



INFORMATION REGULATOR (SOUTH AFRICA)

*Ensuring protection of your personal information
and effective access to information*

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RE: SUBMISSION OF COMMENTS IN RELATION TO THE DRAFT POLITICAL FUNDING BILL, 2017 BY THE INFORMATION REGULATOR

1. The Information Regulator (Regulator) is established in terms of Section 39 of the Protection of Personal Information Act 4 of 2013 (POPIA). The Regulator is mandated to exercise its powers and to perform its functions in accordance with POPIA and the Promotion of Access to Information Act 2 of 2000 (PAIA).
2. The Regulator welcomes the Draft Political Funding Bill, 2017 and wishes to address the impact of the Bill on PAIA, POPIA and the recent Western Cape High Court decision of *MY VOTE COUNTS NPC V PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA & OTHERS (13372/2016) [2017] ZAWCHC 105*.

MY VOTE COUNTS NPC V PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA & OTHERS (13372/2016) [2017] ZAWCHC 105.

3. The application in the case was premised on the right of access to information in terms of Section 32(1) of the Constitution of the Republic of South Africa, Act 106 of 1996 (Constitution). Section 32 of the Constitution entitles citizens to have access to the private funding information of political parties. Such information is reasonably required for the effective exercise of the right to vote in elections and to make political choices as these rights are enshrined in Sections 19(1) and (3) of the Constitution.

4. Section 32 of the Constitution envisage two holders of information, the unqualified right of access to information in terms of Section 32(1)(a) held by the State and a qualified right of access to information held by another person in terms of Section 32(1)(b), which the latter is required for the exercise or protection of "any rights". The Court was of the view that political parties fall within the category of "another person" in terms of Section 32(1)(b) of the Constitution.
5. The Court held that Sections 32 and 19 must be read together in order to determine what the Constitution required, and that the information about political parties private funding is required for the exercise of an informed right to vote.
6. The Court affirmed the statement by the Majority Judgment in **My Vote Counts NPC V Speaker of the National Assembly & Others 2016(1)SA 132 (CC)** that PAIA is the legislation envisaged in Section 32 of the Constitution. The issue before the Constitutional Court was not to challenge PAIA, but that Parliament has failed to fulfill its constitutional obligation to enact legislation giving access to private funding information, and it was in that context that the Court identified PAIA as the legislation to be challenged.
7. The Court further held that Section 32(1) read with Section 19 of the Constitution and Sections 7(2) and 1(d) thereof, require disclosure of information on political parties private funding for the exercise and protection of the right to vote.
8. The Regulator concurs with reasoning of the Court with regards to the application of Sections 32 and 19 respectively.

9. The Regulator would like to comment firstly on the need for the amendment of PAIA to include political parties, and secondly, on the Draft Political Party Funding Bill, 2017.

COMMENTS ON THE AMENDMENT OF PAIA

10. The Court identified the gaps in PAIA as the Act appears to have been drafted without having political parties in mind at all. There are categories of “persons” outside the State for whom PAIA has failed to make express or any provision. The Regulator agrees with the Court that Section 32(1) read with Section 19 of the Constitution and Sections 7(2) and 1(d) thereof, require disclosure of information on political parties private funding for the exercise and protection of the right to vote. However, the Regulator is of the view that in order to exercise their right to vote and to make political choices, the electorate requires all information held by political parties, including information relating to private funding they receive.
11. The Regulator proposes that PAIA should be amended to include the disclosure by political parties of information that will enable voters to exercise their right to vote.
12. The Court has identified a number of deficiencies in PAIA. These deficiencies include the following:
 - 12.1 Sections 18 and 53 of PAIA do not cater for proactive disclosure of information but provides for disclosure of records on application. The Regulator recommends that these sections should be amended to include the proactive disclosure of information held by public and private bodies (including political parties) systematically and regularly without an application.

- 12.2 Further, the right to information under PAIA is restricted to recorded information, the Regulator recommends that PAIA should be amended to make provision for access to unrecorded information.
13. The Regulator agrees with the Court that given these deficiencies, PAIA's mechanisms and processes are inherently limited. PAIA is therefore not in sync with Section 32 of the Constitution and limits the latter section and also Section 19(1) and (3) respectively.
14. Accordingly, this renders PAIA unconstitutional and invalid insofar as it does not allow for disclosure of information held by political parties given the public nature of political parties.
15. The Regulator's proposal to include political parties in PAIA is buttressed by their inclusion in POPIA in so far as it (POPIA) provides for the processing of personal information concerning a data subject's political persuasion. It therefore makes sense to include political parties in both **POPIA** and **PAIA**.

DRAFT POLITICAL PARTY FUNDING BILL, 2017

16. The Regulator submits as follows in relation to the Draft Bill.

Chapter 2, Section 3(5) of the Bill provides that:

"Any contributor contemplated in subsection (3)(a) may request the Commission not to disclose their identity or the amount of the contribution"

17. The Court in relation to privacy, held that given the public nature of political parties and the fact that the private funds they receive have a distinctly public purpose, their rights to privacy can justifiably be attenuated. The same principle must also apply to their donors.

18. Consequently, Chapter 2 of Section 3(2) of the Bill defeats the very purpose of the Court judgment as far as it relates to the principles of accountability and transparency. The Regulator recommends that Section 3(2) of the Bill should be deleted.

19. Chapter 5 of the Bill deals with Enforcement, Section 15(2) thereof provides the following:

"In order to monitor compliance with this Act or investigate a complaint, the Commission may request any person -

" To disclose any relevant information;....

20. Section 15(4) further provides that:

" If a complaint relating to the income and expenditure of a political party is lodged with the Commission, it must, if the accounting officer of the Funds is of the view that there is prima facie substance to the complaint, investigate the complaint"

21. In relation to Section 15(2) Regulator submits that given the legislative mandate of the Electoral Commission its role in investigating complaints must be limited to the investigations of complaints related to non-disclosure of income and expenditure. The Regulator propose that Section 15(2) must be amended accordingly to make it consistent with Section 15(4).