

The amendments proposed by the FSB, refers. We would like to respond as follows:

Ad proposed new clause 38:

We do not support the proposal by the FSB that the words "exercise of statutory authority" should be inserted.

The "exercise of statutory authority" condition is already covered in the phrase "any function conferred on any person in terms of the law". It is one of the conditions to be complied with for the clause to be applicable, not an independent ground for exemption. Most of the responsible parties (especially public bodies) who are subject to the Bill process personal information in terms of statutory authority. The purpose of the Bill is to regulate *bona fide* processing. The clause should remain as is (subject to a decision as to whether a reference to clause 15 should be included).

Ad clause 72 (previous draft clause 77 and the definition of "accountable"):

We do not support the proposal. The proposed amendment is, among others, technically not well drafted. The proposed subparagraph (b) does not follow the introductory sentence.

In so far as the substantive content of the proposed amendment is concerned, it should be noted that the definition will only applicable where the steps taken by the responsible party has been unsuccessful. Merely informing the Regulator what these unsuccessful steps were does not constitute accountability and does not provide the Regulator with any authority to address the situation.

In order to address the problem of "liability" vs "accountability" the following could be considered:

- (i) Replacing the words "a public body" in the second line of clause 77(1)(a) with the words "two or more public bodies" to clarify that the memorandum of understanding should be entered into by two public bodies (one local and one foreign);
- (ii) inserting the words "for purposes of this Act" in clause 77(2) after the words "remains accountable";
- (iii) the definition of "accountable" remains as is; and
- (iv) including a new clause 99(2)(f) which could read as follows:

"(2) In the event of a breach the responsible party may raise any of the following defences against an action for damages:

(a) - (e)...

(f) the breach was perpetrated by a recipient of personal information while a party to a non-binding memorandum of understanding between two or more public bodies in terms of section 72.

It is trusted that the above information will be of assistance to you.

Kind regards

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Option 1:**[Exclusion] Processing of personal information for journalistic purposes**

7. (1) This Act does not apply to the processing of personal information for exclusively journalistic purposes by responsible parties who are—

- (a) subject to, by virtue of office, employment or profession, a code of ethics that provides adequate safeguards for the protection of personal information; or
- (b) not subject to, by virtue of office, employment or profession, a code of ethics, as referred to in paragraph (a), to the extent that the Regulator has, in terms of section 37, exempted such responsible parties from one or more of the conditions for the lawful processing of personal information as referred to in Chapter 3.

(2) In the event that a dispute may arise in respect of whether adequate safeguards have been provided for in a code as required in terms of subsection (1) or not, regard may be had to—

- (a) the special importance of the public interest in freedom of expression;
- (b) domestic and international standards balancing the—
- (i) public interest in allowing for the free flow of information to the public through the media in recognition of the right of the public to be informed; and
- (ii) public interest in safeguarding the protection of personal information of data subjects;
- (c) the need to secure the integrity of personal information;
- (d) domestic and international standards of professional integrity for journalists; and
- (e) the nature and ambit of self-regulatory forms of supervision provided by the profession.

(3) In considering whether and the extent to which exemption should be granted in terms of section 37(1)(a) to the responsible parties referred to in subsection (1)(b), the Regulator must also consider the factors referred to in subsection (2)(b) to (d).

Regulator may exempt processing of personal information

37. (1) The Regulator may, by notice in the *Gazette*, grant an exemption to a responsible party to process personal information, even if that processing is in breach of a condition for the processing of such information if the Regulator is satisfied that, in the circumstances of the case—

- (a) the public interest in the processing outweighs, to a substantial degree, any interference with the privacy of the data subject that could result from such processing; or
- (b) the processing involves a clear benefit to the data subject or a third party that outweighs, to a substantial degree, any interference with the privacy of the data subject or third party that could result from such processing.

(2) The public interest referred to in subsection (1) includes—

- (a) the interests of national security;
- (b) the prevention, detection and prosecution of offences;
- (c) important economic and financial interests of a public body;
- (d) fostering compliance with legal provisions established in the interests referred to under paragraphs (b) and (c);
- [or]
- (e) historical, statistical or research activity; or
- (f) the special importance of the interest in freedom of expression.

(3) The Regulator may impose reasonable conditions in respect of any exemption granted under subsection (1).

Option 2:**Guidelines about codes of conduct**

65. (1) The Regulator may provide written guidelines—

- (a) to assist bodies to develop codes of conduct or to apply approved codes of conduct;
- (b) relating to making and dealing with complaints under approved codes of conduct; and

- (c) about matters the Regulator may consider in deciding whether to approve a code of conduct or a variation or revocation of an approved code of conduct.

(2) The Regulator must have regard to the guidelines as set out in section 7(2)(a) to (d) when considering the approval of a code of conduct for the processing of personal information for exclusively journalistic purposes where the responsible party is not subject to a code of ethics as referred to in section 7(1).

~~[(2)] (3)~~ Before providing guidelines for the purposes of subsection (1)(b), the Regulator must give everyone the Regulator considers has a real and substantial legitimate interest in the matters covered by the proposed guidelines an opportunity to comment on them.

~~[(3)] (4)~~ The Regulator must publish guidelines provided under subsection (1) in the *Gazette*.

Regulator may exempt processing of personal information

37. (1) The Regulator may, by notice in the *Gazette*, grant an exemption to a responsible party to process personal information, even if that processing is in breach of a condition for the processing of such information if the Regulator is satisfied that, in the circumstances of the case—

- (a) the public interest in the processing outweighs, to a substantial degree, any interference with the privacy of the data subject that could result from such processing; or
- (b) the processing involves a clear benefit to the data subject or a third party that outweighs, to a substantial degree, any interference with the privacy of the data subject or third party that could result from such processing.

(2) The public interest referred to in subsection (1) includes—

- (a) the interests of national security;
- (b) the prevention, detection and prosecution of offences;
- (c) important economic and financial interests of a public body;
- (d) fostering compliance with legal provisions established in the interests referred to under paragraphs (b) and (c);
- ~~or~~
- (e) historical, statistical or research activity; or
- (f) the special importance of the interest in freedom of expression.

(3) In considering whether and the extent to which an exemption should be granted to a responsible party in terms of section 37(1)(a), where the responsible party processes personal information for journalistic purposes and is not subject to, by virtue of office, employment or profession, a code of ethics as referred to in section 7(1)(a) the Regulator must also consider the factors referred to in section 7(2)(b) to (d).

~~[(3)] (4)~~ The Regulator may impose reasonable conditions in respect of any exemption granted under subsection (1).

Powers, duties and functions of Regulator

40. (1) ...
(2)

[(3) In performing its functions in terms of subsection (1)(b)(ix)(bb) with regard to information matching programmes, the Regulator must have particular regard to whether or not the—

- (a) objective of the programme relates to a matter of significant public importance;
(b) use of the programme to achieve that objective will result in monetary savings that are both significant and quantifiable or in other comparable benefits to society;
(c) use of an alternative means of achieving that objective would give either of the results referred to in paragraph (b);
(d) public interest in allowing the programme to proceed outweighs the public interest in adhering to the information protection principles that the programme would otherwise contravene; and
(e) programme involves information matching on a scale that is excessive, having regard to—
(i) the number of responsible parties or operators that will be involved in the programme; and
(ii) the amount of detail about a data subject that will be matched under the programme.]

[(4)](3) The provisions of sections 3 and 4 of the Commissions Act, 1947 (Act No. 8 of 1947), will apply, with the necessary changes, to the Regulator.

[(5)](4) The powers and duties of the Regulator in terms of the Promotion of Access to Information Act are set out in Parts 4 and 5 of that Act.

Regulator to have regard to certain matters

44. (1) In the performance of its functions, and the exercise of its powers, under this Act the Regulator must—

- (a) have due regard to the conditions for the lawful processing of personal information as referred to in Chapter 3;
(b) 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 public and private bodies in achieving their objectives in an efficient way;
(c) take account of international obligations accepted by South Africa; and
(d) consider any developing general international guidelines relevant to the better protection of individual privacy.

(2) In performing its functions in terms of section 40(1)(b)(ix)(bb) with regard to information matching programmes, the Regulator must have particular regard to whether or not the—

- (a) objective of the programme relates to a matter of significant public importance;
(b) use of the programme to achieve that objective will result in monetary savings that are both significant and quantifiable or in other comparable benefits to society;
(c) use of an alternative means of achieving that objective would give either of the results referred to in paragraph (b);
(d) public interest in allowing the programme to proceed outweighs the public interest in adhering to the information protection principles that the programme would otherwise contravene; and
(e) programme involves information matching on a scale that is excessive, having regard to—
(i) the number of responsible parties or operators that will be involved in the programme; and
(ii) the amount of detail about a data subject that will be matched under the programme.

(3) In determining whether the processing of personal information for exclusively journalistic purposes by a responsible party who is not subject to, by virtue of office, employment or profession, a code of ethics as referred to in section 7(1), constitutes an interference with the protection of the personal information of the data subject in terms of section 73, the Regulator must have particular regards to the factors referred to in section 7(2)(a) to (d)

Staff

47. (1) The Regulator must establish its own administration to assist it in the performance of its functions and to this end the Regulator must appoint—

- (a) a suitably qualified and experienced person, or secure the secondment of such person in terms of subsection (6), as chief executive officer of the Regulator for the purpose of assisting the Regulator, subject to the Regulator's direction and supervision, in the performance of all financial and administrative functions in terms of this Act and the Promotion of Access to Information Act, work arising from the administration of this Act and the Promotion of Access to Information Act and to exercise any power delegated by the Regulator to him or her; and
- (b) such other member of staff, or secure the secondment of such persons in terms of subsection (6), as the Regulator may deem necessary to assist the Regulator and the chief executive officer, as the case may be, with all such work as may arise through the performance of its functions.

(2) (a) The chief executive officer may appoint a senior member of staff as acting chief executive officer to perform the functions of the chief executive officer in his or her absence.

(b) A member of the Regulator may not be appointed as acting chief executive officer.

(c) In the event that the chief executive officer is absent for a longer period the Regulator must appoint an acting chief executive officer.

(3) The Regulator must, in the appointment of the staff of the Regulator—

- (a) provide for the advancement of persons disadvantaged by unfair discrimination, with the aim that its staff, when viewed collectively, represents a broad cross-section of the population of the Republic; and
- (b) subject to paragraph (a), apply equal opportunity employment practices.

(4) The Regulator may pay to the persons in its employ such remuneration and allowances and provide them with such pension and other employment benefits as are consistent with that paid in the public sector.

(5) In exercising its powers in terms of subsections (1) and (4), the Regulator must consult with the Minister of Finance.

(6) The Regulator may, in the performance of the functions contemplated in subsection (1), at its request, be assisted by officials in the Public Service seconded to the service of the Regulator in terms of any law regulating such secondment: Provided that the secondment of an official to the service of the Regulator may not exceed 12 months and that the initial period of secondment may only be extended once for a subsequent period not exceeding 12 months.

(7) The Regulator may, in consultation with the Minister of Finance, on a temporary basis or for a particular matter which is being investigated by it, employ any person with special knowledge of any matter relating to the work of the Regulator, or obtain the co-operation of any body, to advise or assist the Regulator in the performance of its functions under this Act and the Promotion of Access to Information Act, and fix the remuneration, including reimbursement for travelling, subsistence and other expenses, of such person or body.