

**NEW CHALLENGES:
SHIFTING POWER IN
UNCERTAIN TIMES**
12-14 August 2009



22nd ANNUAL LABOUR LAW CONFERENCE

Protecting your identity

Managing personal data in the workplace

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Can you ...?

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- A staff member of yours has resigned. A prospective employer contacts you to discuss the former staff member. Can you discuss:
 - What the former staff member was earning
 - That the former staff member took 6 months unpaid leave prior to resigning
 - That a disciplinary enquiry against the former staff member was pending at the time of resignation
 - That the former staff member spent two weeks in a rehab clinic for alcoholism during the period of unpaid leave
- Can you ask your IT manager to forward copies of e-mails from members of staff that might be involved in a fraud scam?

OVERVIEW

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- Context of ‘Protection of Personal Information Bill’
- What is personal information/data?
- What are the information protection principles?
- How do these principles apply in the workplace?
- What else is in the Bill?
- How is compliance achieved / penalties etc?
- How do these principles apply to the interception and monitoring of communications in the workplace?

Context?

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- Constitutional context: right to privacy
 - Limits the ability to gain, publish, disclose or use information about others
 - Privacy of communications
- Required by our trading partners
- Protection of Personal Information Bill, 2005

Personal data?

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- Information that identifies a natural person, including information about:
 - Race, gender, sex, pregnancy, marital status, national, ethnic or social origin, colour, sexual orientation, age, physical or mental health, disability, religion, conscience, belief, culture, language
 - Education, medical, criminal, employment history, financial transactions
 - Identifying number or symbol
 - Address, fingerprints, blood-type
 - Personal opinions, views or preferences
 - Private or confidential correspondence

Personal data?

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- Other peoples views about that person
- A person's name IF its context would reveal personal information
- Excluding information about a dead person (after 20 years)
- Think twice before you 'process' such information

Processing?

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- ‘Processing’ personal information means
 - Automated* and non automated collection, recording, organising, storing, updating, modifying, retrieving, consulting, using, disseminating or distributing any form, merging, linking, destroying
 - ‘Record’ = written information; audio and video recordings, computer recorded, photograph, drawing etc regardless of who created it

* ECT Act provisions

Managing data in the workplace

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- Recruitment & selection
 - Advertising, applications, verification, short-listing, interviews, pre-employment vetting,
 - Giving of references
- Employment Records
 - Leave, pension schemes, discipline / grievance
 - Information about workers' health
- Monitoring at the Workplace
 - Audio, video, etc. or info from third parties

information protection principles?

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- Principle 1 : Processing limitation
 - » Minimality, consent or necessity
- Principle 2: Purpose specification
 - » Specific purpose, recipients and retention/destruction
- Principle 3: Further processing limitation
- Principle 4: Information quality [accurate]
- Principle 5: Openness
- Principle 6: Security safeguards [integrity]
- Principle 7: Individual participation
 - » Access & correction
- Principle 8: Accountability
 - » ‘Special Personal Information’

- [Note:- Principles apply to state & private bodies; & cross border flows of personal information; personal activities/Households exempt]

'Special Personal Information'? (SPI)

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- SPI = person's religion or philosophy of life, race, political persuasion, health or sexual life, trade union membership, criminal behaviour
- Consent must be given to process SPI, *EXCEPT* where:
 - Religion or philosophy : processed by religious associations
 - Race : to assign preferential status to address inequalities
 - Political persuasion: members or employees of political institutions, where it is necessary
 - TU membership: processed by a TU
 - Health or sexual life: processing by medical professions, social services where necessary for treatment and care; insurance companies; schools; pension funds and employers where necessary - obligation of confidentiality
 - Criminal behaviour: bodies applying criminal law; bodies assessing an application by data subjects or protecting their interest in the face of a legitimate concern that a crime will be committed against them
- Unless: subject made information public / necessary for exercise or defence of a right / important public interest / scientific research

What else is in the Bill?

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- Information Protection Officer
 - Within organisations
 - Link with PAIA
- Information Protection Commission
 - IP Commissioner + 2
 - Educate, receive & investigate / mediate complaints, monitor compliance & consult
 - Codes of conduct
 - Register of notification of processing (unless exempted)
 - Prior investigation

Complaints ...

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- Commission to investigate / refer or settle matter
- May obtain warrant to search and enter
 - Exempt from seizure = legal adviser/client communication
- Enforcement notice
 - Obstruction of Commission or failure to comply is an offence – fine &/ or imprisonment
- May seek civil remedies for patrimonial and non-patrimonial damages

Interception & monitoring?

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- Electronic Communications & Transactions Act
 - S 86(1) : prohibits unauthorised access
- Regulation of Interception of Comm ... Act
 - Prohibits interception UNLESS consent OR warrant
 - S 6 = business exception
 - Penalties (R2 mil fine/imprisonment)
- Best defence is consent

Admissibility of unlawfully obtained evidence?

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- RIC Act
- Issue of fairness – extent & purpose of monitoring
 - TELEPHONE TAPPING:-
 - *Moonsamy v The Mailhouse*
 - but
 - *Sugreen v Standard Bank*
 - EMAIL INTERCEPTION:-
 - *Bamford & Others / Energiser (SA)*

In conclusion

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- Many angles of privacy:
 - To determine what others know about you
 - To be left alone
 - To have one's identity intact
- Any processing of data thus threatens privacy and therefore should be minimised
- Even with consent:
 - Right to privacy shrinks but does not disappear