

**MEMO: FILLING OF VACANCY AT THE INFORMATION REGULATOR IN TERMS OF
THE PROTECTION OF PERSONAL INFORMATION ACT 4 OF 2013**

18 FEBRUARY 2020

1. CONTEXT

On 20 November 2019, the following was referred to the Committee for consideration and report (ATC 104-2019)

“Filling of vacancy in Information Regulator

A letter, dated 4 November 2019, has been received from the President of the Republic, informing the Assembly of the resignation of Professor Tana Pistorius as a part-time member of the Information Regulator, and requesting the National Assembly to start the process of filling the vacancy created by the resignation, in terms of section 41 (2) of the Protection of Personal Information Act, 2013 (Act No 4 of 2013).”

2. BACKGROUND

The Protection of Personal Information Act, 2013, aims to give expression to the right to informational privacy, also known as the right to the protection of personal data.

Section 2 of the Act sets out the purpose of the Act, which is to—

“(a) give effect to the constitutional right to privacy, by safeguarding personal information when processed by a responsible party, subject to justifiable limitations that are aimed at—

(i) balancing the right to privacy against other rights, particularly the right of access to information; and

(ii) protecting important interests, including the free flow of information within the Republic and across international borders;

(b) regulate the manner in which personal information may be processed, by establishing conditions, in harmony with international standards, that prescribe the minimum threshold requirements for the lawful processing of personal information;

(c) provide persons with rights and remedies to protect their personal information from processing that is not in accordance with this Act; and

(d) establish voluntary and compulsory measures, including the establishment of an Information Regulator, to ensure respect for and to promote, enforce and fulfil the rights protected by this Act.”

In order to implement these laws, and in line with international practice, the Act provides for the establishment of an Information Regulator (in section 39).

The Information Regulator is independent, subject only to the Constitution and to the law; and must be impartial and perform its functions and exercise its powers without fear, favour or prejudice. It is accountable to the National Assembly.

3. INFORMATION REGULATOR'S ROLE AND FUNCTIONS

The Regulator's powers, duties and functions are set out in section 40 of the Act. Key responsibilities with respect to the protection of personal information, include:

- Providing education;
- Considering policy and law reform, as needed;
- Monitoring and enforcing compliance;
- Mediating disputes;
- Handling complaints;
- Facilitating cross-border cooperation;
- Developing codes of conduct; and
- Establishing an enforcement Committee

The Regulator also has responsibilities in terms of the Promotion of Access to Information Act, 2000. The South African Human Rights Commission has these responsibilities at present but once the Regulator is fully established, these will be transferred to the Regulator. The amendments reflected in the Schedule of the Act further aim to establish the Information Regulator as the sole functionary, apart from the courts, that may consider complaints against decisions that have been taken by public or private bodies in respect of requests for access to records of the bodies concerned.

4. COMPOSITION

4.1 Section 41 of the Act provides for the establishment of the Information Regulator, as follows:

- The Regulator consists of five members: A Chairperson (who must be appointed in a full-time capacity), as well as four ordinary Members of the Regulator.
- The ordinary Members of the Regulator must be appointed as follows:
 - Two ordinary members in a full-time capacity; and
 - Two ordinary members in a full-time **or** part-time capacity.

4.2 At present, the Regulator has the following Members, who are appointed with effect from 1 December 2016 for a period of five years:

- Adv. Pansy Tlakula as the Chairperson.
- Adv. Lebogang Cordelia Stroom as a full-time member.
- Mr Johannes Collen Weapond as a full-time member.
- Mr Sizwe Lindelo Snail ka Mtuze as a part-time member.
- Prof. Tana Pistorius, whose position is now vacant, was appointed as a part time member.

4.3 In terms of section 43(2)(a) of the Act, the full-time members perform their responsibilities as follows:

- Adv Lebogang Stroom-Nzama is responsible for the Promotion of Access to Information Act 2 of 2000; and
- Adv Collen Weapond is responsible for the Protection of Personal Information Act.

The present Members all are legally qualified and some have experience in practicing law. They have diverse qualifications, experience and skills. Notably, Prof. Pistorius, whose position must be filled, is an academic whose fields of specialization include intellectual property (IP) law and information technology law:

Adv Pansy Tlakula (Chairperson) holds a B. Proc degree from the University of the North (now University of Limpopo), an LLB degree from the University of the Witwatersrand and an LL.M degree from Harvard University. In 2006 she was awarded an Honorary Doctorate in Legal Studies by the Vaal University of Technology. Adv. Tlakula has held high profile positions in the academia, public and private sector. These include Senior Law Lecturer at the then University of Bophuthatswana (now North West University), National Director of the Black Lawyers Association, one of the founding Commissioners of the South Africa Human Rights Commission, Chairperson of the Board of the National Credit Regulator, Chairperson of Council of the then University of the North West (now North West University) and the Chancellor of the Vaal University of Technology. She was also Independent Non-Executive Director of the Bidvest Group Limited and the Chief Electoral Officer and later Chairperson of the Electoral Commission of South Africa (IEC). Tlakula is currently the Chairperson of the African Commission on Human and Peoples Rights (AU Organ) and its Special Rapporteur on Freedom of Expression and Access to Information in Africa.

Adv. Lebogang Stroom-Nzama (Full-time Member) completed her LLB degree at the University of Pretoria. She began her career as a Candidate Attorney at Hack, Stupel and Ross Attorneys where she completed her articles of clerkship. She was admitted as an Attorney of the High Court. She further obtained her LLM Degree with specialisation in Commercial law at University of South Africa, and a Certificate in Compliance Management with the University of Johannesburg. Her previous work experience includes areas of legal, compliance and risk at various financial services institutions such as Santam Insurance, First National Bank, SASRIA, and Liberty Life. In 2012 she was admitted as an Advocate of the High Court of South Africa and a member of the Johannesburg Bar. She is currently a full-time member of the Information Regulator.

Adv. Collen Weapond (Full-time Member) is an admitted Advocate of the High Court of South Africa. His areas of specialization include information technology, risk management, forensic investigation, compliance management, business management as well as law with a specialization in the law of contracts. Amongst other Johannesburg hold the following qualifications, a B. Iuris, LLB (UNISA), B.Com (Honours IT) (UCT), B. Tech in Policing (TUT), Diploma in Education III (RCE), Diploma in Compliance Management (UJ), Postgraduate Diploma in Computer Forensics (Coursework) (UCT), Certificate in Fraud Examination (Cum Laude) (UP), Certificate in Policing (TUT), Masters in Business Systems (Coursework Completed). Adv. Weapond currently serves as the Chairperson of the Audit Committee of the Office of the Premier in the Eastern Cape and Chairperson of the Risk Management Committee of the Department of Telecommunication and Postal Services. He also serves as a member of the Audit Committee of the Department of Telecommunications and Postal Services, the Limpopo Provincial Audit Committee, Free State Provincial Audit Committee, Wholesale and Retail SETA, Free State Department of Education. He is also a member of Council of the University of Mpumalanga (UMP) and the Chairperson of the Strategy Subcommittee. He was appointed as the Independent Expert for Legal and ICT at the Quality Council for Trade and Occupation (QCTO). Furthermore, Adv. Weapond served as a Non-Executive Director (Member of the Board) of the National Lotteries Commission and as the Chairperson of Risk Management Committee, Legal, Request for Proposal Subcommittee and Ad hoc Legal Subcommittees of the Board. He also served as a member of the Cybersecurity Advisory Council of South Africa, member of Council of the Council for Medical Schemes (CMS) and a member of the Appeals Committee of Council. Lastly, Prof. Weapond served as a Non-Executive Director and Coordinator of the Audit Function at Brakpan Bus Company (BBC), member of the Audit Committee of the National Department of Human Settlements, member of Council of the Forestry Advisory Council, and member of Council of the Heraldry Council.

Prof Tana Pistorius (Part-time Member) holds the South African Research Chair in Law, Society and Technology, hosted by the College of Law, UNISA. She obtained a BA, LLM and LL.D from the University of Pretoria and an LLB degree from UNISA. She is a qualified attorney and a notary of the

High Court of South Africa. Prof. Pistorius' fields of specialization include intellectual property (IP) law and information technology law. She is a rated researcher and a fellow of the Alexander von Humboldt Foundation. Prof Pistorius serves on the Cybersecurity Advisory Council and she is a member of the Cybersecurity Research, Development and Innovation Agenda Task Team. She serves on the board of directors of DALRO. She is a senior adjudicator of the South African Institute of Intellectual Property Law's ADR panel for the .za domain-name system. She is an external co-editor of the Journal for Juridical Science (UFS) and the Editor-in-Chief of the International Journal of Intellectual Property Management (Inderscience). She is a member of the WIPO-WTO Colloquium Editorial Board and has served on the executive council of the International Association for the Advancement of Teaching and Research in Intellectual Property (ATRIP) since 2009. She was the president of ATRIP (2014-2015). She is currently involved in a number of projects for the World Intellectual Property Organisation on the teaching of IP law. She was a member of the Copyright Review Commission (2011). Prof Pistorius was appointed as an international expert of the International Telecommunications Union (ITU) for a judiciary training project on the legal aspects of electronic commerce in Africa. In 2011-2012, Prof. Pistorius was appointed as an international expert for a project of the ITU on the development of the *SADC Model Law on Electronic Transactions and Electronic* and for its national transposition in six SADC member states (2013-2016). She was a member of the research team that drafted the Electronic Communications and Transactions Act 25 of 2002.

Mr Sizwe Snail ka Mtuze (Part-time Member) holds a Baccalareus Legum (LLB) from the University of Pretoria with Tax Law and Cyber-Law electives and also a Master's Degree (LLM) in Information Technology Law from the University of South Africa. He is a practising attorney with the law firm, Snail Attorneys at Law and International Co-ordinator of the African Centre for Cyberlaw and Crime Prevention based in Kampala, Uganda. He is the author of various articles on Cyberlaw in accredited and non- accredited journals both locally and internationally and has given ad hoc lectures for the LSSA, ACFE, University of Johannesburg, Fort Hare University and University of Pretoria and comments on Cyberlaw in various South African Newspapers and radio talk shows. He also presents papers and attends both local and international conferences. He is also co-editor and author of the 3rd Edition of Cyberlaw @ SA. He also does corporate presentations, regularly gives opinions to both the private and government sectors as well as individualized legal compliance testing as well as in-house workshops / training for various private companies and government institutions both in South Africa and in Central, West and East Africa. Mr Snail ka Mtuze was a member on the ICT REVIEW Panel of the Department of Telecommunications & Postal Services (DTPS), serving as a Chair of the E-commerce Committee (Digital Society as renamed) within the Panel sub-committees. Mr Snail Ka Mtuze also currently serves on the National Cyber Security Advisory Counsel of the DPTS. He is also currently serving as Deputy Chair for the LSSA, E-Law Committee (2013 – to date). He is also a Trainee Adjudicator of the SAIPL, Domain Disputes. He is also co-founding member of the Annual Cyberlaw

Conference and the Annual Lex – Informatica (2008 – 2016). He is also a WASPA Adjudicator (2008- to date) and an Adjunct Research fellow in the field of Cyberlaw with the University of Fort Hare since 2014 where he has also recently registered as a student to pursue his LLD on “Protection of Privacy and Personal Information in Cyberspace “.

5. APPOINTMENT PROCESS (section 41)

5.1 Criteria for appointment:

5.1.1. Section 41 of the Act provides that the members of the Regulator must be appropriately qualified, fit and proper persons:

- At least one of whom must be appointed on account of experience as a practicing advocate or attorney or a professor of law at a university; and
- The remainder of whom must be appointed on account of any other qualifications, expertise and experience relating to the objects of the Regulator.

5.1.2. In terms of section 41(1)(g), the following disqualifies a person from appointment to the Regulator:

“A person may not be appointed as a member of the Regulator if he or she—

(i) is not a citizen of the Republic;

(ii) is a public servant;

(iii) is a member of Parliament, any provincial legislature or any municipal council;

(iv) is an office-bearer or employee of any political party;

(v) is an unrehabilitated insolvent;

(vi) has been declared by a court to be mentally ill or unfit; or

(vii) has at any time been convicted, whether in the Republic or elsewhere, of any offence involving dishonesty”.

5.2 Process of appointment:

5.2.1. Section 41(2)(a) of the Act provides that the President appoints the Chairperson and the members of the Regulator on the recommendation of the National Assembly.

5.2.2. The National Assembly must recommend persons:

- Nominated by a committee of the Assembly composed of members of parties represented in the Assembly; and

- Approved by the Assembly by a resolution adopted with a supporting vote of a majority of the members of the Assembly.

5.2.3. The recommendation must also indicate which ordinary members must be appointed in a full-time or part-time capacity.

5.2.4. Section 41(3) provides that the members of the Regulator will be appointed for a period of not more than five years and will, at the expiration of such period, be eligible for reappointment.

5.3 VACANCIES

5.3.1. Section 41(5) of the Act provides that a person may resign upon written notice to the President (as has occurred) and the effect of this is a vacancy in the Regulator (see 42(1)(b)).

5.3.2. When a vacancy occurs, the procedure (for appointment) contemplated in section 41(2) applies (section 42(2)(a)).

5.3.3. However, any Member appointed to fill a vacancy holds office for the rest of the period of the predecessor's term of office, unless the President, upon recommendation by the National Assembly, appoints that Member for a longer period which may not exceed five years.

6. WAY FORWARD

- It is recommended that the Committee adopt a similar approach/process to that followed in the case of the Deputy Public Protector.
- As a first step, the position should be advertised. (Note, it may be prudent to advertise in the new year, as typically there is a poor response to adverts placed at the very end of the year)
- A decision must be taken regarding whether the position be filled for the remainder of the five-year term or whether there should be a recommendation that the appointment be for five years. It is suggested that the Committee requests that the Speaker's office engages with the Information Regulator to establish its views on this matter, as part of the process of establishing an appropriate recommendation. (Note that there is only two years remaining of the term of office.)

- Clarification should also be sought (with the assistance of the Speaker's Office) regarding the terms and conditions (including remuneration) applicable to part-time members of the Information Regulator.