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**LEGAL OPINION**

**TO:** Mr TMH Mofokeng, MP  
Chairperson: Select Committee on Security and  
Constitutional Development

**COPY:** Mr M B Coetzee  
Secretary to Parliament

**DATE:** 11 June 2013

**SUBJECT:** Opinion on the proposed amendment to clause 38(2) of  
the Protection of Personal Information Bill [B9B-2009] by  
the Financial Service Board

**LEGAL ADVISER:** Ms SS Isaac

**REFERENCE:** 164/13

(a) The FSB's proposed amendment to clause 38(2), and

issues:

3. As per the request to our Office, the opinion will consider the following

**Issues**

2. The proposed amendment is supported by the National Treasury but opposed by the Department of Justice and Constitutional (DOJCD). Despite discussions on the issue the parties have not managed to reach consensus.

1. The Chairperson of the Select Committee on Security and Constitutional Development requested that our office advise him on an amendment proposed by the Financial Services Board (FSB) to clause 38(2)(b) of the Protection of Personal Information Bill [B9B-2009].

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**Date:**

11 June 2013

**From:**

Legal Services Office

**Copy:**

Mr M B Coetsee, Secretary to Parliament

**To:**

Mr TMH Mofokeng, MP

Chairperson: Select Committee on Security and Constitutional Development

**MEMORANDUM**



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- (b) The proposed amendment in light of the draft General Data Protection Regulation of the European Parliament and of the Council.

## **Legal Framework**

4. The Protection of Personal Information Bill [B9B-2009] (the Bill) seeks, among others, to promote the protection of personal information processed by public and private bodies and to introduce certain conditions so as to establish minimum requirements for the processing of personal information. Clause 38 of the Bill provides for exemptions in respect of certain functions when personal information is processed. Clause 38 provides as follows:

(1) Personal information processed for the purpose of discharging a relevant function is exempt from sections 11, 12, 15 and 18 in any case to the extent to which the application of those provisions to the personal information would be likely to prejudice the proper discharge of that function.

(2) "Relevant function" for purposes of subsection (1), means any function—

(a) of a public body; or

(b) conferred on any person in terms of the law, which is performed with the view to protecting members of the public against—

(i) financial loss due to dishonesty, malpractice or other seriously improper conduct by, or the unfitness or incompetence of, persons concerned in the provision of banking, insurance, investment or other financial services or in the management of bodies corporate; or

(ii) dishonesty, malpractice or other seriously improper conduct by, or the unfitness or incompetence of, persons authorised to carry on any profession or other activity.

**The Amendment proposed by the FSB**

5. The FSB is of the opinion that the application of clause 38 was not far reaching enough to apply to certain functions of FSB. The FSB argues that they do not process information only to protect members of the public but also in relation to fulfilling other aspects of its mandate. The FSB states that it exchanges personal information of data subjects on a daily basis with international markets. The FSB further states that it also receives applications from international markets and cross border entities on a daily basis to verify data subjects who wish to do business in that market. This required processing of identity numbers and other personal information. The FSB argue that to qualify for an exemption in terms of clause 38 requires a particular event to happen but their work is proactive as opposed to reactive in nature.

6. The FSB proposes the following amendment:

(2) "Relevant function" for purposes of subsection (1), means any function—

(a) of a public body; or

(b) conferred on any person in terms of the law, which is performed with the view to

(i) protecting members of the public against—

(aa) financial loss due to dishonesty, malpractice or other seriously improper conduct by, or the unfitness or incompetence of, persons concerned in the provision of banking, insurance, investment or other financial services or in the management of bodies corporate; or

(bb) dishonesty, malpractice or other seriously improper conduct by, or the unfitness or incompetence of, persons authorised to carry on any profession or other activity.

(ii) "protecting the integrity, stability or soundness of financial institutions or markets."

## Discussion

7. The current provisions of clause 38 provide that personal information processed for the purpose of discharging a relevant function is exempt from sections 11,1 12,2 153 and 184 in any case to the extent to which the application of those provisions to the personal information would be likely to prejudice the proper discharge of that function. The exemption applies, to the extent applicable, to a broad range of activities in the Bill.
8. For the purposes of the clause, "relevant function", means a public body or any function conferred on any person in terms of the law which is performed with the view to protecting members of the public against specified improper actions.
9. The FSB argues that the definition of "relevant function" is not adequate to cover the tasks that it carries out as their tasks are not limited to the protection of the public. Their proposed amendment will define "relevant function" to include protecting the integrity, stability or soundness of financial institutions or markets.
10. The DOJCD is of the opinion that the FSB may in terms of the current provisions carry out its mandate unhindered. Both the proposed amendment by the FSB and the argument by the DOJCD are legally acceptable. Therefore, a decision to accept or reject the proposed amendment is solely a policy choice.
11. However, that said, the existing provisions in clause 38 may be adequate to address the concerns raised by the FSB. Instead of relying on the exemption in terms of clause 38(2)(b), the FSB may more appropriately be exempted in terms of clause 38(2)(a).

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<sup>1</sup> Consent, justification and objection

<sup>2</sup> Collection directly from data subject

<sup>3</sup> Further processing to be compatible with purpose of collection

<sup>4</sup> Notification to data subject when collecting personal information

12. In terms of clause 38(2)(a), a public body processing personal information

for the purpose of discharging a relevant function is exempt from sections 11, 12, 15 and 18 in any case to the extent to which the application of those provisions to the personal information would be likely to prejudice the proper discharge of that function. In terms of the definitions clause "public body" means any other functional or institution when exercising a public power or performing a public function in terms of any legislation.

13. The FSB was established in terms of the Financial Services Board Act [Act 97 of 1990]. It also has a mandate in terms of other legislations and is responsible for ensuring that regulated entities comply with legislation and capital adequacy requirements for financial soundness.<sup>6</sup> As a body exercising a public function in terms of legislation, the FSB is a public body as defined by the Bill.

14. While clause 38(2)(b) exempts the FSB in respect of its activities related to the protection of the public, the provisions of clause 38(2)(a) are broader and therefore sufficient to enable the FSB to enjoy the exemptions, to the extent allowed by the Bill, in respect of all the activities it carries out that relate to the processing of personal information.

15. Further, the proposed amendment does not provide for instances that are not current addressed by clause 32(2)(a). Hence, the effect of the FSB's proposed amendment will be the same as the exemption allowed in clause 32(2)(a).

## EU Data Protection Directives

<sup>5</sup> Collective Investment Schemes Control Act (Act 45 of 2002)  
Financial Services Board Act (Act 97 of 1990)  
Financial Advisory and Intermediaries Services Act (Act 37 of 2002)  
Financial Institutions (Protection of Funds) Act (Act 28 of 2001)  
Financial Markets Act 19 of 2012  
Financial Supervision of the Road Accident Fund Act (Act 8 of 1993)  
Friendly Societies Act (Act 25 of 1956)  
Inspection of Financial Institutions Act (Act 80 of 1998)  
Long-term Insurance Act (Act 52 of 1998)  
Pension Funds Act, 24 (Act 24 of 1956)  
Short-term Insurance Act (Act 53 of 1998)  
Supervision of the Financial Institutions Rationalisation Act (Act 32 of 1996)  
The Securities Services Act (Act 36 of 2004) – Repealed  
Financial Services Ombud Schemes Act (Act 37 of 2004)  
<sup>6</sup> Financial Services Board Annual Report 2012, p2

16. The proposed amendments to the European Union Data Protection Directives are still under discussion and I therefore cannot provide a conclusive opinion as to impact of the intended amendments will have on the Bill until the Directives are finalised. However, in general the proposed amendments to the EU Directives seek to increase data protection standards.

17. The Directives provide that the compliance with the obligations is mandatory for any transfers of personal data to third countries or international organisations, including onward transfers. Further, the Directives sets out the criteria, conditions and procedures for the adoption of an adequacy decision by the Commission. The criteria takes into account for the Commission's assessment of an adequate or not adequate level of protection include expressly the rule of law, judicial redress and independent supervision. The article now confirms explicitly the possibility for the Commission to assess the level of protection afforded by a territory or a processing sector within a third country.

18. Hence, affording further exemptions from the Bill may run into conflict with the EU Directive.

### **Conclusion**

19. Clause 38(2)(a) provides a similar exemption for the FSB as in its proposed amendment. Any amendment to clause 38(2)(b) may therefore have a negligible effect and not change the status quo. However, such an amendment is a policy choice that may be made by the Committee.



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**Ms SS Isaac**

**Parliamentary Legal Adviser**

