 

**TO: Chairperson, Standing Committee on Finance [Mr Y Carrim, MP]**

**FROM: Constitutional and Legal Services Office**

**DATE: 27 November 2017**

**SUBJECT: Advice on the letter from SARS Commissioner**

**Purpose**

1. To advise the Standing Committee on Finance (SCoF) on the letter from SARS Commissioner, Mr T Moyane, dated 15 November 2017.

**Background**

1. On 6 November 2017 the Chairperson of SCoF requested the report on the disciplinary enquiry into Mr Jonas Makwakwa and Ms Kelly-Anne Elskie from the Commissioner of SARS. The letter was based on legal advice that section 56 of the Constitution authorises all committees of the National Assembly to summon any person to appear before it to produce documents. The request was copied to the Minister of Finance.

1. The request included the proviso that classified aspects of the report, if there are any, could be considered in a closed meeting or deleted from the report based on agreement between legal advisers from SARS and Parliament.
2. The request also indicated that the Commissioner must provide legal reasons should he decide not to make the report available to SCoF.
3. The Committee also requested the Hogan Lovells report on this matter.
4. On 10 November, BizNews reported that the Hogan Lovells report was limited to identifying whether any misconduct had been committed by Mr Makwakwa and Ms Elskie as employees of SARS.[[1]](#footnote-1) According to the article, the Hogan Lovells report did not seek to “directly investigate the financial transactions identified” by the Financial Intelligence Centre (FIC) and that “all criminal related allegations arising from the FIC report were referred to the relevant authorities for investigation.”
5. The BizNews article indicated that the Hogan Lovells report recommended that disciplinary action should be taken against Mr Makwakwa for non-disclosure of external interests and that no action was recommended against Ms Elskie. “SARS subsequently followed its own internal disciplinary procedures which included charges relating to Makwakwa’s breach of his suspension conditions and the failure to disclose. A hearing was convened and chaired by an independent senior counsel, Advocate Terry Motau SC. The findings of that internal enquiry acquitted Makwakwa of all charges.”
6. Articles in the Daily Maverick (Pauli van Wyk, 21 November 2017) and Business Day (Linda Ensor & Natasha Marian, 23 November 2017) confirm the limited brief of Hogan Lovells, although the reason for the terms of reference appears to be an attempt not to consider the FIC report and the consequent PwC Report on it due to taxpayer confidentiality.
7. On 15 November 2017 the Commissioner responded to the Chairperson of SCoF, indicating that he was willing to release the report on the disciplinary enquiry and the Hogan Lovells report. However, the response indicated that due to the provisions of the Financial Intelligence Centre Act, legal representatives from SARS, Parliament, Treasury and the FIC should meet to agree on briefing a Senior Counsel or the permissibility of disclosing the reports. The response indicated that the legal argument presented in the request for the said reports is legally flawed.
8. The response referred to the “Financial Intelligence Act and its dictates, especially around the disclosure of South African citizens’ personal information arising from the FIC suspicious report.” The Commissioner’s response further referred to the criminal complaint laid by Corruption Watch against him for his disclosure of the FIC report to Mr Makwakwa for the purpose of the disciplinary process against the latter.
9. The Chairperson responded to the SARS Commissioner on 24 November saying the matter had been referred to Parliament’s Legal Services Unit and requested a copy of the Terms of Reference of the Disciplinary Enquiry and the PWC Report which it is said in the media is linked to this matter.

**Regulatory framework**

1. The crisp issue is whether the Financial Intelligence Centre Act No. 38 of 2001 prohibits the Commissioner from disclosing the report on the disciplinary enquiry and the Hogan Lovells report.
2. At the outset it appears from the media that the Hogan Lovells report did not deal with the issues raised by the FIC concerning payments received by Mr Makwakwa and Ms Elskie. It further appears that the disciplinary enquiry did not deal with these issues either.
3. Be that as it may, the Commissioner is alleged to have supplied the report from the FIC to Mr Makwakwa for the purpose of the disciplinary enquiry.
4. Section 29(4) provides as follows:

*(4) No person who knows or suspects that a report has been or is to be made in terms of this section may disclose that knowledge or suspicion or any information regarding the contents or suspected contents of any such report to any other person, including the person in respect of whom the report is or is to be made, otherwise than—*

*(a) within the scope of that person’s powers and duties in terms of any legislation;*

*(b) for the purpose of carrying out the provisions of this Act;*

*(c) for the purpose of legal proceedings, including any proceedings before a judge in chambers; or*

*(d) in terms of an order of court.*

1. Subsections (1) and (2) of section 60 provide as follows:

*60. Misuse of information.—(1) Any person who—*

*(a) discloses confidential information held by or obtained from the Centre otherwise than in accordance with section 40 or 41;*

*(b) willfully destroys or in any other way tampers with information kept by the Centre for the purposes of this Act;*

*(c) uses information from the Centre otherwise than in accordance with—*

*(i) any arrangements or safeguards made or imposed by the Director in terms of section 40 (3); or*

*(ii) section 40 (6); or*

*(d) discloses a fact or information contemplated in section 45B (2A), or uses such information, otherwise than as permitted by section 45B (5),*

*is guilty of an offence.*

*(2) Any person who knows, suspects or ought reasonably to have known or suspected—*

*(a) that information has been disclosed to the Centre; or*

*(b) that an investigation is being, or may be, conducted as a result of information that has been or is to be disclosed to the Centre,*

*and who directly or indirectly alerts, or brings information to the attention of, another person which will or is likely to prejudice such an investigation, is guilty of an offence.*

1. Section 40 provides for the circumstances under which the FIC must make information available to certain organs of state. Neither the National Assembly, nor any of its committees is listed. The Public Protector is listed.
2. Section 41 provides as follows:

*41. Protection of confidential information.—No person may disclose confidential information held by or obtained from the Centre except—*

*(a) within the scope of that person’s powers and duties in terms of any legislation;*

*(b) for the purpose of carrying out the provisions of this Act;*

*(c) with the permission of the Centre;*

*(d) for the purpose of legal proceedings, including any proceedings before a judge in chambers; or*

*(e) in terms of an order of court.*

1. Section 53 provides as follows:

*(1) Any person referred to in section 29 (3) who discloses a fact or information contemplated in that section, otherwise than in the circumstances or for the purposes authorised in that section, is guilty of an offence.*

*(2) Any person referred to in section 29 (4) who discloses a knowledge or suspicion or any information contemplated in that section, otherwise than in the circumstances and for the purposes authorised in that section, is guilty of an offence.*

1. Confidential information obtained from the FIC is protected in terms of the FIC Act. A person may only disclose such information in terms of the FIC Act. Failure to do so is a criminal offence.
2. Section 16 of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004 provides that a witness who is requested to produce a document under oath is immune from civil and criminal liability for such disclosure.

**Advice**

1. Confidential information obtained from the FIC included in a report which will be made public or disclosed outside the boundaries of the FIC Act will have to be redacted. Failing this the person disclosing the information commits an offence.
2. However, a committee must abide by the law and thus a request for information must be lawful. In this regard the FIC may give permission in terms of section 41 for the disclosure of such information. It follows that if the reports include confidential information obtained from the FIC, the SCoF or the Commissioner may request the FIC to allow the disclosure.
3. As suggested in the letter of request, confidential information in the two reports can be considered in a meeting excluding the public in terms of National Assembly rules 184 and 189. These rules are based on section 59(2) of the Constitution.
4. In light of the media report and the provisions of the FIC Act, confidential information obtained from the FIC should not be included in the Hogan Lovells report as the attorneys should not have access to such information in the ordinary scope of their mandate.
5. Whether confidential information obtained from the FIC is included in the report on the disciplinary enquiry, is not evident from the facts set out above.
6. The SCoF must decide how to respond to the proposal from the Commissioner. In this regard the SCoF may request the Minister of Finance to comment on the proposal. He is the responsible member of Cabinet for the implementation of the Act. He was also copied in the request from SCoF and it is not clear whether he is aware of the response from the Commissioner.
7. The Constitution empowers the SCoF to request the reports and permits it to exclude the public from the meeting if it is reasonable and justifiable in an open and democratic society. The exclusion would be an exception to the default constitutional position of open meetings. It is a means of last resort should the reports include confidential information and the FIC has given permission for its disclosure subject to such condition.

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1. <https://www.biznews.com/undictated/2017/11/10/makwakwa-probe-into-sars-no-2/> [↑](#footnote-ref-1)