Submission by the Public Service Accountability Monitor (PSAM) on the Protection of Personal Information Bill (B9-2009) to Parliament's Portfolio Committee on Justice and Constitutional Development

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Submitted via email to: the Committee Secretary, Mr V Ramaano at vramaano@parliament.gov.za

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The Public Service Accountability Monitor (PSAM) is a programme of the Centre for Social Accountability (CSA) and has been engaged in social accountability monitoring since 1999. The PSAM aims to improve public service delivery and the progressive realisation of constitutional rights to healthcare, education, social security and housing by using various social accountability monitoring tools (which relate to resource allocation, strategic planning, performance monitoring, expenditure management, integrity and oversight processes). These tools have been developed in order to systematically monitor the public resource management cycle and enable citizens to hold government officials accountable for the delivery of services and the performance of their duties.

The PSAM has actively sought to use the Promotion of Access to Information Act of 2000 in order to enhance transparency and advance participatory democracy in South Africa.

We therefore regard it as important to make a submission on the revised Protection of Personal Information Bill (POPIB).

We wish to record at the outset that interested parties have been placed under considerable pressure to make submissions given that:

1) The explanatory summary to the Bill was only recently released in Government Gazette No. 32495 under Notice No. 1107 dated 14 August 2009.
2) The Bill was tabled in the National Assembly on 25 August 2009;
3) The South African Law Reform Commission's *"Project 124 - Privacy and Data Protection Report"* comprising in excess of 800 pages was released to the public on 26 August 2009;
4) Submissions from the public on the Bill must be made by no later that 7 October 2009, which is 30 working days since the Bill was made available.

These factors and the relative complexity of the Bill have restricted our ability to make a detailed submission.[1]

[1] We recognize however the Bill's lengthy development as documented at Chapter 1 of the South African Law Reform Commission's Project 124 Report and the deliberations of the Project Committee chaired by the Honourable Justice CT Howie.

PSAM Submission

Our overall view is that the current Bill goes too far in seeking to correctly regulate access to and processing of personal information and will result in various unintended consequences.

1. We are of the view that the definition of *'personal information'* as it appears within section 1 of the Bill is too broad and is not sufficiently further clarified or saved by the *Principles* contained at Chapter 3 of the Bill.

   As currently defined it may result in unintended consequences. We have specific concerns with paragraphs *(e), (f), (g)* and *(h)* insofar as they relate to *'public bodies'* (as defined in the Bill) and certain juristic bodies and private bodies which have or are rendering a public function or which have or are paid for out of public funds.

   The following examples will serve to illustrate our concerns:

   - A public interest organization[2] whose objective is to improve democratic governance and promote accountability of public office bearers seeks to access and process personal information defined at paragraph (e) , for example, the personal opinion, view or preference that an MEC for Education expresses when his/her Department is considering the awarding of a scholar transport tender. The proposed definition will regard the MEC's utterance as *'personal information'* which will now be protected from being processed. We submit that this could not have been intended by the drafters of the Bill.

   - A public interest organization aiming to promote accountability of public office bearers seeks to access and process personal information as defined at paragraph (g) – for example: that an advisor to the Director-General of Education recalls a conversation with the latter where he/she acknowledges to being an avid creationist and where he/she states the wish to eliminate any reference to 'evolution' from the primary school curriculum. Another example could be: The views or opinions of a political analyst regarding schisms within a ruling political party, which are explained in terms of personal differences between key individuals who are said to hold views aligned to neo-liberal or socialist approaches to ensuring sustainable development.

2. We are of the view that the definition of *'responsible party'* as it appears within section 1 of the Bill is too broad. We submit that it should differentiate between certain responsible parties:

   a) those organizations (non-profit) pursuing a public interest objective, which may involve accessing and processing personal information in the furtherance of constitutional rights and public interest objectives, and

[2] See further in this regard point 2 below which submits that these organizations should be excluded under section 4 of the Bill.

specifically those organizations which have a specific interest in holding public duty-bearers and private duty-bearers to account for their actions and/or decisions and/or performance in the course of managing available public resources. *These parties should be exempted without restriction and we submit that section 4 of the Bill should be amended to include all such public interest organizations and/or individuals acting in pursuit of the public interest.*

We submit that the provisions of section 32(b) are insufficient and too restrictive in seeking to recognize such parties' rights to access and hold personal information pertaining to public duty-bearers and private duty-bearers (especially those private service providers sub-contracted for purposes of providing public services or for purposes of assisting in the management of public resources).

b) private sector profit-driven information-mining and commercial entities whose primary purpose is private and/or commercial gain. *The Bill correctly seeks to regulate this sector in line with numerous countries which have adopted privacy laws.*

3. We submit that section 4 of the Bill which exempts the '*Executive Council of a province and a municipal council of a municipality'* from the processing of personal information, may result in unintended consequences and is not sufficiently motivated for, for inclusion in the Bill. It is noteworthy that neither of these two political tiers of government fall within the ambit of section 12 of the Promotion of Access to Information Act which determines that the Act is not applicable to the records 'of the national Cabinet and its committees'.

Should an Executive Council of a province or a municipal council possess *personal information* (as defined in the Bill) which is inaccurate concerning a *data subject,* the *data subject* will be unable to utilize sections 22 to 24 of the Bill to try and address such inaccuracies. Both of these political tiers of government process personal information of data subjects, with municipalities' possessing extensive databases of data subjects domiciled in their area who are liable for rates, taxes, vehicle registration and so forth. Should members of a municipal council access or utilize such data for improper purposes a data subject's rights will be constrained by the current exemption which is proposed.

We note however that the processing of personal information pertaining to parliamentarians, members of the executive and certain designated public officials is nevertheless permitted by:

- the Executive Members Ethics Act of 1998;
- the Local Government Municipal Systems Act of 2000;
- the Code of Conduct for Members of the National Parliament;
- various Codes of Conduct adopted by the 9 provincial legislatures;
- the Public Service Regulations of 2001;

whose provisions are not affected by the proposed Bill.

4. We are of the view that section 34 of the Bill would impose a *de facto* limitation upon currents rights contained in the Constitution to access and/or process personal information pertaining to public and private duty-bearers and would inhibit attempts to ensure good governance and accountability by these parties.

   The section introduces a significant hurdle in that the Regulator will act as a gatekeeper with discretionary powers to determine whether a responsible party can access and/or process such personal information. We would like to propose that the Bill be amended at section 34(2) by the addition of a further example of what *'public interest'* includes namely:

   > *(f) those organizations (non-profit) pursuing a public interest objective, which may involve accessing and processing personal information in the furtherance of constitutional rights and public interest objectives, and specifically those organizations which have a specific interest in holding public duty-bearers and private duty-bearers to account for their actions and/or decisions and/or performance in the course of resources, particularly public resources.*

5. We would like to propose that section 44(2)(b) be amended by the insertion of the bold text which appears below:

   > *Have due regard for the protection of all human rights and social interests that compete with privacy, including the general desirability of a free flow of information and the recognition of the legitimate interests of government **[, civil society]** and business in achieving their objectives in an efficient way;*

6. We note the proposed amendments to sections 1, 10, 32, 83, 84 and 85 which will result in the Information Regulator replacing the South African Human Rights Commission (SAHRC). It is widely recognized that the primary obstacles towards ensuring widespread utilization of the Promotion of Access to Information Act include:

   - Constraints placed upon the Human Rights Commission to fulfil its mandate described in Part 5 of the Promotion of Access to Information Act, as more fully documented in the ***Report of the ad hoc Committee on the Review of Chapter 9 and Associated Institutions*** dated 31 July 2007;

   - inordinate delays within the Department of Justice which has failed to prioritize and introduce cost effective access to information hearings before Magistrate's. To date only well resourced requesters of information have been able to enforce their rights in court due to the fact that only High Courts can hear such matters. The SALRC Project 124 Report has recognized these constraints.[3]

[3] See for instance p.484 of the Report.

The SALRC Project 124 Report recognizes the importance of ensuring that the Information Regulator is well resourced.[4] The successful implementation of the proposed Bill will depend heavily upon Parliament disbursing sufficient resources in accordance with section 41 so as to enable the Regulator to fulfil its onerous functions effectively.

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[4] See for instance p.485 – 486 of the Report