include information relating to the education or the medical, financial, criminal or employment history of the person. POPI applies to the processing of personal information by making use of automated or non-automated means. Processing, as defined by POPI would include the collection, receipt, collation, storage, distribution, use or making the personal information available in any form. This database therefore lends itself to the application of POPI.
- 10 The application of POPI is intended to be wide. Storing information is as much part of the definition of "processing" as is distributing the information. Therefore the DIB has to hold the information in accordance with the provisions laid down in POPI for the lawful processing of personal information.
- 11 It is clear from the above that in order for the transport companies to provide the information to the DIB, they would have to comply with the provisions of POPI for the lawful processing of such information.
- 12 The driver, whose personal information would be processed through this database, is afforded extensive rights under Section 5 of POPI, which provides as follows:

"A data subject has the right to have his, her or its personal information processed in accordance with the conditions for the lawful processing of personal information referred to in Chapter 3, including the right- inter alia,

(a) to be notified that-

- i. personal information about him is being collected; or
 - ii. his personal information has been accessed by an unauthorised person.
- 13 POPI also affords the driver rights, including the right to request, where necessary, the correction, destruction or deletion of his personal information; the right to object on reasonable grounds to the processing of his personal information and the right not to be subject, under certain circumstances, to a decision based on the automated processing of information that has been intended to provide a profile of such person.

- 14 We have perused the opinion provided to you by Michalsons and unfortunately come to a different conclusion on the application of POPI. Page 5 of the Michalsons report advises that consent of the driver is not necessary. This is in fact incorrect as one of the conditions of lawfully processing information is that the data subject, in this case the driver, consents, which consent may be withdrawn at any time, to the processing of his personal information. This is set out in chapter 3, section 11 of POPI and provides *inter alia*:

"Personal information may only be processed if the data subject or a competent person where the subject is a child consents to the processing".

If the data subject has objected to the processing of personal information in accordance with POPI, the DIB, as well as the transport company providing the information, who are defined in terms of POPI as the responsible party, may no longer process the personal information.

- 15 It should be borne in mind that there is dual consent required from the driver. The driver must consent to the processing of information by the transport companies and also consent to the further processing by the DIB for purposes of the database.
- 16 In this regard, it is advisable that the transport companies approach the driver whose information is about to be processed for written consent from the driver. In order to indemnify the DIB from liabilities that may arise as a result of the unlawful processing of information, the driver must not only consent to the transport companies' processing of information, but also consent to the further processing of the information by the DIB for purposes of this database. Without this consent, the DIB has not complied with its own obligation to lawfully process the driver's personal information.
- 17 In the event that the driver does not give consent to the processing of his personal information, and DIB or the transport company nevertheless processes such information, such processing would be unlawful and indeed amount to an infringement of the driver's rights.
- 18 A further condition, amongst others, placed by POPI for the lawful processing of personal information, is that the responsible party has to take reasonably practical steps to ensure that the data subject, the driver in this instance, is aware of the information being collected, and where the information is not being collected from the driver, the driver must be notified of the source from which it is collected. There exists an exception to the above, in that, should the driver consent to non-compliance with the duty to notify, or non-compliance will not prejudice the legitimate interests of the driver or, if for a defined purpose, non-compliance was not necessary then the responsible party may not be obliged to notify.
- 19 It is important to note that the conditions for the lawful processing of information are not absolute in that the Regulator, appointed in terms of POPI may grant an exemption for the processing of information that is in breach of a condition for lawful processing. The Regulator would have to be satisfied that, in the circumstances of the case, the public interest in the processing, outweighs, to a substantial degree, any interference with the privacy of the driver that could result from such processing.
- 20 The responsible party would be required, in the event of a breach of a condition prescribed by POPI, to build a case that justifies the breach and the interference with the constitutionally protected right, to the satisfaction of the Regulator. However, should the Regulator find that there has been an interference with the protection of personal information of the driver, the Regulator may in accordance with section 95 of POPI serve the responsible party with an enforcement notice calling on the responsible party to refrain from taking such steps or to stop processing such personal information. Infringements in terms of POPI are punishable by the imposition of a fine of up to R10 million rand and/or imprisonment of 10 years.
- 21 If the driver establishes that his right to privacy has been impaired, the responsible party's conduct may not be wrongful if it can show that the invasion of the privacy was reasonable and

justifiable in terms of Section 36 of the Constitution and the factors contained therein to test the justifiability of such invasion. The difficulty is that the law does not provide an absolute standard that can be laid down for determining reasonableness, which means that this will be established on the particular circumstances of the case.

- 22 The courts, weighing up all the factors will then consider the effects and importance of infringing the law on the one hand and the effect of the infringement on the other. Ultimately, there must be a reason which is justified and serve a justifiable purpose.
- 23 In our view, it would be in your best interest to obtain a written consent from the driver, to process his personal information and indicate where and how such information will be collected as well as consent to provide the DIB with the information and indicate the intended purpose for such processing. Without the requisite consent, you may open yourself up for constitutional challenges and extensive litigation in justifying the unlawful processing of the driver's personal information.

We trust that you will find the above in order.

Yours faithfully

HUGO PIENAAR
CLIFFE DEKKER HOFMEYR INC