

Note: The Department of Justice aims to have this Bill available on the PMG website by 20 August 2009.

EXPLANATORY MEMORANDUM ON THE OBJECTS OF THE PROTECTION OF PERSONAL INFORMATION BILL, 2009

1. PURPOSE OF BILL

The Protection of Personal Information Bill, 2009 (the Bill), emanates from the South African Law Reform Commission's report on privacy and data protection. The Bill aims to give effect to the right to privacy, by introducing measures to ensure that the personal information of an individual (data subject) is safeguarded when it is processed by responsible parties. The Bill also aims to balance the right to privacy against other rights, particularly the right of access to information, and to generally protect important interests, including the free flow of information within and across the borders of the Republic.

2. OBJECTS OF BILL

2.1 The Bill is divided into 12 Chapters and a number of the Chapters of the Bill are further subdivided into different Parts.

2.2 Chapter 1 of the Bill contains two clauses dealing with "definitions" and the "purpose" of the Bill, respectively. Clause 2 provides that the purpose of the Bill is to—

- (i) protect the right to privacy with regard to the processing of personal information; and
- (ii) balance the right to privacy against other rights, such as the right of access to information.

2.3 Chapter 2 reflects those provisions dealing with the application of the Act. Clause 3 clarifies that the Bill applies to the processing of personal information by or on behalf of a responsible party. A "responsible party" is defined as a public or private body or any other person who, alone or in conjunction with others, determines the purpose of and means for processing personal information. Clause 3 further provides that the Bill applies to the processing of personal information where the responsible party is domiciled in the Republic or where the responsible party is not domiciled in South Africa, but makes use of automated or non-automated means that are situated in the Republic.

2.4 The wide ambit of clause 3 necessitates certain exclusions as far as its application is concerned. Clause 4 provides that the Bill does not apply to the processing of personal information in the following circumstances:

- (i) Personal or household activities;
- (ii) de-identified information (i.e. information that had deletions effected in a such a manner that the identification of the data subject is not possible);
- (iii) the processing of personal information carried out in the interests of national security, defence or public safety or the prevention, investigation or proof of offences;
- (iv) the processing of personal information for exclusively journalistic purposes;
- (v) information processing by the Cabinet and its committees, the Executive Council of a province and a Municipal Council of a municipality;
- (vi) information processing relating to the judicial functions of a court referred to in section 166 of the Constitution of the Republic of South Africa, 1996; and
- (vii) the processing of personal information that has been exempted from the application of the information protection principles that are contained in the Bill.

2.5 Clause 5 establishes the principle that the Bill does not affect the operation of any other legislation that regulates the processing of personal information and is capable of operating concurrently with the Bill. Clause 6 provides that the Bill binds all public and private bodies.

2.6.1 Chapter 3 deals with conditions for lawful processing of personal information. Part A of the Chapter reflects eight core information protection principles, namely, accountability, processing limitation, purpose specification, further processing limitation, information quality, openness, security safeguards and data subject participation. The aforementioned principles give effect to internationally accepted information protection principles which ensure that the Bill prescribes the minimum requirements for lawful processing of personal information.

2.6.2 The Bill, among others, draws a distinction between personal information and special personal information. Part B of Chapter 3 therefore regulates the processing of special personal information and places a prohibition on the processing of special personal information by responsible parties (i.e. public or private bodies). The term "special personal information" is defined in clause 25 as information concerning—

- (i) a child who is subject to parental control in terms of the law; or
- (ii) a data subject's religious or philosophical beliefs, race or ethnic origin, trade union membership, political opinions, health, sexual life, or criminal behaviour.

2.6.3 The general prohibition in respect of the processing of special personal information is subject to a number of exceptions reflected in clauses 26 to 32. The general trend of the aforementioned exceptions can be explained with reference to a few clauses. Clause 26 creates certain exemptions in respect of the processing of special personal information concerning a data subject's religious or philosophical beliefs if such processing is carried out by spiritual or religious

organisations in respect of their members. Clause 28 provides that a trade union, of which the data subject is a member, may process the information concerned if such processing is necessary to achieve the aims of the trade union. Clause 30 provides, among others, that special personal information regarding a data subject's health or sexual life may be processed by medical professionals, healthcare institutions or social services if such processing is necessary for the proper treatment and care of the data subject.

2.7 Chapter 4 contains exemptions from the information protection principles. Clause 33 provides that processing of personal information will not be in breach of the information protection principles if the Information Protection Regulator (to be established in terms of Chapter 5 of the Bill) authorises such processing. Clause 34 provides that the Regulator may authorise a responsible party to process personal information, even if that processing is in breach of an information protection principle if the Regulator is satisfied that, in the circumstances of the case—

- (i) the public interest in the processing outweighs, to a substantial degree, any interference with the privacy of the data subject that could result from the processing; or
- (ii) the processing involves a clear benefit to the data subject or a third party that outweighs, to a substantial degree, any interference with the privacy of the data subject or third party that could result from the processing.

2.8.1 Part A of Chapter 5 regulates matters dealing with the establishment of the Regulator (clause 35) as an independent statutory authority. This Chapter contains provisions dealing with the constitution of Regulator and period of office of the members thereof (clause 36); the remuneration, allowances, benefits and privileges of such members (clause 37); the Secretary and staff of the Regulator (clause 38); committees of the Regulator (clause 39); meetings of the Regulator (clause 40); funding of the Regulator (clause 41); protection of the Regulator (clause 42) and the powers and duties of the Regulator (clause 43). The Regulator is, among others, empowered to monitor and enforce compliance by public and private bodies with the provisions of the Bill. The Regulator is also responsible for issuing codes of conduct for different sectors and to make guidelines to assist bodies with the development and application of codes of conduct. Clause 44 aims to require that the Regulator must have due regard to certain matters (for example the protection of all rights and interests that compete with the right to privacy) in the performance of its functions and the exercise of its powers. Clauses 45 to 47 deal with programmes of the Regulator, reporting by the Regulator and the duty of confidentiality, respectively.

2.8.2 Part B of Chapter 5 consists of two clauses which regulate the duties and responsibilities of information protection officers and the designation of deputy information protection officer,

respectively. Information protection officers are, in terms of clause 48, among others, responsible for dealing with requests that are made to the public or private bodies in terms of the Bill. These officers are required to ensure that the public or private bodies of which they are the information protection officers comply with the provisions of the Bill. Clause 49 makes provision for the designation by public and private bodies of deputy information protection officers to perform those duties contemplated in clause 48. The procedure for the designation of deputy information protection officers is regulated in terms of section 17 of the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000).

2.9.1 Chapter 6, which regulates "notification" (Part A) and "prior investigation" (Part B), relates to two information protection principles contained in Chapter 3, namely, Principles 3 (purpose specification) and 6 (openness). Clause 50 places an obligation on responsible parties to notify the Regulator before they commence with the processing of personal information. Clause 51 prescribes the particulars, such as the name and address of the responsible party, the purpose of the processing and a description of the categories of data subjects and of the information or categories of information relating thereto, that must be contained in the notification. Clause 52 deals with the exemption in respect of the notification requirement. This clause provides that the Regulator is empowered to exempt certain categories of information processing from the notification requirement. The Regulator must, in terms of clause 53, maintain a register of all notices which he or she must make available to the public. An offence is created in terms of clause 54 in respect of any failure to comply with the notification requirement as stipulated in terms of clause 50.

2.9.2 Part B of Chapter 6 regulates prior investigations. Clause 55 requires that the Regulator must initiate an investigation before any processing commences. This requirement will be applicable where a responsible party intends, for example, to process information in respect of criminal behaviour on behalf of third parties or for the purposes of credit reporting. Clause 56 regulates matters relating to the prior investigation requirement. This clause, among others, provides that responsible parties may not carry out information processing until the Regulator has completed his or her investigation.

2.10 Chapter 7 introduces Codes of Conduct. The development of codes of conduct (code or codes) will contribute to the proper implementation of the information protection principles, as reflected in Chapter 3 of the Bill, in each sector. Clause 57, among others, provides that a code must prescribe how the information protection principles are to be complied with within specific sectors as far as the processing of personal information is concerned. The remainder of the clauses provide for the following:

- (i) The Regulator may issue codes on his or her own initiative or on application by persons who process personal information (clause 58). Provision is also made in subclause (1) for stakeholder involvement and consultation in the issuing of a code.
- (ii) The Regulator must, after a code is issued, publish a notice in the *Gazette* indicating that a code has been issued and where copies thereof are available. A code will come into operation 28 days after publication of the notice (clause 59).
- (iii) The Regulator may from time to time amend or revoke a code that has been issued under clause 57 (clause 60).
- (iv) A code may prescribe procedures for making and dealing with complaints alleging a breach of the code. If a code sets out procedures for making and dealing with complaints, the Regulator must be satisfied that the procedures meet the prescribed standards and any guidelines that may have been issued by the Regulator (clause 61).
- (v) The Regulator may provide written guidelines to assist bodies to develop codes or to apply approved codes (clause 62).
- (vi) The Regulator must keep a register of approved codes (clause 63).
- (vii) The Regulator may, on his or her own initiative, review the operation of an approved code (clause 64).
- (viii) Failure to comply with a code is deemed to be a breach of an information protection principle (clause 65).

2.11 Chapter 8 regulates the rights of persons in respect of unsolicited electronic communication and automated decision making. Some forms of direct marketing are, or have the capacity to be, more intrusive than others. The three clauses reflected in Chapter 8 therefore regulate matters relating to "unsolicited electronic communications" (clause 66), "directories" (clause 67) and "automated decision making" (clause 68). The general principle contained in this Chapter is that if a data subject does not respond to a responsible party's invitation to make use of its direct marketing advances, the responsible party will not be allowed to contact the consumer for a second time.

2.12 Chapter 9 consists of one provision and aims to regulate transfers of personal information outside the Republic. The flow of information across our borders benefits both organisations and individuals by lowering costs, increasing efficiency and improving customer convenience. However, the flow of personal information leads to concerns about privacy and present new challenges with respect to protecting individuals' personal information. Clause 69 therefore stipulates that information will not be transferred to another country if proper safeguards for the protection of the information have not been adopted in that country.

2.13.1 Chapter 10 provides for complaints to be lodged with the Regulator by data subjects regarding any interference with the protection of their personal information. Interference with the protection of the personal information of a data subject consist, in terms of clause 70, of—

- (i) any breach of the information protection principles set out in Chapter 3 of the Bill;
- (ii) non-compliance with any obligations created in terms of the Bill; or
- (iii) a breach of the provisions of a code that has been issued in terms of clause 57.

12.3.2 The remaining provisions of the Chapter deal with the powers of the Regulator as far as investigation of complaints are concerned and aim to regulate the following:

- (i) Clauses 71 and 72 provide that complaints may be submitted to the Regulator regarding the interference with personal information of a data subject and the manner in which such complaints may be made, respectively.
- (ii) Clauses 73 to 78 reflect those provisions dealing with the investigation of complaints by the Regulator and include matters such as the power to refer a complaint to another regulatory body if such regulatory body is in a better position to deal with the complaint. The Regulator is also required, in terms of clause 77 as part of the Regulator's proceedings that precede the investigation itself, to inform the complainant of his or her intention to conduct an investigation and to allow the responsible party with the opportunity to submit a written response in respect of the complaint to the Regulator. Clause 78 provides that the Regulator may, if it is possible to settle the dispute between the parties, to do so without proceeding with or concluding an investigation.
- (iii) Clauses 79 to 86 regulate the various aspects associated with the investigations conducted by the Regulator. As far as the investigation of complaints is concerned the Regulator will, among others, in terms of clause 79 be empowered to summon persons to appear before him or her, receive and accept any evidence and enter and search any premises that is occupied by a responsible party. The remaining clauses deal with procedural aspects in relation to the investigations to be conducted by the Regulator. These provisions deal with the issuing of search warrants (clause 80); the requirements for warrants to be issued (clause 81); the execution of warrants (clause 82); matters that are exempt from searches (clause 83); exemption of communication between a legal adviser and his or her client (clause 84); the possibility of objections to be raised with regard to searches (clause 85) and the return of warrants to the court that issued them after they have been executed or if they were not executed within the authorised period (clause 86).
- (iv) Clauses 87 and 88 give effect to the need for assessments or audits to be conducted with regard to the processing of personal information practices in order to determine whether such practices comply with the provisions of the Bill. An assessment may, in terms of clause 87, be conducted on the Regulator's own initiative or at the request of another

person. After completing the assessment the Regulator must report the results thereof to the responsible party together with an appropriate recommendation.

- (v) Clause 89 requires that the Regulator must inform complainants and responsible parties of any developments in or the result of investigations.
- (vi) The Regulator will also be empowered to make a determination that a responsible party must take specified action, or cease to act in a specific manner, within a specified period for the purpose of complying with the provisions of the Bill. Failure to comply with the notices will be a criminal offence. Clauses 90 to 93 of the Bill aim to give effect to the aforementioned.
- (vii) Clause 94 provides that a court may, apart from compensatory damages for patrimonial and non-patrimonial loss, also award aggravated damages that are just and equitable.

2.14 Chapter 11 deals with offences and penalties. The Chapter, among others, creates offences such as obstruction of the Regulator (clause 95), breach of confidentiality by a person acting on behalf of a responsible party (clause 96) and the failure to comply with an enforcement notice (clause 98).

2.15 Chapter 12 reflects certain general provisions such as the amendment of certain laws (clause 101), the Minister's power to make regulations (clause 102) and the short title and commencement of the Act (clause 104). The Schedule to the Bill is intended to effect certain amendments to existing legislation, among others, to ensure that all the responsibilities of the Human Rights Commission in terms of the Promotion of Access to Information Act, 2000, are assigned to the Regulator.