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# **SOUTH AFRICAN NATIONAL EDITORS' FORUM (SANEF)**

## **SUBMISSION ON**

# **THE PROTECTION OF PERSONAL INFORMATION BILL [B 9-2009]**

Chairperson: J Rantao • Dep. Chair: H Jeffreys • Secretary-General: M Papayya • Treasurer: J Williams • Executive Director: F Mehtar •

## SA National Editors' Forum

### Representation to Ministry of Justice and Constitutional Development on the Protection of Personal Information Bill (B 9-2009)

1. The SA National Editors' Forum (Sanef) is a voluntary forum of editors, senior journalists and journalism trainers from all areas of the media industry in South Africa, whose primary aim is to promote the quality and ethics of journalism, to reflect the diversity of South Africa and to champion freedom of expression. The institution has been in being for more than 10 years and has frequently made representations to various bodies including the relevant portfolio committees in the National Assembly on issues relating to national legislation and those relating to the conduct of the media. It has also made representations to various authorities and others about official attitudes and conduct towards the media and on media freedom and freedom of expression issues. In upholding and maintaining freedom of expression and media freedom it is guided by the principle -- which has frequently been stressed without qualification by judges of our highest courts and courts in other democracies -- that those freedoms are vital core values of democratic governance and a country that does not abide by them cannot claim to be a democracy. The key aspect of those values is the defining principle that the public has the right to know, to be informed of all relevant information about the conduct of the community and people in authority in the community and society at large and thus have the informed capacity to decide on their future and how the affairs of the country should be conducted. In short, the right to know serves the public interest.

2. Sanef is concerned about several aspects of the Bill for a number of reasons, one of them being a contravention of the Constitution in respect of the balancing of rights when measured against the freedom of expression clause (Clause 16). Also one of the features of the Bill is the excessive number of exemptions and exclusions which detract materially from the Constitutional concept that legislation should be of general application and for that principle to be varied only in exceptional circumstances. Indeed contrary to the spirit of the Bill -- ie, to protect people's privacy and data -- the exemptions provide for an enormous range of people in various institutions, official positions and even businesses having access to private information about people. Further, the law can be said to be giving these people legal protection for the information they hold, a situation which can be deemed to be contrary to the purposes of the legislation.

3. Another feature of the exemptions is those applying to the Security and police services which are the authorities invested with powers which though not so intended can be used to abuse a person's privacy -- a factor that is recognised in Clause 14 of the Constitution which provides for protection from arbitrary searches of the homes of people, searches of their property, seizure of their possessions and the privacy of their communications infringed. While the last contravention may, indeed, be committed by others rather than the security authorities, the major perpetrators of this infringement are the police and security services. Indeed, there is legal protection under the security laws in certain circumstances for interception of communication. These exemptions reinforce the power of these authorities to have access and retain private information about people and to invade their privacy without the safeguards against arbitrary action which have been introduced in certain types of legislation. We are referring to legislation where before the security forces can carry out certain acts they have to seek the permission of a high court judge.

4. A theme running through this legislation -- no doubt unintended and perhaps falling into the category of the unintended consequences of legislation -- is censorship. This is embodied in the structure to be established for the office of an Information Protection Regulator. The very title is expressive of censorship. This official's role is to regulate the flow of personal information across borders which implies that he/she has the power to prevent information from being disseminated. Other terms in the legislation which raise the spectre of censorship are "processing limitation", "purpose specification", "openness" (because of the implication that there is a lack of openness in the legislation), "processing of special personal legislation", "exemption from information protection principles", "information protection officer", "transborder information flows" and "retention of information any longer than necessary".

5. Another feature of the legislation is the broad definition of "personal information" (in the definitions) about a person and the purposes of the Bill to protect it (Section 2 (1) (a), (b), (c) from forms of processing which extend to discussing it either in private or in public while ignoring information about a person which is readily apparent from the appearance and/or situation of a person or posture adopted by the person should one come across the person in a street or in a public place. One refers to the gender, appearance, race, colour, etc, features which are apparent as a person appears in public.

6. An exemption which applies to journalism, is especially of concern because an important principle of the practice of journalism is that journalists and their publications should not have powers greater or lesser than those of the ordinary individual. Journalists -- and their code of conduct as outlined in the procedures of the Press Council and its ombudsman and appeal panel processes -- are beholden to the principle that they are to be treated in law by the same laws and rules that apply to the ordinary individual with no greater or lesser safeguards being applied to them. The draft Bill exclusion places journalists in a special category where they cannot be prosecuted for what an ordinary member of the public may be prosecuted for doing. An added danger for journalists is that if this principle is accepted, journalists may be required to register to show that they are journalists and this immediately poses the danger that as easily as they are required to register they can be removed from such a register which would be an unconstitutional form of censorship. The concept of a special exclusion for journalists is repugnant.

7. In addition, this exemption contains the requirement that the journalists (and no doubt their publications and their libraries or archives) have to be "responsible parties" with no definition of what a responsible party is and have to be subject to a "code of ethics" that provides adequate safeguards for the "protection of personal information" when there is no definition of what such safeguards are.

8. No journalist organisation -- even those subscribing to the Press Ombudsman would be able to comply with that undefined measure. Also, there are a range of publications that do not subscribe to an identifiable code of conduct and newspapers and other publications imported from overseas would also not be subject to any such code or "adequate safeguards". The implication is that these publications could be prosecuted for infringements under this law.

9. Section 16 of the draft Bill refers to the updating of information in an archive -- or wherever. An enormous task is faced by large archives of having to update the information they hold not only to take account of later information but also the injunction in another section of the Bill that the accuracy of archival material has to be corrected. This would be a huge task for newspaper archives, which, one presumes, despite the attempt to exempt journalistic activity from the provisions of the Bill, would still be required to comply with Section 16. The broad comment on this is that such processing would require enormous physical effort and staffing quite beyond economic feasibility.

10. Section 34 refers to a "public interest" factor being involved in the processing of information. It then goes on to define public interest as a security interest rather than a broad public interest as is understood by a broad legalistic interpretation of the term public interest. It is noted too that the public interest relates purely to policing, state security and the economic and financial interests of the state -- far removed from general public interest considerations and showing an overwhelming weighting in favour of state security and policing, hardly activities conducive to maintaining privacy.

11. In Section 34 (3) reference is made to the regulator not only requesting that information about an individual be processed but that he/she may impose "reasonable conditions" on such processing, a suggestion of censorship which is unacceptable.

12. Section 35 refers to the establishment of a regulator -- which is not one but several people -- and lays down the duties of such persons (Section 43) in an overly broad manner which indicates that the officials are invested with a high degree of power. Inherent in the role of regulator is that of an unacceptable censorship official but nowhere does it outline how this person is to be chosen and appointed to the post. There is no institution described such as the Judicial Service Commission or other impartial body that will be tasked with this job. This is highly unsatisfactory and indicates the probability of a political appointee or a person deployed by the ruling party. The views expressed about the establishment of the office of the regulatory apply in equal measure to the appointment of an Information Protection Officer and deputy (Section 48 et seq).

13. Section 44 (2) (b) refers in a commendable manner that the Regulator should 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" but then subverts this high ideal by introducing the "recognition of the legitimate interests of government and business in achieving their objectives in a reasonable way". This latter aim is as far removed as one could conceive of protecting the privacy of an individual.

14. Section 52 refers to the Regulator exempting an information processor from informing him/her of an information processing procedure. This also applies to certain legal investigations, again showing the bias of this legislation towards the authorities exercising their powers without reference to the safeguards in the legislation applying to others.

15. In the Memorandum on the Objects of the Bill (introductory paragraph) it is noted that in outlining the purpose of the Bill, it is stated that the Bill aims to balance the right to privacy against other rights, particularly the right to access to information and to generally protect important interests, including the free flow of information within and across the borders of the republic.

16. A notable omission from this statement is the need to include as a balancing right freedom of expression. It is also noted that an undue emphasis -- in the context of the principles outlined in the statement -- is placed on "generally protecting important interests". The extent of these "important interests" is also not stated.

17. We see little call for this legislation especially in the flawed manner in which it is presented and suggest that the Law Commissioners who introduced it pay detailed attention to the common law protection of privacy in South Africa which has protected the privacy of individuals without the contorted legal approach of this legislation for years.

18. We are aware that this legislation follows South Africa having adopted requests from the European Union to initiate protection of privacy legislation. We believe that if this draft follows the principles outlined in European legislation then that legislation is flawed and a contravention of the EU's freedom of expression legislation and requires review.

19. Finally we request the opportunity of presenting these and further views on this legislation orally before the relevant parliamentary portfolio committee when the public hearings are held.

On behalf of the SA National Editors' Forum, we thank you for the opportunity to present a point of view on this draft legislation.

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