

Date:
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Enquiries:
Neo Tsholanku
Tel: (011) 800 2560
Fax: (011) 800 5503 / 3487

Mr V. Ramaano
Portfolio Committee of Justice and Constitutional Development

Our reference: COM0180

Per email: vramaano@parliament.gov.za

Dear Mr Ramaano

ESKOM'S COMMENTARY ON THE PROTECTION OF PERSONAL INFORMATION BILL.

Eskom Holdings Limited ("Eskom") appreciates the opportunity it has been afforded to comment on the Protection of Personal Information Bill. It has been a long time coming since the South African Law Reform Commission report on privacy and data protection, which Eskom also commented on, was released and we are excited with the end product.

As much as we are excited with the end product, a Bill that aims to balance the right to privacy against other rights (particularly the right of access to information), we are concerned that some of the shortcomings in the Bill will make it difficult to achieve its stated objectives. To this extent, Eskom has decided to share its concerns in the form of the attached comments, which comments are divided into general and specific comments.

We also hope to attend the Portfolio Committee hearings and should in the interim, pick up more concerns or shortcoming with regards to the Bill, we will seek your indulgence to raise same at the public hearings.

We hope our input adds value.

Corporate Services Division

Head Office

Megawatt Park Maxwell Drive Sunninghill Sandton PO Box 1091 Johannesburg 2000 SA

Tel +27 11 800 8111 Fax +27 11 800 5503 www.eskom.co.za

Directors: RM Godsell (Chairman) PJ Maroga (Chief Executive) LCZ Cele SD Dube LG Josefsson (Swedish) HB Lee (Korean) WE Lucas
Bull PM Makwana J Mirenge (Rwandan) JRD Modise AJ Morgan U Nene Company Secretary: TN Msoni
Eskom Holdings Limited Reg No 2002/015527/06



Kind regards

P.P. [Signature] (Acting GM Legal)

Willem du Plessis

General Manager: Legal

**PROTECION OF PERSONAL INFORMATION
BILL**

COMMENTS BY ESKOM

6 OCTOBER 2009

COMMENTS BY ESKOM ON THE BILL

PUBLISHED FOR GENERAL COMMENT IN THE GOVERNMENT
GAZETTE 32495 ("BILL")

1. INTRODUCTION

The purpose of the Bill is to promote the protection of personal information processes by public and private bodies. This the Bill does by establishing principles for the processing of personal information which responsible parties must comply with.

This initiative is supported by Eskom however; we are concerned that shortcomings in the Bill will make it somewhat difficult to achieve this stated purpose with ease. Thus the comments set out hereunder intend to illustrate the point and assist the Department to make the necessary adjustments to the Bill.

2. SECTION 1 – GENERAL COMMENTS

- 2.1 When one looks at the definitions of “processing” and “personal information”, as set out in the Definitions section of the Bill, the logical conclusion to make is that Eskom is a responsible party (as defined) to which the Bill will apply. That being the case, Eskom has an obligation to comply with Section 7 of the Bill which provides as follows:

“The responsible party must ensure that the principles set out in this Chapter and all the measures that give effect to the principles are complied with”

Eskom is of the opinion that this will be a difficult task considering that the Bill does not provide direction as to what should happen with personal information that is presently in Eskom's position or rather how private should and public bodies deal with personal information that is presently in their possession.

To this end, Eskom proposes that the Bill should provide for time to normalise the environment wherein the Bill, once an Act, will apply. We believe that it would be prudent for the Act, once in operation, to provide both private and public bodies a 6 (Six) to 12(Twelve) wherein they will ensure that personal information presently in their possession is aligned to the requirements of Principles 2 to 8.

3. SECTION 2 – SPECIFIC COMMENTS

3.1 Ad Definitions

The Preamble to the bill states that it's purpose is to promote the protection of personal information processed by public and private bodies. In the definitions section, "Personal information" is defined as 'information about an identifiable, living natural person, and, where it is applicable, existing juristic person.'

This definition somewhat seems to contrast with the purpose of the act, which it appears is geared towards the protection of the personal information of natural persons as it includes juristic persons. It is not clear what the words 'where it is applicable' mean or in what circumstances would the act apply to juristic persons. This more so, as the Bill makes no further reference to juristic persons other than in the definition. The Bill

does not outline where its provisions will or will not be applicable to juristic persons.

The extension of the bill to juristic persons may well be in conflict with section 36 of the Promotion of Access to Information Act (PAIA), and other laws protecting confidential commercial information.

3.2 Ad Section 16 – Quality of Information

Responsible parties must take reasonably practicable steps to ensure information is complete, accurate, not misleading and updated where necessary.

This section places an undue requirement on an Employer in ensuring that the information provided to it by its employees is correct, complete and accurate.

It is recommended that this section should ideally require the data subject to ensure that he/she updates the information provided to the responsible party, as the data subject is in a much better position to know when the information provided needs to be updated rather than an Employer, who will if the bill is passed unable to independently verify the information provided.

3.3 Ad Sections 17 and 50 – Notification to Regulator and to data subject

This provision is too onerous especially in relation to Employers who collect and process personal information for Human Resource purposes. This is something that they do on a daily purpose.

These provisions would require companies such as Eskom to notify the Regulator on aspects prior to any recruitment exercise being conducted. Not only is this provision a time consuming exercise which will stall human resource processes (taking into account the particulars that must be stated in such notification as per section 51), but it is impractical and too onerous taking into account that the data subject may have already consented to the processing of his/her personal information under section 17.

It is recommended that this area should also be exempted from the provisions of Section 17 and 50. Alternatively, to comply with the said provisions, such notifications, where information is collected or processed for Human Resources purposes, notifications should be made once every six months after the processing has commenced.

3.4 Ad Sections 22, 23 and 24 - Access to Personal Information.

The current Bill provides that a data subject can make a request for information pursuant to POPIA (as opposed to PAIA). The section, however, requires that access requests must be made in the form required under PAIA (pursuant to sections 18 and 53 of PAIA)

Although the section provides that a data subject may ask whether their personal information is being held by a responsible party free of charge, it also makes provision for the responsible party charging a 'prescribed fee that is not excessive' for other contextual information. The section seems to contradict itself as the fee cannot be excessive if prescribed.

It is recommended that a prescribed fee be charged so that the fee is not left in the hands of responsible persons which may lead to a debate on what is meant by 'not excessive'.

Further, with regards to the forms to be used, they may be relevant for Section 22 of the Bill. However, they may need to be adapted for purposes of Section 23. Is this adaptation going to be in the hands of the requester? It is recommended that it should not be. The Regulator must prescribe the nature of the adaptation to be made to the form.

3.5 Ad Chapter 10 – Information Protection Regulator

Although, the bill seeks to ensure that there is transparency and independence in the role that the Regulator plays in the enforcement process, the bill does not ensure that the advice, mediation, and enforcement operations of the Regulator act independently, e.g. it does not require that a member involved in attempting to settle a dispute by, for example, conducting a mediation, cannot subsequently issue a binding order regarding the same dispute.

It is recommended that it be specifically provided that where a Regulator mediates between parties, he/she must then not proceed to investigate and issue a binding order in the dispute but the dispute must be investigated and finalized by an alternative Regulator.

3.6 Ad Section 93 – Appeal rights.

A data subject has a right to appeal directly to the High Court regarding the results of an investigation conducted by the Regulator, however, the section does not provide for appeal of the decision of the Regulator not to investigate the matter in terms of s75 (1). It is our recommendation that this limitation must be removed from the Bill.

4. CONCLUSION

Eskom would like to extend its appreciation to the Department of Justice and Constitutional Development for the opportunity to influence the provisions of the Bill. We trust that our comments have been constructive and that they are of assistance in finalising the Bill. In the event that further clarification or information is required, Eskom would be more than happy to provide same.