

ARE BACKGROUND CHECKS LEGAL UNDER POPIA?

1. OVERVIEW

Undoubtedly, background checks are super invasive and require A LOT of personal information. These days, background checks are part and parcel of many application processes, from job applications to professional accreditations to admission to specific academic courses or vendor and tender application processes. Organisations simply have to do their due diligence and verify that candidates are who they say they are. Sometimes background checks are required by legislation. Sometimes organisations implement their own background check requirements. In the latter case, what legal basis under POPIA can organisations use to justify their background checks on candidates?



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2. WHAT KIND OF 'BACKGROUND' CHECKS DO YOU GET, EXACTLY?

A good old Google search will tell you there are numerous background checks you can do in South Africa. These include:

- criminal record check
- civil records check (such as what court judgments an applicant has been involved in (e.g. divorce or CCMA hearing) or has against them, e.g. judgment debt)
- deeds record check (what property an applicant owns)
- bankruptcy or debt review records check (has the applicant ever been declared insolvent or been put under debt review)
- education, employment history or professional body membership verification checks
- credit check
- ID verification check
- directorship check
- social media checks



If these checks are conducted on a candidate ... a responsible party can compile A LOT of sensitive personal information about an applicant!

3. WHAT LEGAL BASIS SHOULD YOU USE TO JUSTIFY YOUR BACKGROUND CHECKS?



Photo: Lukas Blazek/Unsplash

You can use several legal bases in terms of section 11 of POPIA to justify the background check you require candidates to undergo.

These include:

- **consent; or**
- **because the background check is necessary for the conclusion or performance of a contract (that could be an employment contract or admission as a member of a professional body etc); or**
- **your legitimate interest or legitimate interest of a third party.**

3.1. CONSENT

For some background checks, consent will be the required legal basis for you to use. Either a piece of legislation requires consent, or the background check requires processing the candidates' special personal information.

For example, with credit checks, the National Credit Act 2016 Regulations allow you to draw a credit report for:

- considering a candidate for employment in a position that requires honesty in dealing with cash or finances, and
- verifying educational qualifications and employment, provided you have the candidate's consent.

Additionally, a criminal background check on a candidate involves processing personal information related to criminal behaviour or alleged criminal behaviour. This is special personal information. Therefore, you will need the candidate's consent.

3.2. NECESSARY FOR THE CONCLUSION OR PERFORMANCE OF A CONTRACT

Often (usually concerning candidate claims of alleged unfair discrimination in the application process), employers will maintain that certain background checks are 'an inherent requirement of a job'.

Section 6(2)(b) of the Employment Equity Act provides that:

It is not unfair discrimination to distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.

While the 'inherent requirement of the job' concept is usually only applied in labour law cases, we think this concept can also be used to justify processing personal information related to background checks under POPIA. Our argument goes that if a certain type of background check is required as 'an inherent requirement of a job', the background check would also be 'necessary for the conclusion or performance of a [an employment] contract'.

What counts as 'an inherent requirement of a job'? There are numerous cases on this topic. However, generally under South African law (specifically section 7.1.2 of the **Employment Equity Act: Code of good practice: Disabilities**), inherent requirements of a job are defined as:

those requirements an employer stipulates as necessary for a person to be appointed to the job, and are necessary in order to enable an employee to perform the essential functions of a job.

For example, suppose an inherent requirement of a job is that a candidate must have passed a particular exam or obtained a specific professional qualification. In that case, the employer is well within their rights to justify verifying this information via a background check in terms of section 11(1)(b) of POPIA.

NB! Remember, even if a credit or criminal background check is considered 'an inherent requirement of a job', you will still need the candidate's consent to conduct these checks.

3.3. LEGITIMATE INTEREST

Suppose you cannot justify that a background check is 'an inherent requirement of a job'. In that case, you do not automatically have to rely on consent (except for credit checks, criminal background checks and other background checks which involve processing special personal information). There is a middle-ground, relying on your or the legitimate interest of a third party to conduct a background check on a candidate. You must conduct a Legitimate Interest Assessment to rely on this legal basis. Processing employee personal information has been recognised as an employer's likely legitimate interest in **Recital 47 of the GDPR**. Recital 47 also mentions fraud prevention as a recognised legitimate interest for organisations.

4. DIFFERING VIEWPOINT

On the other hand, the ICO (the UK data privacy regulator) thinks that all pre-screening and background check activities concerning job candidates require consent. The **ICO's Data Protection 'The employment practices code'** states:

If it is necessary to secure the release of documents or information from a third party, obtain a signed consent from the applicant.

The **ICO's Data Protection 'The employment practices code'** also offers practical advice on conducting background checks for candidate screening in the most data privacy-sensitive ways.



5. WHAT DO YOU DO NOW?

- Decide which legal basis is the most relevant for you regarding the particular position, membership selection or admission criteria you are screening for.
- Ensure that where you are collecting personal information from third party sources for your background checks, you will also need to comply with section 12 of POPIA. You will most likely be able to justify your third-party collection practices in terms of the exemptions listed in section 12(2)(a), 12(2)(e) or 12(2)(b).
- You must explain your background screening practices in your relevant privacy notices and detail which specific third-party sources you use to conduct your background checks.

6. FURTHER READING



You can read more about the relevant legal justifications for processing personal information and special personal information in **Chapters 6** and **7**. You can read specifically about how to conduct a Legitimate Interest Assessment in **Chapter 2**.

Chapter 10 deals with collecting personal information from third-party sources (as opposed to collecting personal information directly from the data subject).