Chebet & Munyaka Advocates LLP | in association with Rödl & Partner

COMMENTS ON THE PROPOSED PRIVACY AND DATA PROTECTION POLICY AND BILL ,2018

October 3, 2018

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AGENDA

1 Comments on draft policy

2 Comments on draft privacy bill

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COMMENTS ON PROPOSED POLICY

1. Clause 1: "*The Government recognizes that this protection is an essential element in maintaining public trust in entities managing Personal Data and essential for the social-economic development of Kenya in the fourth revolution*." We recommend a few typographical and grammatical edits

Proposed clause: The Government recognizes that this protection is an essential element in maintaining public trust in people and entities managing Personal Data and is essential for the social-economic development of Kenya in the fourth industrial revolution.

2. Clause 2: We recommend a concise statement that at the heart of the policy and legislation on protection of privacy is the individual. This is in line with the Constitution which protects the individual's right to privacy. We believe that this focus on the individual (individual-centricity) will then be key to focus the various provisions of the Bill and regulations.

Proposed clause, amending clause 2.1: The Constitution of Kenya has laid the foundation for protection of the individual's right to privacy in the following manner: Every person shall have the right of every person not to have - (c) "…*information relating to their family or private affairs unnecessarily required or revealed*" - (d) "…*the privacy of their communications infringed".* This Policy sees to enforce and implement this Constitutional right. The Policy and implementing laws must therefore be centered on the individual, with all provisions and clauses being solely viewed and interpreted through the lens of the individual's privacy.

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3. Clause 4.4 and 4.6: Scope

4.4. This policy applies to any Personal Data which is processed or controlled by a data controller in Kenya or outside Kenya that processes personal data using a data processor inside Kenya.
4.6. The policy applies to all data subjects, whether resident in Kenya or not, whose data is or has been collected or processed by a data controller in Kenya.

Both the above clauses appear to contradict the intention and person centricity of the policy by providing that the scope is on processors in Kenya. We recommend instead re-focusing on the individual whose right to privacy is protected by the Constitution of Kenya, and on processors over whom the Kenya government can exercise jurisdiction. It would be unnecessarily onerous to extend the Policy's scope to cover privacy of data subjects who are not in Kenya at the time of the processing activity.

Proposed clause: This policy applies to the personal data of any data subject who is in Kenya at the time such data is processed, whether or not such data processor is in Kenya.'

4. Clause 5.2.3: We recommend deletion of this clause as '*historical research purposes or statistical purposes'* potentially takes away the entire '*purpose limitation*'.

5. Clause 5.4.2: We recommend deletion of this clause for reasons similar to above.

6. Clause 5.5.2: We recommend to substitute '*suitable*' with 'reasonable' as this makes the test of the steps to be taken in that clause more objective than subjective.

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7. Clause 6.1: We recommend deletion of '*or when there are competing rights and therefore would require an assessment based on the facts and circumstances.*' This phraseology introduces a subjective protection of privacy and at the same time introduces the issue of an 'assessment' by an undisclosed party on whether the data subject's rights are to be overridden by '*competing rights*'. We surmise that the default position of protecting privacy is paramount.

8. Clause 7.3.1: We recommend deletion of the exception based on '*competing rights…*' on similar grounds as above.

9. Clause 8.2.7 and 8.2.8: We recommend deletion of this clause, and leaving the issue of registration to the law (Act or regulations) in which documents some *de-minimis* requirements should be provided for a controller to be required to register with the data protection regulator.

10. Clause 8.6.2: This states that '*The Data Controller may disapprove a request for personal data, but must provide reasons for denying the request*.' We recommend that this clause should be deleted in as far as the clause is addressing the rights of a data subject who should have an unrestricted right (subject only to time and cost restrictions set out in clause 8.6.1) and this should not be taken away merely by providing '*reasons*'. Maintaining this clause would be tantamount to taking away a number of the data subject rights in clause 6.1.

11. Definition of '*sensitive personal data*'. We recommend that this definition exclude ' (*l) the commission or alleged commission of any offence by the data subject, or (m) Any proceedings for an offence committed or alleged to have been committed by the data subject, the disposal of such proceedings or the sentence of any court in such proceedings.* ' both of which ought to be matters of public record and whose disclosure is in the interest of the public.

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1. Sec 2: Definition of 'cross-border processing':

The definitions in (a) and (b) of that clause need not be separated because both make reference to processing by a processor outside Kenya. In addition, the reference to a data controller in the definition is spurious.

We recommend it reads : Cross-border processing means processing of personal data of data subjects in Kenya by a data processor who is outside Kenya .

2. Sec 2: Definitions: We recommend deletion of '*identifiable natural person*' as this wording is used in the definition of a '*data subject*', and instead using the definition set out in the definition of 'identifiable natural person' in the definition of 'person data'. As such, we recommend the following definitions:

'Data Subject' means a natural person who can an identified or identifiable natural person who can be identified directly or indirectly, by reference to personal data

'Personal data' means data about an individual which makes such an individual identifiable, and includes the following data:

-name;

-an identification number;

-location data;

-an online identifier;

-one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity;

-any of the above relating to another individual or organisation which makes that individual identifiable.

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3. Sec. 4: Application

There is no reference to the data subject in this section. We recommend deletion of the proviso in sec 4(1)(a) that states *'provided that when the recorded personal data is processed by non-automated means, it forms a whole or part of a filing system as it is ambiguous and unnecessary;*
We also recommend deletion of sec 4(1)(b) as it reads, and replacing it with wording reflective of the fact that the focus of application should be the data subject, so to read ' (b) of any data subject who is in Kenya at the time such data is processed, whether or not such data processor is in Kenya.'

4. Sec 4(2) (a): The exemption from the provisions of the Act on a '*need-to-know basis*' is arbitrary and not defined in the draft Bill, and we recommend deletion of this.

5. Sec 4(2)(b): We recommend also that the exemption for processing 'by an individual in the course of a purely personal or household activity ' be deleted. Our view is that any and all processing of personal data be governed by the law, with *de minimis* provisions applying only to registration thresholds and not contexts. In any event, it is unclear what 'a household' activity, and there is no justification not to protect the personal data of, say, a domestic worker in a home/household setting.

6. We recommend the deletion of the unnecessary definition of the '*Data Commissioner means the Data Protection Commissioner…*' and instead having and using one or the other title across the Bill.

7. We recommend deletion of the Data Commissioner's function of '*exercise control on all data processing operations*' set out in Sec 7(1)(c), as this is an unnecessary function. Our view is that the core function of the DC is to enforce the Act and monitor compliance, but not to 'control data processing operations.'

8. Section 7 and 8: These sections set out the DC's functions and powers. While there is an investigatory power and even power to issue summons, there is no explicit power to the DC to hear and determine matters on alleged violation/contravention of the Act, and it is therefore unclear in the Bill altogether who has the power to, for example, impose the penalties set out in the Bill. As currently drafted, the DC has no powers to enforce the law, or sanction any processor for breaches.

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9. Part III: This part deals extensively with 'registration of data controllers and data processors'. Our recommendation is that this entire part (exept sec 21) be deleted because by definition, a data processor is so by fact; by virtue of the fact that such person carries out an activity which the Bill specifies to be a 'processing' activity. Requiring registration of virtually everyone is not only unnecessary but is also suggestive of a lack of focus of the Bill of protection of privacy and instead on a revenue collection point (through a licensing/registration regime).

10. Sec. 21: This section deals with designation of a DPO by a processor. We laud this section, and recommend making this designation mandatory for data processors of certain categories, for example, all processors processing sensitive personal information, or where the targeted data subjects are children, or where data processing is intended to make commercial use of the personal data (this would cover the 'big data' companies in Kenya such as the telcos, taxi hailing apps, social media firms and the like which commercialise individual's data and therefore should be particularly required to be accountable for their processing activities)

11. Sec 44: This requires that servers where data is stored are located in Kenya. We recommend deletion of this because without Kenya first investing in the infrastructure required to locate data centers in Kenya, this provision will make global companies stop doing business with Kenyans completely. A better option would be to only maintain the requirement to comply with the Bill and additionally required appointment of a DPO for certain categories of processors or processors who meet some *de minimis* thresholds.

12. Sec 45: The nature of the proof required should be clear. As it currently reads, it is not clear whether there is a requirement to prove that the law in that other country provide the safeguards described, or whether the requirement as to proof is that the particular entity to whom the data is transferred has those safeguards. We additionally recommend deletion of sec 45(1)(c) as these reasons are repeated.

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13. Sec 48 and 49: We recommend deletion of these provisions which exempt compliance with the law for the specified purposes, because our view is that the principles set out in the Bill for protection of privacy should be complied with in all cases, without giving room, for example for a data controller to decide the instances and occasion (as provided in sec 48(1)(b) that publication is in the public interest.

14. Section 50: We recommend deletion of this section as there ought not be room to make an exemption by the CS which would allow/enable breach of a Constitutional right, particularly in absence of requirement on the part of the CS to be accountable for such exemptions.

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CONTACT

Judy Chebet

Partner, Chebet & Munyaka Advocates LLP
Telephone: +254 (702) 463 272
E-Mail: judy.chebet@roedl.com

Penninah Munyaka

Partner, Chebet & Munyaka Advocates LLP
Telephone: +254 (702) 463 272
E-Mail: penninah.munyaka@roedl.com

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