

# B-BBEE VERIFICATION EVIDENCE & POPIA



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Since the publishing and full enforcement of the Protection of Personal Information Act (POPIA) on 1<sup>st</sup> July 2021, organisations have been aware of their responsibilities in collecting, processing and sharing third-party information. POPIA has changed how South African organisations conduct business, as it compels careful consideration and protection of the rights of Data Subjects.

It has been a long time since parliament assented to the POPIA on 19<sup>th</sup> November 2013. A portion commenced on 11<sup>th</sup> April 2014, including section 1, Part A of Chapter 5, section 112 and section 113. The balance of POPIA came into effect on 1<sup>st</sup> July 2020, except sections 110 and 114(4), which became effective on 1<sup>st</sup> July 2021.

POPIA, although promoting the right to privacy outlined in the Constitution, manages the flow, timeframe of retaining and destruction of information. POPIA refers to:

Responsible Party	A public or private body that determines the purpose and means for processing personal information taken from a Data Subject.
Operator	The party that processes Personal Information on behalf of a Responsible Party.
Data Subject	Any party to whom the Personal Information relates. It means an identifiable, living, natural person and an identifiable, existing juristic person.
Personal Information	Relates to any information that can identify a Data Subject in any way.

The purpose of POPIA is to regulate, along with international standards, the processing of personal information by public and private bodies. The objective is to store and process Personal Information in a manner that respects the right to privacy. Subject to justifiable limitations, POPIA aims to protect the rights and vital interests of Data Subjects.

The safekeeping of the vast amount of personal information necessary for a B-BBEE Verification is dictated by the 2008 Verification Manual and the SANAS R47-03 document. The introduction of POPIA has not changed any BEE requirements. If any Personal Information or other relevant document is not available at the time of a B-BBEE Verification, it will not be recorded as evidence.

## In terms of evidence at a B-BBEE Verification, what party is responsible for proving adherence to POPIA?

The Responsible Party is the organisation rolling out its B-BBEE Strategy. It must take responsibility for collecting, processing and sharing information with the correct permissions. The Responsible Party must ensure that it has the consent of the Data Subject to share their information in line with its B-BBEE Verification, irrespective of whether an Operator collected the Personal Information on their behalf.

The role of a B-BBEE Rating Agency remains to verify the data supplied by a Responsible Party for a B-BBEE Verification that must include a SANAS audit if necessary. Therefore, any information not provided will not be counted in an organisation's B-BBEE Verification, impacting its overall B-BBEE Score.

Once a B-BBEE Rating Agency collects, processes and shares information for a B-BBEE Verification, it, in turn, becomes the Responsible Party for that Personal Information. To fulfil its POPIA compliance requirements, a B-BBEE Rating Agency must provide evidence that all Personal Information received from a Responsible Party was in line with POPIA.

## How is information lawfully processed from its origin to a B-BBEE Rating Agency?

The Responsible Party collecting, processing and sharing Personal Information must take into consideration section 2.4.1 of POPIA :

- > Accountability;
- > Processing limitation;
- > Purpose specification;
- > Further processing limitation;
- > Information quality;
- > Openness;
- > Security safeguards; and
- > Data Subject participation.

## Are there any exclusions for POPIA compliance?

POPIA addresses exclusions to compliance in Chapter 2, Section 6 and 7. The following are exclusions from POPIA:

- > Where Personal Information processed is not recorded in any other form;
- > Where Personal Information forms part of internal household activities;



- > Where information has been de-identified to the extent that it cannot be re-identified again;
- > When an organisation is a public body that protects national security;
- > When an organisation is a public body that prosecutes offenders;
- > A Cabinet or Executive Council of a province;
- > A court as defined in the Constitution; and
- > When Personal Information is processed for journalistic, artistic or literary purposes as per section 7.

The scope of POPIA is broad and applies to the processing of personal information rather than a particular person or organisation. Therefore, any organisation that processes data must comply with POPIA and, in particular, a Responsible Party must utilise all personal data according to the protection principles held within POPIA.

The POPIA framework shapes the rules and practices a Responsible Party must follow when processing information about individuals or juristic persons. It bestows specific rights regarding data, and generates an independent regulator to enforce such rules, rights and practices.

POPIA applies to all information processed automatically, recorded on paper, including health records and certain public authority records.

### Does a Data Subject have the right to refuse information sharing?

A Data Subject is not obliged to share their personal information; however, refusing could limit their access to employment, participation in B-BBEE initiatives or any such benefits.

As POPIA safeguards a Data Subject's Personal Information, the Promotion of Access to Information Act (PAIA) provides the right to access and controls the use of Personal Information. In effect, these pieces of legislation balance out the right to privacy and the legitimate needs of organisations to collect and use personal data for business or any other legitimate purpose.

### How does Personal Information flow through parties to allow for a B-BBEE Verification?

The Personal Information of a Data Subject is captured and processed long before it is presented as evidence at a B-BBEE Verification. It is, therefore, fair to surmise that the flow of Personal Information would end at a B-BBEE Verification after flowing through various parties. However, the Personal Information, from its origin, as it flows through multiple parties, must be traceable with the relevant approvals, allowing it to flow.

All Parties must ensure that they process Personal Information lawfully and in a reasonable manner that does not infringe, the privacy of the Data Subject. Responsible Parties may only process the minimum amount of relevant information, and it must be for a specific purpose.

### From where does the evidence necessary for a B-BBEE Verification stem?

During the B-BBEE Verification process, Personal Information from a multitude of Data Subjects is collected. From the time Data Subjects become Participants or Beneficiaries in a Responsible Party's B-BBEE Strategy, their Personal Information will be collected and processed through various parties, ending with a B-BBEE Verification. In theory, because of the flow of a Data Subject's Personal Information, the process becomes more complex as the responsibility spreads to a broader network.

More often than not, an organisation will use the services of B-BBEE Consultants or an Operator to drive its Skills Development, Procurement, Enterprise Development, Supplier Development or Socio-Economic Development Solutions. It is, therefore, crucial that an organisation works with service providers that implement POPIA requirements. At any given time during the process of capturing and sharing Personal Information, the relevant Responsible Party bears the burden of proof that it obtained consent from the Data Subject from the initial interaction.

Responsible Parties must consider what historical data would be necessary for a B-BBEE Verification. Therefore, obtaining consent from Data Subjects pertaining to the last financial period must be factored into the preparation timeline of a B-BBEE Verification.

### What information must a Responsible Party provide to a Data Subject when requesting their Personal Information?

Data Subjects must provide consent for their Personal Information or Special Personal Information to be processed. The request must be clear and concise in its intention. The following must be communicated to a Data Subject when requesting their Personal Information:

- > What Personal Information or Special Personal Information will be collected;
- > The purpose for which the information is being collected;
- > What other parties will be privy to this information and the purpose for sharing it; and
- > Contact details of Information Officers or Deputy Information Officers responsible for sharing a Data Subject's Personal Information.

## What are the criteria for sharing Personal Information?

POPIA provides the criteria according to which Personal Information may be processed.

- ① The Data Subject, or legal guardian if the Data Subject is a child, has provided explicit consent for processing Personal Information.
- ② When a Data Subject is a party to a contract, their Personal Information needs to be processed to meet their obligations.
- ③ Where a Responsible Party processes Personal Information to meet legal obligations.
- ④ When the processing of Personal Information will protect the legitimate interest of the Data Subject.
- ⑤ The processing of Personal Information is necessary for the proper performance of a public law duty by a public body.
- ⑥ When processing is necessary to pursue a legitimate interest of the Responsible Party or a third party.

Data Subjects have the right to withdraw their consent at any time, providing there are no legal implications as mentioned in the above points 2 to 6. However, as per the points 4 to 6 above, withdrawal must be made in a prescribed format, outlining the reason why.

If a Data Subject withdraws their consent, a Responsible Party may no longer use that information. If the Personal Information flows through various parties, the relevant Responsible Party must ensure the withdrawal of that Data Subject's Personal Information.

## What evidence is necessary to confirm that POPIA requirements were adhered to by the Responsible Party at the time of a B-BBEE Verification?

Before embarking on a B-BBEE Verification, a B-BBEE Rating Agency may require evidence that a Data Subject gave consent to have their Personal Information processed. Responsible Parties must consider what Personal Information is necessary per scorecard indicators.

## How do the POPIA requirements flow through the B-BBEE Scorecard? What are the considerations for each element?

The following outlines the necessary evidence for a B-BBEE Verification and how Personal Information flows through each element.

### Ownership

Data Subject's consent required

Participants & Beneficiaries of trusts, BBOs and ESOPs.

#### Considerations

- > Where Data Subjects hold indirect Ownership using the flow-through principle, a Responsible Party must develop a strategy to collect this information.
- > Special Purpose Vehicles such as trusts and collective investment ownership structures, like BBOs or ESOPs, hold Ownership that identifies Data Subjects as Participants or Beneficiaries. The design of such vehicles must identify Data Subjects as Participants or Beneficiaries in a way that defines and identifies each individually or as a collective class of natural persons. A Responsible Party should have the requisite information of the specific Participants or Beneficiaries at the time of a B-BBEE Verification and the permissions to share and process this information.
- > As evidence for this element is at the date of a B-BBEE Verification, proof of consent for Data Subjects or natural persons that hold direct Ownership should be on hand.

### Management Control

Data Subject's consent required

Board members, Directors and all employees.

### Skills Development

Data Subject's consent required

All employed and unemployed people considered for:

- > Training;
- > Learnerships;
- > Bursaries;
- > Internships; and
- > Apprenticeships.

#### Considerations

- > A Responsible Party needs to ensure that third-party Skills Development service providers or Operators are POPIA compliant and have obtained the necessary consent from each relevant Data Subject.

## Enterprise & Supplier Development

Data Subject's consent required

Owners of Beneficiary businesses and Affidavit Deponents.

### Considerations

- > The collection of Affidavits where personal details of Deponents feature;
- > Where Data Subjects hold indirect Ownership in the flow-through principle, a Responsible Party must develop a strategy to collect this information.

## Socio-Economic Development

Data Subject's consent required

Beneficiaries of Socio-Economic Development interventions.

### Considerations

- > A Responsible Party will need to ensure that third-party service providers are POPIA compliant and have obtained the necessary consent from each relevant Data Subject.

## Yes for Youth (YES)

Data Subject's consent required

YES Employees.

### Considerations

- > A Responsible Party who facilitates benefits to Data Subjects must ensure they obtain consent to process and share information for the duration of the YES employment contract, including a B-BBEE Verification.

## What are the responsibilities of a B-BBEE Rating Agency when processing Personal Information?

The SANAS R47-03 accreditation regulations mean that B-BBEE Rating Agencies already had strict controls for the identification, storage, protection, back-up, archiving, retrieval, retention time and disposal of Personal Information. Section 21 of the SANAS document requires the following from B-BBEE Rating Agencies:

- > Request for evidence, including the initial and ongoing B-BBEE Verifications;
- > Justification of the timeframe determined for a B-BBEE Verification;
- > Records of complaints and appeals, and any subsequent corrections or corrective actions;
- > Adequate deliberations and decisions;
- > Documentation of the findings; and
- > Record of B-BBEE Verification Certificates issued.

Section 21 further stipulates that a B-BBEE Rating Agency must retain Personal Information from the current accreditation cycle, plus the previous one; otherwise as the law prescribes. Currently, the accreditation cycle is four years. However, Section 14 of POPIA addresses this, as it allows records to be retained for a period, as and when required, prescribed in law or a code of conduct.

Due to remote B-BBEE Verifications, B-BBEE Rating Agencies have adapted security for capturing, processing and sharing data. In some cases, third parties oversee the process. The responsibility, however, lies with a B-BBEE Rating Agency to communicate clearly to its client how Personal Information will be processed, protected and ultimately destroyed.

Responsible Parties must ensure that their chosen B-BBEE Rating Agency does have POPIA compliance protocols in place. A B-BBEE Rating Agency's B-BBEE Verification agreement should clearly outline what its POPIA processes are, how it safeguards, retains and destroys Personal Information.