

SUBMISSION

BY

MIH INTERNET AFRICA (PTY) LTD

**ON THE PROTECTION OF PERSONAL
INFORMATION BILL [B9 – 2009]**



TABLE OF CONTENTS

1	INTRODUCTION	3
2	GENERAL COMMENT	3
3	SUBMISSIONS IN RESPECT OF NECESSARY AMENDMENTS TO THE BILL	7
4	CONCLUSION	11

1 INTRODUCTION

- 1.1 MIH Internet Africa (Pty) Ltd ("MIHIA") welcomes the opportunity to submit its comments on the Protection of Personal information Bill ("the Bill"), published under Government Notice 1107 of 2009 in the Government gazette on 14 August 2009 (No 32495).
- 1.2 MIHIA does not wish to make oral representations in amplification of this submission, but will avail itself to do so should the Portfolio Committee for Justice and Constitutional Development wish to hear further from MIHIA.
- 1.3 In the course of this submission, MIHIA may make use of words and phrases that are defined in the Bill. These words and phrases should be construed, in this submission, to have the meanings that they are defined to have in the Bill, unless expressly stated otherwise, or where the context in which the word or phrase is used would indicate otherwise.

2 GENERAL COMMENT

- 2.1 While MIHIA welcomes the advent of an era in which the protection of personal information and the individual's right to privacy is regulated by statutory means which are permissive, and facilitative, of data processing, MIHIA is concerned that the Bill, as it currently stands may inadvertently prevent an important form of data processing that should freely take place in the public interest.
- 2.2 MIHIA may, in the future, conduct a business which allows remote, computerised, access by subscribers to an MIHIA service to publically available records kept by the Registrar of Deeds in terms of the Deeds Registries Act, 47 of 1937 ("the Deeds Act"), as well

as records kept by the Companies and Intellectual Property Registration office ("CIPRO") and the Surveyor General.

2.3 Such a business is already being conducted by several private companies in South Africa.

2.4 It is worth noting that the Registrar of Deeds is enjoined in terms of section 3(1)(y) of the Deeds Act to:

"keep, whether by means of a computer or in any other manner or by means of a computer and in any other manner, such registers containing such particulars as are necessary for the purpose of carrying out the provisions of this Act or any other law and of maintaining an efficient system of registration calculated to afford security of title and ready reference to any registered deed"

2.5 Section 7(1) of the Deeds Act states that:

"Each registrar shall ... permit any person to inspect the public registers and other public records in his registry, other than the index to such registers or records, and to make copies of those records or extracts from those registers"

2.6 The records kept by the Registrar of Deeds include (but are not limited to) records relating to the following: ownership, hypothecation and transfers of immovable property, registered real rights in respect of immovable property (including servitudes), mortgage bonds, general plans of erven and sub-divisions of land notarial leases, ante-nuptial and postnuptial contracts and orders of court lodged with the Registrar. These records refer to identifiable individuals in many cases and, as such, constitute personal information within the meaning of the Bill.

- 2.7 The records kept by CIPRO include (but are not limited to): company and close corporation names, addresses, directors (past and present), shareholders (past and present), trade mark registrations and proprietors. These records also refer to identifiable individuals and constitute personal information.
- 2.8 The records kept by the Surveyor General include (but are not limited to): records relating to surveyed real rights and spatially related information.
- 2.9 The solution that MIHIA would provide to subscribers simply allows those subscribers to easily, and conveniently, access information that is already freely available to any person, in so far as it would be used to access records of the institutions referred to in paragraph 2.2 above¹.
- 2.10 Subscribers to the service that MIHIA may conduct (as described above) would include persons from a range of vocations and professions that may need to have easy access to the records of the institutions referred to in paragraph 2.2 above and will wish to obtain such access without the need to visit the offices of the Registrar of Deeds, CIPRO or the Surveyor General, as the case may be. Such persons would include (but are not limited to): attorneys engaged in conveyancing, commercial, intellectual property or litigation practice, tracing and information verification agents and credit grantors seeking to verify information relating to a credit applicant.
- 2.11 Because the success of the service contemplated depends upon ready access to the records that are to be accessed through the service, it is contemplated that MIHIA would replicate the records of

¹ The same service may be used to search the records of one or more credit bureaus, but that aspect of the service is not of relevance to this submission

the various bodies to which it provides access, to create a data base for use only in circumstances where the record keeper's information system cannot be accessed directly either because of technical malfunction or maintenance.

2.12 MIHIA submits that the service it has described fulfils an important public interest and legal imperative, which is to allow persons ready access to information as contemplated in section 32 of the Constitution and the Promotion of Access to Information Act, 2 of 2000. Indeed, the service also assists the Registrar of Deeds and other public bodies whose records can be searched via the service with the fulfilment of their mandates to make their records available to the public on request.

2.13 MIHIA recognises, of course, that rights of access to information must be balanced against individual rights to privacy as contemplated in section 14 of the Constitution. This is clearly what the Bill seeks to achieve and this is evident from:

2.13.1 the preamble of the Bill (where it is recorded, inter alia that, "*the need for economic and social progress, within the framework of the information society, requires the removal of unnecessary impediments to the free flow of information, including personal information*"; and

2.13.2 the wording of section 2 of the Bill where it is stated in section 2(1)(i) that it is a purpose of the Bill to, "*balance the right to privacy against other rights, particularly the right of access to information*".

2.14 MIHIA submits further however that the business it contemplates in this submission, which MIHIA may undertake in due course, does not infringe upon any individual's right to privacy because the personal information that is processed is available in the public

domain (albeit through the employment of more cumbersome means of access).

3 SUBMISSIONS IN RESPECT OF NECESSARY AMENDMENTS TO THE BILL

- 3.1 MIHIA, naturally, would wish to conduct its proposed service lawfully in accordance with the provisions of the Bill, once it is enacted.
- 3.2 Several provisions of the Bill, including several of the principles for processing personal information that are enumerated in chapter 3 of the Bill, may constitute a presumably unintended, but nevertheless real impediment to MIHIA's business plans.

Principle 2 – Processing Limitation

- 3.3 Section 10 of the Bill states that personal information may only be processed if one or more of the requirements listed in section 10(1)(a) to (f) is met.
- 3.4 It would not be the case that data subjects are always aware of, or would have been given the opportunity to consent to, the processing of their personal information by users of the service that MIHIA posits. Nor is it the case that any of the other factors listed in section 10(1)(a) to (f) would necessarily be of application in any particular data search by a user of the service, although it is possible that one or more may be of application in any given instance.
- 3.5 To the extent, however, that none of the factors listed in section 10(1)(a) to (f) of the Bill apply in any given circumstance in which the posited service is being used, then MIHIA would not be able to

provide the service, as it would not have complied with section 10 of the Bill.

- 3.6 It is submitted that this would be an absurd outcome, as MIHIA would effectively be prevented from providing easy access, in the public interest, to personal data that is already in the public domain. The proposed service does not in any way infringe upon an individuals' right to privacy.
- 3.7 The purposes for which subscribers to MIHIA's posited services might use the service range, but none can be said to be contrary to the legitimate interests of any data subject.
- 3.8 In the circumstances, MIHIA respectfully suggest that an exemption from principle 2 should be included in the Bill, such that it is not necessary to comply with the requirements of section 10(1) if the data processor is merely processing personal information that is already in the public domain, or accessible by the public upon request, provided that the data processing is not contrary to the legitimate interests of the data subject.
- 3.9 In consequence of the suggested amendment, it should further be stated in section 10 of the Bill, that where the exemption requested applies, no data subject may exercise his or her rights in terms of section 10(2) and (3) as there would be no basis for the exercise of these rights in circumstances where the data subject's right to privacy is not being infringed upon at all.
- 3.10 Section 11(2)(a) provides a list of circumstances in which data processors will be exempt from the requirement in section 11(1) to obtain personal information directly from the data subject. Clearly, in the circumstances envisaged in this submission, MIHIA and its users would not be obtaining personal information directly from a data subject. While the provisions of paragraphs (a) and (f) of

section 11(2) would avail MIHIA it is suggested that for the avoidance of any doubt, the exemption enumerated in paragraph (a) should be amended to read "*the information is contained in, or derived from, a public record*". This would cover the circumstance in which a service subscriber might make use of a replica data base as envisaged in paragraph 2.11 above.

Principle 4 – Further Processing Limitation

- 3.11 In light of the suggested amendment recorded in paragraph 3.10 above, it will be necessary to amend section 15(3)(b) in the same way, (ie by amending paragraph (a) to read *the information is contained in, or derived from, a public record*".

Principle 6 - Openness

- 3.12 The requirement (as enumerated in section 17(2) of the Bill to notify the data subject of the collection of personal information would not apply to MIHIA in the posited circumstances because of the exemption given in section 17(6)(b) (non-compliance would not prejudice the legitimate interests of the data subject). Nevertheless, and for the avoidance of any doubt, it is submitted that a further exemption should be added to section 17(6) such that it is not necessary to comply with the requirements of section 17(2) if the data processor is merely collecting personal information that is already in the public domain, or accessible by the public upon request, provided that the data processing is not contrary to the legitimate interests of the data subject.

Principle 8 – Data Subject Participation

- 3.13 It would not be practicable for MIHIA, in the circumstances posited, to comply with the provisions of section 22(1) of the Bill.

- 3.14 Given that what is contemplated is the processing of personal information that is in the public domain, which does not infringe upon an individual's right to privacy and which is not contrary to the legitimate interest of the data subject, an exemption should be provided for from compliance with section 22 such that such that it is not necessary to comply with the requirements of section 22 if the data processor is merely processing personal information that is already in the public domain, or accessible by the public upon request, provided that the data processing is not contrary to the legitimate interests of the data subject.

Part B of Chapter 3 – Processing of Special Personal Information

- 3.15 Section 25(a) of the Bill states that a responsible party may not process personal information concerning a child, who is subject to parental control in terms of the law.
- 3.16 It is possible that the records to which MIHIA will provide access will contain personal information relating to children. Given that what is contemplated is the processing of personal information that is in the public domain, which does not infringe upon an individual's right to privacy and which is not contrary to the legitimate interest of the data subject, an exemption should be provided for from compliance with section 25(a) such that such that it is not necessary to comply with the requirements of section 25(a) if the data processor is merely processing personal information that is already in the public domain, or accessible by the public upon request, provided that the data processing is not contrary to the legitimate interests of the data subject.

4 **CONCLUSION**

- 4.1 MIHIA would like to thank the Portfolio Committee for Justice and Constitutional Development for giving it this opportunity to comment on the Bill.
- 4.2 Should the Portfolio Committee for Justice and Constitutional Development require any additional information from MIHIA in respect of this submission or should it wish to make contact with MIHIA in respect of the same, the Portfolio Committee on Justice and Constitutional Development is respectfully requested to contact Mr Wayne Benn, Head: Business Development and Legal, on (021) 525 1008 or WBenn@mweb.com .