NORTON ROSE FULBRIGHT

Protection of Personal Health Information in South Africa - Ten things to know

The existing healthcare legislation in South Africa provides for protection of personal health information in the following ways:

1. Confidentiality

All personal health information of persons treated in public or private health institutions (called health users) or held by medical schemes and managed healthcare organisations is confidential.

In addition, the participation of users in clinical trials or stem cell research is confidential as is the information collected during the course of such research.

2. Access to health records

A healthcare provider may access a person's health records for purposes of treatment provided they are authorised by that person to do so.

De-identified health information may be accessed and used by healthcare providers for study, teaching or research purposes without authorization.

A medical scheme is entitled (subject to certain legislative provisions) to access any treatment record held by a managed health care organisation or healthcare provider and other medical records of a beneficiary if the medical scheme and the organisation or provider concluded a managed health care agreement.

Access to records of personal health information by statutory or regulatory bodies is permissible where it is deemed necessary in the interests of justice or for the safety of other patients.

3. Consent to disclosure

The National Health Act, 2003 permits the disclosure of personal health information with the informed consent of the patient.

Depending on the nature of the institution the requirements for consent differ. In the case of health institutions, personal health information may only be disclosed if a patient provides written consent or if authorized by statute or court order. In the case of medical schemes, the express consent of the beneficiary is required.

In the case of minors, parental or guardian consent is required. For information pertaining to deceased patients, written consent must be obtained from the next-of-kin or executor of the estate.

Where non-disclosure of personal health information poses a serious risk to public health or where the disclosure can be justified as being in the public interest, it may be disclosed without consent.

Health workers and institutions may disclose personal health information to other persons or institutions (such as medical schemes) if this is necessary to serve a legitimate purpose within the ordinary course and scope of their duties, provided such disclosure is in the interests of the health user.

PROTECTION OF PERSONAL INFORMATION BILL, 2009 (POPI)

The POPI Bill has been passed by Parliament and is expected to be signed into effect soon. It aims to give effect to the constitutional right to privacy by safeguarding personal information of individuals (called data subjects) processed by public and private bodies (called responsible parties). Some salient features of this new law affecting the processing of personal health information are:

4. Duties of responsible parties

A responsible party must uphold the conditions for lawful processing of personal information outlined in POPI. Consent must be obtained from a data subject prior to processing any personal information (see 6 below). Data may only be collected for a specific, lawful purpose and any processing must be compatible with that purpose.

Processing of special types of personal information regarded as sensitive without the consent of a data subject is prohibited. Examples include information regarding health or sex life and biometric information.

5. Processing of personal health information allowed

Despite the general prohibition on processing of sensitive information, information concerning a person's health may be processed by medical professionals and healthcare institutions as necessary for the proper treatment of that person or for administration purposes.

Insurance companies, medical schemes and their administrators and managed healthcare organisations may process information as needed to perform in terms of an insurance or medical agreement or to assess the risk insured or covered provided the data subject has not objected to the processing.

Any personal health information processed in this manner is subject to an obligation of confidentiality and may only be disclosed as required by law and then only to authorised third parties

6. Record retention periods

Information may not be retained for longer than is necessary to fulfil the original purpose for collection, except where the data subject consents thereto or where retention of records is required by law. Records may be retained if this is a contractual requirement or where the responsible party requires it for purposes of its lawful functions and activities

Personal information must be destroyed or at least de-identified as soon as practicable once the purpose for collection is fulfilled and the responsible party is no longer authorised to retain the record.

7. Consent to processing

Consent under POPI means any voluntary, specific and informed expression of will in terms of which permission is given for the processing of personal information.

Personal information may only be processed if the data subject, or a competent person where the data subject is a child, consents to the processing. This means that where information is collected, the responsible party must take steps to ensure that the data subject is made aware of among other things the details of the responsible party, what information is being collected, what the information will be used for and who the recipients are to be.

8. Security and collateral collection of health information

A private or public body is responsible for the security and integrity of personal health information collected by it. Security measures need to be in place if a third party will process information on the responsible party's behalf.

Personal health information must be collected directly from a person unless consent to collateral collection has been obtained or the information is derived from a public record. Further exceptions are contained in section 12 of the Act.

9. Processing of health information by third parties and cross-border transfers of information

Where the processing of personal health information is outsourced to third parties, the responsible party must ensure that the conditions of lawful processing are complied with and that agreements with third parties require them to comply with the relevant conditions of lawful processing.

The term ‘processing’ is comprehensive. A responsible party must review agreements with any third party who collects, receives, records, organises, collates, stores, updates, modifies, retrieves, alters, uses, disseminates, distributes, makes available, merges, links, degrades, destroys or erases personal health information.

Unauthorised processing of personal health information constitutes an offence.

The processing of certain types of information, including cross-border transfers of personal health information to third parties, may require once-off prior authorisation from the Information Regulator depending on the level of protection and safeguards put in place by the third party in the foreign country.

10. The regulator and information officer

An Information Regulator will be established to monitor and enforce compliance. It will also receive and investigate complaints of violations of POPI and issue codes of conduct for specific sectors.

A responsible party is required to designate an internal Information Officer to ensure that it complies with the conditions for lawful processing of personal information contained in POPI. This person must register with the regulator and must deal with requests made under POPI.

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