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THE PERSONAL DATA PROTECTION BILL, 2012

A Bill for

AN ACT of Parliament to give effect to Article 31 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 Personal Data Protection Act, 2012.
- Interpretation. **2.**(1) In this Act, unless the context otherwise requires –
- “Agency” includes public entities and private bodies;
- “Board” means the Freedom of Information and Data Protection Board established under section 19 of the Freedom of Information Act;
- No....of 2012.
- “member” means a member of the Board;
- No....of 2012.
- " 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 (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 material" means any document or other material used in connection with, or produced by, data equipment;

"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 data in the course of his 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;

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

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

"privacy code" means a written code regulating acts and practices that affect data protection and the code shall not provide for less protection than is provided for by the personal information protection principles in this Act;

"prescribed", in the case of fees, means prescribed by regulations made by the Cabinet Secretary, in any other case, means prescribed by regulations made by the Board with the approval of the Cabinet Secretary;

"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;

“Committee” means the Parliamentary committee responsible for matters relating to data protection;

“personal information” means information about an identifiable individual, 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;

“public entity” includes-

- (a) Parliament and staff of Parliament;
- (b) the Judiciary;

(c) all state organs, government ministries, departments or agencies at all levels of Government;

any body which -

- (i) is established by virtue of the President's powers or by or under an Act of Parliament or an Order made under an Act of Parliament or which is established in any other way by a Cabinet Secretary of the government or by a government department or public entity;
- (ii) receives any part of its revenues directly from money provided by Parliament or from a levy authorized by an enactment or fee or charge of any other description so authorized;
- (iii) a statutory corporation within the meaning of the State Corporations Act;
- (iv) a commission of inquiry established under the Commissions of Inquiry Act;
- (v) all local authorities established under the Local Government Act;
- (vi) any body carrying out a statutory or public function, provided that the body is a public entity only to the extent of its statutory or public function; or
- (vii) any other body or entity designated by the Cabinet Secretary as a public entity for purposes of this Act;

No....of.....

“public officer” has the meaning assigned to it in Article 260 of the Constitution ;

“record” in relation to a public entity or private body, 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;

“state officer” has the meaning assigned to it in Article 260 of the Constitution;

“service commission” means the Public Service Commission;

“whistle blowing” refers to confidential raising of problems or concerns within an organisation (institution) or with an independent review structure associated with that organisation.

PART II – OBJECTS AND PERSONAL INFORMATION PROTECTION PRINCIPLES

Objects of this Act

3. The objects of this Act include-

- (a) to give effect to the right of every person to privacy as provided under Article 31 (c) and (d) of the Constitution;
- (b) to 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) to 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.(1) The principles of data protection include that–

- (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. (1) Every person has a right to privacy with respect to their personal data relating to their private and family life, insofar as they have an interest deserving protection under the Constitution and this Act unless the right to privacy is lost due to the general availability of the data in the public domain.;

(2) The right to privacy may be limited in order to safeguard overriding legitimate interests of another person and the limitation must be carried out using the method that is least intrusive to the data subject.

(3) Where personal data concerning a data subject is destined for automated or manual processing the data subject shall have the right on request to the following—

- (i) information on the person processing data concerning him or her;
- (ii) place of origin of the data;
- (iii) use of the data collected;
- (iv) any other person to whom the data is transmitted;
- (v) rectification of incorrect data and the right to erasure of illegally processed data.

(2) A person whose rights have been breached under this Act shall have recourse to the Court.

Collection of personal information

6. (1) Personal information shall not be collected, stored or used by a person by unlawful means or by means that, in the circumstances, intrude to an unreasonable extent, upon the personal affairs of the data subject except in terms of this Act or other legislation.

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

- (i) the information is collected for a lawful purpose connected with a function or activity of the agency; and
- (ii) the collection of the information is necessary for that purpose.

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

(3) Notwithstanding the provisions of subsection (2) (a) (ii) an agency will not be held to have collected the information unnecessarily where it can demonstrate on reasonable grounds that---

- (a) the information is publicly available information; or
- (b) the data subject authorised collection of the information from someone else; or
- (c) non-compliance would not prejudice the interests of the data subject; or
- (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) or 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 Board, being proceedings that have been commenced or are reasonably in contemplation; or
 - (v) for purposes of exemptions set out in the Freedom of Information Act;
- (e) compliance would prejudice the purposes of the collection; or
- (f) compliance is not reasonably practicable in the circumstances of the particular case; or
- (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 section 10.

Duty to notify.

7. (1) Where a person 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) whether 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; and
 - (ii) 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 it is not practicable to comply with subsection (1) before collection of information or where 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 that 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 must 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 must notify a data subject that a waiver of rights under this Act will be construed as consent and authorisation for collection of information.

Protection and security
of personal information.

8.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;

- (ii) access and use by an unauthorised person, modification, or negligent disclosure, except with the authority of the agency that holds the information; and
- (iii) negligence; and

(b) if it is necessary for the information to be given to a person 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.

9. (1) Where an agency holds personal information or where an individual believes that an agency is holding 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 Freedom of Information Act.

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(3) The procedure for a request for access to information under subsection (1) shall be as provided under the Freedom of Information Act.

Correction of information

10. (1) Pursuant to Article 35 (2) of the Constitution, where a person holds personal information, the data subject shall be entitled to request correction of the 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 that information.

(3) A denial of a request made in terms of Article 35 (2) of the Constitution to correct personal information shall be

in writing disclosing the grounds for denial.

(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 that information, the agency shall, if so requested by the data subject, attach to the information, in such a manner that it will be read with the information, a statement provided by that individual of the correction sought.

(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.

11. An agency that holds personal information shall not use that information without taking 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.

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

Misuse of information.

13. An agency that holds personal information that was obtained in connection with one purpose shall not use the information for any other purpose.

14.

Use of Unique
Identifiers

14. (1) An agency shall not assign a unique identifier to an individual unless the assignment of that identifier is necessary to enable the agency to carry out any one or more of its functions efficiently.

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(2) An agency shall not assign to an individual a unique identifier that, to that agency's knowledge, has been assigned to that individual by another agency, unless those two agencies are associated persons within the meaning of the Income Tax Act.

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(3) 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.

(4) 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

Interference with
personal information

15. For the purposes of this Act, a person who interferes with personal information of a data subject or practices breaches in relation to personal information that relates to the data subject commits an offence.

PART III – POWERS AND FUNCTIONS OF THE BOARD

Functions of the Board

16. (1) In additions to the functions conferred on the Board under the Freedom of Information Act, the Board may- –

- (a) investigate any complaint relating to a violation of any person's rights under this Act;
- (b) provide a framework or mechanisms for effective conflict management or dispute resolution on matters relating to this Act; and
- (c) take such further action as is contemplated by this Part.

(2) The Board 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.

- (2) The Board shall have all the powers necessary for the performance of its functions under this Act.
- (3) The Board may enter into association with such other bodies or organizations within and outside Kenya as the Board may consider desirable or appropriate and in furtherance of the purpose for which the Board is established.

PART IV- DATA PROTECTION – COMPLAINTS, PROCEEDINGS AND SETTLEMENT

Inquiry into complaints

17. (1) A data subject who is aggrieved by any decision of any person under this Act may make a complaint to the Board in accordance with the procedure provided in the Freedom of Information Act.

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

(3) The Board 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 Board may prescribe.

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

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

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

Provided that -

- (i) if the information or report is not received

within the time stipulated by the Board, the Board may proceed to inquire into the complaint without the information or report;

- (ii) if, on receipt of the information or report, the Board is satisfied either that no further action is required or that the required action has been initiated by the agency, the Board 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.

Board.

Proceedings on complaints.

18. On the receipt of a complaint in terms of section 17 the Board may take no action or as the case may require, take no further action on any complaint if, in the opinion of the Board-

- (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; or
- (b) the subject-matter of the complaint is trivial; or
 - (c) the complaint is frivolous or vexatious or is not made in good faith; or
 - (d) the individual alleged to be aggrieved does not desire that action be taken or, as the case may be, continued; or
 - (e) the complainant does not have sufficient personal interest in the subject-matter of the complaint; or
 - (f) where;-
 - (i) the complaint relates to a matter in respect of which a code of practice issued under section **** 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 Board, that it would be reasonable for the individual alleged to be aggrieved to exercise.

(2) Notwithstanding anything in subsection (1) , the Board 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 Board that, having regard to all the circumstances of the case, any further action is unnecessary.

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

Settlement of complaints.

19. Where it appears from a complaint, or any written response made in relation to a complaint under section 18, 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 Board 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 Board on the complaint

20. (1) If in any proceedings under section 18 or section 19, the Board 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 Board thinks fit.

(2) In any proceedings under section 17 or section 16 of this Act, the Board may award such costs against the defendant as the Board thinks fit, whether or not the Board 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 18 or

section 19 that the interference was unintentional or without negligence on the part of the defendant, but the Board shall take the conduct of the defendant into account in deciding what remedy to grant.

Damages

21. In any proceedings under section 18 or 19 of this Act, the Board 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.

22.

- (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 9 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.

- Regulations.
- 23.** The Cabinet Secretary may make regulations for the following purpose—
- (a) providing the procedure for the service of notices and documents under this Act: or
 - (b) providing for such matters as are contemplated by or necessary for giving full effect to this Act and for its due administration.

PART VI- OFFENCES

- Offences.
- 24.** (1) A person who—
- (a) without reasonable excuse, obstructs, hinders, or resists the Board or any other person in the exercise of their powers under this Act;
 - (b) makes any statement or gives any information to the Board 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.

(2) A person who commits an offence under this Act shall be liable on conviction to a fine not exceeding five hundred shillings or to imprisonment for a term not exceeding two years or to both.

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 contains provisions on principles of personal information protection. Clause 5 provides for collection of personal information, Clause provides for notice to persons on information collection, Clause 7 provides that information should not be collected unlawfully, Clause 8 provides that information should be protected, Clause 9 and 10 provides for access to information for correction purposes, Clause 11 provides for the parameters on use of information, Clause 12 provides for storage of information, Clause 13 provides for protection against misuse of information, Clause 14 provides for protection against disclosure of information, Clause 15 provides for protection against use and disclosure of unique identifiers and Clause 16 provides for protection against interference with the data protection principles.

Part III contains provisions under clause 17 on the functions and powers of the Freedom of Information and Data Protection Commission on data protection.

Part IV contains provisions on data protection violations complaints; it provides at Clause 21 the principles that will guide the Commission in the settlement of these complaints.

Part V contains powers and remedies of the Commission in relation to violation of data protection principles. It provides at Clause 23 for damages that may be awarded.

Part VI contains miscellaneous provisions

Part VII contains provisions on offences. Clause 26 provides for various offences and penalties.

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

Dated the2012.

SAMUEL POGHISIO,

Minister of Information and Communications.