



Commonwealth Human Rights Initiative

NGO in Special consultative Status with the Economic and Social Council of the United Nations

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Executive Committee

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Ananda Louw

South African Law Reform Commission
Private Bag X668
Pretoria 0001
South Africa

27 February 2006

Maja Daruwala
Director

Dear Sir/Madam,

Members

R. V Pillai
Anu Aga
K. S Dhillon
B. K Chandrashekar
Mool Chand Sharma
Harivansh
Bhagwan Das
Poonam Muttreja
Sanjoy Hazarika

Re: Comments Concerning the South Africa *Privacy and Data Protection Bill*

I am writing from the Commonwealth Human Rights Initiative (CHRI), an independent, non-partisan, international non-government organisation mandated to ensure the practical realisation of human rights in the lives of the people in the Commonwealth. CHRI's Right to Information Programme supports Commonwealth member states to develop and implement strong right to information (RTI) laws.

CHRI understands that the Commission is currently considering the introduction of a Privacy and Data Protection Bill in order to strengthen individual privacy rights and has asked for comments and recommendations from all concerned stakeholders about the Bill. In the first instance, I would like to commend the Commission for providing an opportunity for civil society and the general public to provide their views and recommendations on the proposal and the Bill. I would also like to take this opportunity to provide comments concerning the Law Commission's proposals and draft legislation on Privacy and Data Protection.

CHRI's main concerns about the Bill are that it has the potential to harm the effectiveness of the Promotion of Access to Information Act (PAIA) 2000 which provides the public with the fundamental right to access information. In particular, we are concerned that any move to strengthen privacy and data protection may narrow the coverage and scope of the PAIA and thus severely limit public access to information by citizens of South Africa. CHRI urges the Commission to consider the following recommendations so that the integrity and effectiveness of the PAIA is not harmed by any moves to tighten privacy and the protection of data:

The Privacy and Protection of Data Bill should not include any blanket provision to override the PAIA law.

There are concerns that the Privacy and Protection of Data Bill may include clauses that will allow the Bill to override the PAIA law or that the PAIA may be amended to similar effect. If this is the case, such a move would greatly undermine the effectiveness of the PAIA and render it open to abuse by the bureaucracy, which may seek to use the enactment of the Privacy and Data Bill as an excuse not to disclose information. Indeed, under section 34(1), the PAIA already includes an exemption for the "unreasonable disclosure of personal information about a third party" which should cover any information set out in the Privacy Act anyway.

Amendments to the PAIA should not include blanket exemptions as a means to accommodate provisions under the Privacy and Protection of Data Bill.

There are also fears that the PAIA may be amended to include a blanket exemption for information covered under *the Privacy and Protection of Data Bill*. Again, this would harm the effectiveness of the PAIA and would totally undermine the entire rationale of the Act as a tool to transform the culture of secrecy that has long been embedded in government and bureaucratic practice.

In particular, exemptions should not be used to prevent the release of information concerning public officials where the information relates to their official duties, reflects their capacity to discharge public functions or relates to an allegation of wrongdoing or a human rights violation. It is vital to government accountability that public officials can individually be held to account for their official actions. In Uganda for example, s.26 of the national access law specifically allows access to private personal information if:

- *the individual is or was an official of a public body and the information relates to any of his or her functions as a public official including but not limited to:*
 - (i) *the fact that the person is or was an official of that public body;*
 - (ii) *the title, work address, work phone number and other similar particulars of the person;*
 - (iii) *the classification, salary scale or remuneration and responsibilities of the position held or services performed by the person; and*
 - (iv) *the name of the person on a record prepared by the person in the course of employment.*
- *the information given to the public body by the person to whom it relates and the person was informed by or on behalf of the public body, before it is given, that the information belongs to a class of information that would or might be made available to the public;*

CHRI recommends that if the PAIA is going to be amended to include further exemptions to take into account people's right to privacy then these should be narrowly drawn and specific.

Information covered in the Privacy Bill should be subject to a public interest test.

In order to balance the need for individual privacy as set out in the Privacy Bill with people's right to access information, the Privacy Bill should be amended to include an overall public interest test, which would ensure that information which may be covered under the Privacy Bill should still be released if the public interest in releasing the information outweighs any harm caused. Furthermore, we also recommend that the public interest test in the PAIA be strengthened. Currently, the PAIA includes a limited public interest test because it requires that information should also "reveals evidence of substantial contravention of law or imminent and serious public safety or environment risk" for the test to be applied. International best practice favours placing the "public interest" at the core of a right to information regime. Section 8(2) of the Indian Right to Information Act 2005 sets out that "a public authority may allow access to information, if public interest in disclosure outweighs the harm to the protected interest."

Giving the proposed Information Commissioner responsibility for overseeing implementation of BOTH the Privacy Bill and the PAIA needs to be reconsidered.

CHRI notes that an independent Information Protection Commission to be headed by an Information Commissioner has been made responsible under the Privacy Bill for the

implementation of both the Privacy Bill as well as the PAIA. However, we are concerned that combining these roles under one agency would dilute the Commission's ability to ensure the smooth implementation of both the laws. Furthermore, there is a danger that having a single commissioner would place too much power in one official who could easily favour consolidating a culture of secrecy in carrying out his/her duties under the Privacy Bill ahead of promoting disclosure and transparency. Indeed, in Canada, an independent report commissioned by the Federal Government to assess the strengths and weaknesses of merging the two separate commissions for the Access to Information Act and the Privacy Act recently recommended that both offices should remain separate. The report, which I have attached below for your perusal, was particularly concerned that such a merger would harm the effective implementation of both the federal privacy and access laws.

I hope that CHRI's submission is useful to the Commission and that our recommendations are taken into consideration in any plans to introduce the Privacy Bill and amend the Promotion of Access to Information Act. I would like to note for your information that CHRI has been working on RTI issues in the Commonwealth for more than eight years, during which we have accumulated considerable best practice expertise in terms of legal drafting and implementation. I am enclosing a copy of our 2003 publication, "Open Sesame: looking for the Right to Information in the Commonwealth", for your information. In addition, I have also enclosed a copy of a comparative table of national access regimes across the Commonwealth prepared by CHRI.

Please feel free to contact me by email at majadhun@vsnl.com or Ms Charmaine Rodrigues, Co-Coordinator, Right to Information Programme at charmaine@humanrightsinitiative, or telephone on +91 11 2685 0523 or +91 9810 199 754, if you require further expertise and services of our RTI team.

Yours sincerely



Maja Daruwala
Director