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THE DATA PROTECTION BILL, 2012

A Bill for

AN ACT of Parliament to give effect to Article 31(c) and (d) of the Constitution; to regulate the collection, retrieval, processing, storing, use and disclosure of personal data and for connected purposes

PART I—PRELIMINARY

Short title.

1. This Act may be cited as the Data Protection Act, 2012.

Interpretation.

2. In this Act, unless the context otherwise requires—

“agency” includes public entities and private bodies;

"Cabinet Secretary" means the Cabinet Secretary responsible for information and communications;

“Commission” means the Commission on Administrative Justice established by section 3 of the Commission on Administrative Justice Act, 2011;

"Court" means the High Court or any other court with jurisdiction under any law to adjudicate over matters relating to data protection;

"data" means information which—

(a) is being processed by means of equipment operating automatically in response to instructions given for that purpose;

(b) is recorded with the intention that it should be processed by means of such equipment;

(c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system;

(d) where it does not fall under paragraph (a), (b) or (c), forms part of an accessible record;

(e) is recorded information held by public entity and does not

fall within any of paragraphs (a) to (d);

"data controller" means a person who, either alone or with others, controls the contents and use of personal information;

"data equipment" means equipment for processing data;

"data processor" means a person who processes personal information on behalf of a data controller but does not include an employee of a data controller who processes such information in the course of his or her employment;

"data subject" means an individual who is the subject of personal information;

"disclosure", in relation to personal information, includes the disclosure of information extracted from such data and the transfer of such data but does not include a disclosure made directly or indirectly by a data controller or a data processor to an employee or agent of his for the purpose of enabling the employee or agent to carry out his duties and, where the identification of a data subject depends partly on the data and partly on other information in the possession of the data controller, the data shall not be regarded as disclosed unless the other information is also disclosed;

"electronic record" means a record generated in digital form by an information system, which can be transmitted within an information system or from one information system to another and stored in an information system or other medium;

"person" has the meaning assigned to it in Article 260 of the Constitution;

"personal data" means information about a person, including, but not limited to—

- (a) information relating to the race, gender, sex, pregnancy, marital status, national, ethnic or social origin, colour, age, physical or mental health, well-being, disability, religion, conscience, belief, culture, language and birth of the individual;
- (b) information relating to the education or the medical, criminal or employment history of the individual or information relating to financial transactions in which the

individual has been involved;

- (c) any identifying number, symbol or other particular assigned to the individual;
- (d) the fingerprints, blood type or contact details including telephone numbers of the individual;
- (e) correspondence sent by the individual that is implicitly or explicitly of a private or confidential nature or further correspondence that would reveal the contents of the original correspondence to a third party;
- (f) a person's views or opinions about another person ; and
- (g) any information given in support or relation to a grant, award or prize proposed to be made to an individual;

"processing" means performing automatically logical or arithmetical operations on data and includes—

- (a) extracting any information constituting the data; and
- (b) in relation to a data processor, the use by a data controller of data equipment in the possession of the data processor and any other services provided by him for a data controller, but does not include an operation performed solely for the purpose of preparing the text of documents;

“public entity” means—

- (a) any public office, as defined in Article 260 of the Constitution; or
- (b) any entity performing a function within a commission, office, agency or other body established under the Constitution;

“record” in relation to an agency, means a document or any other source of information compiled, recorded or stored in written form, on film, by electronic process or in any other manner or a record made or kept by a person acting under the authority of law or exercising other official function; and

“secretary” has the meaning assigned to it by section 2 of the Commission on Administrative Justice Act, 2011.

**PART II—OBJECTS AND PERSONAL INFORMATION
PROTECTION PRINCIPLES**

3. The objects of this Act include to—

Objects of this Act.

- (a) give effect to the right of every person to privacy as provided under Article 31 (c) and (d) of the Constitution;
- (b) protect a person’s right to privacy for their personal data with regard to their private and family life subject to this Act; and
- (c) safeguard personal data from use or disclosure which is not in the interest of the data subject except in terms of this Act.

Principles of data protection.

4. The following principles of data protection shall guide the application and interpretation of this Act —

- (a) information is collected or stored if it is necessary for or directly related to a lawful, explicitly defined purpose and does not intrude upon the privacy of the data subject to an unreasonable extent;
- (b) information is collected directly from and with the consent of the data subject;
- (c) data subject is informed of the purpose of any collection of information and of the intended recipients of the information, at the time of collection;
- (d) information is not kept for any longer than is necessary for achieving the purpose for which it was collected;
- (e) information is not distributed in a way incompatible with the purpose for which it was collected that is with direct consent and subject to any notification that would attract objection;
- (f) reasonable steps are taken to ensure that the information processed is accurate, up to date and complete;
- (g) appropriate technical and organizational measures are taken to safeguard the data subject against the risk of loss, damage, destruction of or unauthorized access to

personal information; and

(h) data subjects are allowed a right of access to their personal information and a right to demand correction if such information turns out to be inaccurate.

Right to protection of privacy.

5. Every person has a right to privacy with respect to their personal data relating to their private and family life.

Limitation.

6. The right to privacy may be limited in order to safeguard overriding legitimate interests but the limitation must be carried out using the method that is least intrusive to the data subject.

Duty to notify.

7. (1) Before an agency collects personal information directly from a data subject, the agency shall take such steps as are in the circumstances reasonable to ensure that the data subject is aware of

- (a) the fact that the information is being collected;
- (b) the purpose for which the information is being collected;
- (c) the intended recipients of the information;
- (d) the name and address of the agency that is collecting the information and the agency that will hold the information and whether or not any other agency will receive the information;
- (e) the collection of the information is authorised or required by or under law—
 - (i) the particular law by or under which the collection of the information is so authorised or required;
 - (ii) protocols to comply with the law;
 - (iii) whether or not the supply of the information by that data subject is voluntary or mandatory;
- (f) the consequences if any, for that data subject if all or any part of the requested information is not provided; and

(g) the rights of access to, and correction of, personal information provided under this Act.

(2) The steps referred to in subsection (1) shall be taken before the information is collected.

(3) Where—

(a) it is not practicable to comply with subsection (1) before collection of information; or

(b) the whereabouts of the data subject are not known, the person collecting information shall, as soon as practicable after the information is collected, comply with subsection (1).

(4) An agency shall not be required to take the steps referred to in subsection (1) if the agency has taken those steps on a recent previous occasion when collecting the same information or information of the same kind from that data subject:

Provided that the agency shall notify the data subject where information is to be used for a different purpose from the one for which the information was collected previously.

(5) An agency shall notify a data subject that a waiver of rights under this Act will be construed as consent and authorisation for collection of information.

Collection of personal information.

8. (1) Personal information shall be collected, stored or used by a person—

(a) by lawful means; or

(b) by means that, in the circumstances, do not intrude to an unreasonable extent, upon the personal affairs of the data subject except in terms of this Act or any other written law.

(2) A data controller shall, with respect to personal information kept by him or her, comply with the following limitations—

(a) the information is collected for a lawful purpose connected with a function or activity of the agency; and

(b) the collection of the information is necessary for that purpose.

(3) An agency which collects personal information may collect the information directly or indirectly from the data subject concerned.

Exemptions.

9. Notwithstanding the provisions of section 8 (2), an agency shall not be held to have collected the information unnecessarily where it can demonstrate on reasonable grounds that —

- (a) the information is publicly available information;
- (b) the data subject authorised collection of the information from someone else;
- (c) non-compliance would not prejudice the interests of the data subject;
- (d) non-compliance is necessary—
 - (i) to avoid prejudice to the maintenance of law and order by any public sector agency, including the prevention, detection, investigation, prosecution, and punishment of offences;
 - (ii) for the enforcement of a law imposing a pecuniary penalty;
 - (iii) for the protection of the public revenue and property;
 - (iv) for the conduct of proceedings before any Court or the Commission, being proceedings that have been commenced or are reasonably in contemplation; or
 - (v) for purposes of exemptions set out in the law relating to access to information;
- (e) compliance would prejudice the purposes of the collection;
- (f) compliance is not reasonably practicable in the

circumstances of the particular case;

(g) the information—

(i) will not be used in a form in which the data subject is identified; or

(ii) will be used for statistical or research purposes and will not be published in a form that could reasonably be expected to identify the data subject; or

(h) the collection of the information is in accordance with an authority granted under this Act or any other written law.

Data processing.

10. Where personal data concerning a data subject is destined for automated or manual processing, the data subject shall have the right on request to—

(a) information on the person processing data concerning him or her;

(b) place of origin of the data;

(c) use of the data collected;

(d) any other person to whom the data is transmitted; and

(e) rectification of incorrect data and the right to erasure of illegally processed data.

Protection and security of personal information.

11. An agency that holds personal information shall ensure that —

(a) the information is protected, by such security safeguards as are reasonable in the circumstances against —

(i) loss, damage and destruction;

(ii) access and use by an unauthorised person, modification, or negligent disclosure or use; and

(b) where it is necessary for the information to be transmitted to a third party, in connection with the provision of a service to the agency, everything reasonably within the power of the agency is done to prevent unauthorised use or unauthorised disclosure of the information.

Access to information.

12. (1) Where an agency keeps personal information or where an individual believes that an agency is keeping personal information regarding him or her, in such a way that it can readily be retrieved, the data subject shall be entitled—

- (a) to obtain from the agency confirmation of whether or not the agency holds such personal information; and
- (b) to have access to that information.

(2) Subsection (1) does not apply to information that is exempted from access under the law relating to access to information.

(3) The procedure for a request for access to information under subsection (1) shall be as provided under the law relating to access to information.

Correction of information.

13. (1) Pursuant to Article 35 (2) of the Constitution, where a person holds personal information, the data subject shall be entitled to request correction or deletion of untrue or misleading information.

(2) A person who holds personal information shall, if so requested by the data subject or on his or her own initiative, take steps to correct, or delete untrue or misleading information.

(3) A denial of a request made under subsection (1) shall be in writing disclosing the grounds for the denial of the request.

(4) A request for correction may be denied on the basis that the request does not amount to a correction.

(5) Where an agency that holds personal information denies a request by the data subject to correct, or delete untrue or misleading, information, the agency shall, if so requested by the data subject, attach to the information that it holds, in such a manner that it will be read with the information that it holds, a statement provided by the data subject making the request.

(6) Where the agency has taken steps under subsection (5), the agency shall, if reasonably practicable, inform each person or body or agency to whom the personal information has been disclosed of

those steps.

(7) Where an agency receives a request made pursuant to subsection (1), the agency shall inform the data subject of the action taken as a result of the request.

Use of information.

14. An agency that holds personal data shall take reasonable steps to ensure that, having regard to the purpose for which the information is proposed to be used, the information is accurate, up to date, complete, relevant, and not misleading.

Storage of information.

15. An agency that holds personal information shall not keep the information for longer than is required for the purposes for which the information may lawfully be used.

Misuse of information.

16. Subject to this Act or any other written law, an agency that holds personal information that was obtained in connection with one purpose shall not use the information for any other purpose.

Commercial use of data.

17. A person shall not use for commercial purposes personal information obtained pursuant to the provisions of this Act unless—

(a) given express consent by data subject; or

(b) authorised to do so under any other written law.

Use of unique identifiers.

18. (1) An agency that assigns unique identifiers to individuals shall take all reasonable steps to ensure that unique identifiers are assigned only to individuals whose identity is clearly established.

(2) An agency shall not require an individual to disclose any unique identifier assigned to that individual unless the disclosure is for one of the purposes in connection with which that unique identifier was assigned or for a purpose that is directly related to one of those purposes.

Interference with personal information.

19. For the purposes of this Act, a person who interferes with personal information of a data subject or practices breaches in relation to the right to privacy commits an offence and is liable, on conviction, to a fine not exceeding Kshs. 100,000 and to a term of imprisonment not exceeding two years, or to both.

**PART III – CONFERMENT ON THE COMMISSION OF
OVERSIGHT AND ENFORCEMENT FUNCTIONS AND
POWERS**

Role of the
Commission on
Administrative Justice.

20. (1) The Commission on Administrative Justice is hereby granted the powers of oversight and enforcement of this Act.

(2) In the performance of its functions under this Act, the Commission shall be guided by the national values and principles of the Constitution.

Functions of the
Commission.

21.(1) The functions of the Commission include- —

- (a) investigating any complaint relating to a violation of any person's rights under this Act;
- (b) providing a framework or mechanisms for effective conflict management or dispute resolution on matters relating to this Act;
- (c) taking of statements under oath in relation to any investigations it is undertaking; and
- (d) taking such further action as is contemplated by this Part.

(2) The Commission shall, in performing its functions—

- (a) have regard to all applicable international information management and dissemination standards relating to data protection; and
- (b) ensure that public authorities provide adequate safeguards for protection of personal information.

(3) The Commission shall have all the powers necessary for the performance of its functions under this Act.

**PART IV- COMPLAINTS, PROCEEDINGS AND
SETTLEMENT**

Inquiry into
complaints.

22. (1) A data subject who is aggrieved by any decision of any person under this Act may make a complaint to the Commission in accordance with the procedure provided in the law relating to access

to information.

(2) A person wishing to lodge a complaint under this Act shall do so orally or in writing addressed to the secretary or any other person as may be duly authorised by the Commission for that purpose.

(3) The Commission shall develop mechanisms and procedures to deal with oral complaints and recording of oral complaints.

(4) A complaint under subsection (1) shall contain such particulars as the Commission may prescribe.

(5) The Commission may, notwithstanding subsection (1), commence an investigation on its own initiative.

(6) Upon receipt of a complaint under subsection (1), the Commission may—

- (a) call for information or a report regarding such complaint from the agency within such reasonable time as may be specified by the Commission:

Provided that -

- (i) where the information or report is not received within the time stipulated by the Commission, the Commission may proceed to inquire into the complaint without the information or report;
- (ii) where, on receipt of the information or report, the Commission is satisfied either that no further action is required or that the required action has been initiated by the agency, the Commission shall, in writing, inform the complainant accordingly and take no further action;

(b) without prejudice to paragraph (a), initiate such inquiry as it considers necessary, having regard to the nature of the complaint.

Proceedings on complaints.

23. On the receipt of a complaint in terms of section 22, the Commission may take no action or, as the case may require, take no further action on any complaint if, in the opinion of the Commission —

- (a) the length of time that has elapsed between the date when

the subject-matter of the complaint arose and the date when the complaint was made is such that an investigation of the complaint is no longer practicable or desirable;

- (b) the subject-matter of the complaint is trivial;
- (c) the complaint is frivolous or vexatious or is not made in good faith;
- (d) the individual alleged to be aggrieved does not desire that action be taken or, as the case may be, continued;
- (e) the complainant does not have sufficient personal interest in the subject-matter of the complaint;
- (f) where—
 - (i) the complaint relates to a matter in respect of which a code of practice issued under this Act is in force; and
 - (ii) the code of practice makes provision for complaints procedure and the complainant has failed to pursue, or to pursue fully, an avenue of redress available under that complaints procedure that it would be reasonable for the complainant to pursue; or give the person a place of referral; or
- (g) there is in all the circumstances an adequate remedy, or other right of appeal other than to the Commission, that it would be reasonable for the individual alleged to be aggrieved to exercise.

(2) Notwithstanding anything in subsection (1), the Commission may in its discretion decide not to take any further action on a complaint if, in the course of the investigation of the complaint, it appears to the Commission that, having regard to all the circumstances of the case, any further action is unnecessary.

(3) In any case where the Commission decides to take no action, or no further action, on a complaint, the Commission shall inform the complainant of that decision and the reasons for it

Settlement of complaints.

24. Where it appears from a complaint, or any written response made in relation to a complaint under section 23, that it may be possible to secure a settlement between any of the parties concerned and, if appropriate, a satisfactory assurance against the repetition of any action that is the subject-matter of the complaint or the doing of further actions of a similar kind by the person concerned, the Commission may, without investigating the complaint or, as the case may be, investigating the complaint further, to secure such a settlement and assurance.

PART V – POWERS AND REMEDIES

Powers and remedies of the Commission on the complaint.

25. (1) If in any proceedings under section 23 or section 24, the Commission is satisfied on a balance of probabilities that any action of the defendant is an interference with the data protection under this Act, it may grant one or more of the following remedies- —

- (a) a declaration that the action of the defendant is an interference with the data protection in relation to the individual;
- (b) an order restraining the defendant from continuing or repeating the interference, or from engaging in, or causing or permitting others to engage in, conduct of the same kind as that constituting the interference, or conduct of any similar kind specified in the order;
- (c) an order that the defendant perform any acts specified in the order with a view to remedying the interference; or
- (d) such other relief as the Commission thinks fit.

(2) In any proceedings under section 23 or 24, the Commission may award such costs against the defendant as the Commission thinks fit, whether or not the Commission makes any other order, or may award costs against the plaintiff, or may decline to award costs against either party.

(3) It shall not be a defence to proceedings under section 23 or 24 that the interference was unintentional or without negligence on the part of the defendant, but the Commission shall take the conduct of the defendant into account in deciding what remedy to grant.

Damages.

26. In any proceedings under section 23 or 24 , the Commission may advise the complainant to seek damages in Court against the defendant for an interference with the data protection of a data subject in respect of any one or more of the following—

- (a) pecuniary loss suffered as a result of, and expenses reasonably incurred by the aggrieved individual for the purpose of, the transaction or activity out of which the interference arose;
- (b) loss of any benefit, whether or not of a monetary kind, which the aggrieved individual might reasonably have been expected to obtain but for the interference;
- (c) humiliation, loss of dignity, and injury to the feelings of the aggrieved individual.

PART V – MISCELLANEOUS PROVISIONS

Protection against certain actions.

27. (1) Where any personal information is made available in good faith pursuant to of this Act—

- (a) no proceedings, civil or criminal, shall lie against the agency in respect of the making available of that information, or for any consequences that follow from the making available of that information; and
- (b) no proceedings, civil or criminal, in respect of any publication involved in, or resulting from, the making available of that information shall lie against the author of the information or any other person by reason of that author or other person having supplied the information to an agency.

(2) The making available of, or the giving of access to, any personal information in consequence of a request made under section 12 shall not be taken, for the purposes of the law relating to defamation or breach of confidence or infringement of copyright, to constitute an authorisation or approval of the publication of the document or of its contents by the individual to whom the information is made available or the access is given.

Offences.

28. A person who—

- (a) without reasonable excuse, obstructs, hinders, or resists the

Commission or any other person in the exercise of their powers under this Act;

- (b) makes any statement or gives any information to the Commission or any other person exercising powers under this Act, knowing that the statement or information is false or misleading;
- (c) represents directly or indirectly that he or she holds any authority under this Act when he or she does not hold that authority,

commits an offence and is liable, on conviction, to a fine not exceeding Kshs 100,000 and to a term of imprisonment not exceeding two years, or to both.

Regulations.

29. (1) The Cabinet Secretary may, after consultation with the Commission, make regulations prescribing anything required by this Act to be prescribed or generally for the better carrying out of the provisions of this Act.

(2) Without prejudice to the generality of subsection (1), the regulations may provide for—

- (a) the manner in which applications under this Act are to be made;
- (b) the form in which information requested under this Act is to be supplied;
- (c) the procedure for the service of notices and documents under this Act; or
- (d) providing for such matters as are contemplated by or necessary for giving full effect to this Act and for its due administration.

MEMORANDUM OF OBJECTS AND REASONS

The Ministry of Information and Communications has formulated the Bill herein with a view to protecting personal information that is collected by persons and processed automatically. The Bill recognizes that data protection in relation to personal information is a corollary to expectation of privacy, a human right that is in keeping with best international practice. It also spells out the mechanisms for enhancing data protection. The Bill is borne of the realization that data protection is crucial for the promotion of e-transactions in the global digital economy where a lot of information is processed automatically.

Part I of the Bill contains preliminary provisions.

Part II of the Bill contains provisions on principles of personal information protection. Clause 7 provides for notice to persons on information collection. Clause 8 provides for collection of personal information. Clause 9 provides for exemptions. Clause 11 provides that information should be protected. Clauses 12 and 13 provides for access to information and correction of information. Clause 14 provides for the parameters on use of information. Clause 15 provides for storage of information. Clause 16 provides for protection against misuse of information. Clause 17 prohibits a person from using personal data for commercial purposes without the express consent of the data subject. Clause 18 provides for protection against use and disclosure of unique identifiers. Clause 19 provides for protection against interference with the personal information.

Part III of the Bill contains provisions, under clauses 20 and 21, conferring on the Commission on Administrative Justice oversight functions and powers.

Part IV of the Bill contains provisions on complaints, proceedings and settlement. Clause 22 pertains to inquiry into complaints, Clause 23 governs conduct of proceedings and Clause 24 is on settlement of complaints.

Part V of the Bill contains powers and remedies of the Commission in relation to violation of data protection principles. It provides at Clause 26 for damages that may be awarded.

Part VI of the Bill contains miscellaneous provisions.

The enactment of this Bill will not occasion additional expenditure of public funds.

Dated the2012.

SAMUEL POGHISIO,
Minister of Information and Communications.