

THE DATA PROTECTION BILL
(No. XV of 2004)

Explanatory Memorandum

The object of this Bill is to provide for the protection of the privacy rights of individuals in view of the developments in the techniques used to capture, transmit, manipulate, record or store data relating to individuals.

Paul Raymond Bérenger
Prime Minister,
Minister of Defence and Home Affairs

21 May 2004

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A BILL

To provide for the protection of the privacy rights of individuals in view of the developments in the techniques used to capture, transmit, manipulate, record or store data relating to individuals

ENACTED by the Parliament of Mauritius, as follows -

PART I - PRELIMINARY

1. Short title

The Act may be cited as the Data Protection Act 2004.

2. Interpretation

In this Act -

“adverse action”, in relation to a data subject, means any action that may adversely affect the person’s rights, benefits, privileges, obligations or interests;

“authorised officer” means an officer to whom the Commissioner has delegated his powers under section 9;

“blocking”, in relation to personal data, means suspending the modification of data, or suspending or restricting the provision of information to a third party where such provision is suspended or restricted in accordance with this Act;

“collect” does not include receipt of unsolicited information;

“Commissioner” means the Data Protection Commissioner referred to in section 4;

“consent” means any freely given specific and informed indication of the wishes of the data subject by which he signifies his agreement to personal data relating to him being processed;

"data" means information in a form which -

- (a) (i) is capable of being processed by means of equipment operating automatically in response to instructions given for that purpose; and
- (ii) is recorded with the intent of it being processed by such equipment; or
- (b) is recorded as part of a relevant filing system or intended to be part of a relevant filing system;

"data controller" means a person who, either alone or jointly with any other person, makes a decision with regard to the purposes for which and in the manner in which any personal data are, or are to be, processed;

“data matching procedure” means any procedure, whether manually or by means of any electronic or other device, whereby personal data collected for one or more purposes in respect of 10 or more data subjects are compared with personal data collected for any other purpose in respect of those data subjects where the comparison –

- (a) is for the purpose of producing or verifying data that; or
- (b) produces or verifies data in respect of which it is reasonable to believe that it is practicable that the data,

may be used, whether immediately or at any subsequent time, for the purpose of taking any adverse action against any of those data subjects;

"data processor" means a person, other than an employee of the data controller, who processes the data on behalf of the data controller;

"data protection principles" means the data protection principles specified in the First Schedule;

"data subject" means a living individual who is the subject of personal data;

“direct marketing” means the communication of any advertising or marketing material which is directed to any particular individual;

“document” includes –

- (a) a disc, tape or any other device in which the data other than visual images are embodied so as to be capable, with or without the aid of some other equipment, of being reproduced from the disc, tape or other device; and
- (b) a film, tape or other device in which visual images are embodied as to be capable, with or without the aid of some other equipment, of being reproduced from the film, tape or other device;

“inaccurate”, in relation to personal data, means data which are incorrect, misleading, incomplete or obsolete;

“individual” means a living individual;

“information and communication network” means a network for the transmission of messages and includes a telecommunication network;

“network” means a communication transmission system that provides interconnection among a number of local and remote devices;

"office" means the Data Protection Office established under section 4;

"personal data" means -

- (a) data which relate to an individual who can be identified from those data; or
- (b) data or other information, including an opinion forming part of a database, whether or not recorded in a material form, about an individual whose identity is apparent or can reasonably be ascertained from the data, information or opinion;

“proceedings” –

- (a) means any proceedings conducted by or under the supervision of a Judge, Magistrate or judicial officer; and
- (b) includes –
 - (i) any inquiry or investigation into a criminal offence; and
 - (ii) any disciplinary proceedings;

"processing" means any operation or set of operations which is performed on the data wholly or partly by automatic means, or otherwise than by automatic means, and includes -

- (a) collecting, organising or altering the data;
- (b) retrieving, consulting, using, storing or adapting the data;
- (c) disclosing the data by transmitting, disseminating or otherwise making it available; or
- (d) aligning, combining, blocking, erasing or destroying the data;

"register" means the register referred to in section 33;

"relevant filing system" means a structured set of information relating to individuals that, although it is not in a form capable of being processed automatically, is structured, either by reference to any individual or by reference to criteria relating to the individual, in such a way that the structure allows ready accessibility to information relating to that individual;

"relevant function" means –

- (a) any function conferred on any person by or under any enactment;
- (b) any function of any Minister; or
- (c) any other function which is of a public nature and is exercised in the public interest;

"relevant person", in relation to a data subject, means –

- (a) where the data subject is a minor, a person who has parental authority over the minor or has been appointed as his guardian by the Court;
- (b) where the data subject is physically and mentally unfit, a person who has been appointed his guardian by the Court;
- (c) in any other case, a person duly authorised in writing by the data subject to make a request under sections 41 and 44;

"sensitive personal data" means personal information concerning a data subject and consisting of information as to -

- (a) the racial or ethnic origin;
- (b) political opinion or adherence;

- (c) religious belief or other belief of a similar nature;
- (d) membership to a trade union;
- (e) physical or mental health;
- (f) sexual preferences or practices;
- (g) the commission or alleged commission of an offence; or
- (h) any proceedings for an offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings;

“telecommunication network” means a system, or a series of systems, operating within such boundaries as may be prescribed, for the transmission or reception of messages by means of guided or unguided electro-magnetic energy or both;

“third party” in relation to personal data, means any person other than –

- (a) the data subject;
- (b) a relevant person in the case of a data subject;
- (c) the data controller; or
- (d) a person authorised in writing by the data controller to collect, hold, process or use the data –
 - (i) under the direct control of the data controller; or
 - (ii) on behalf of the data controller;

“traffic data” means any data relating to a communication by means of a computer system and generated by the system that form part in the chain of communication, indicating the communication’s origin, destination, route, time, date, size, duration, or type of underlying service;

“Tribunal” means the ICT Appeal Tribunal set up under section 36 of the Information and Communication Technologies Act 2001;

“underlying service” means the type of service that is used within the computer system;

“use” in relation to personal data, includes disclose or transfer the data.

3. Application of Act

(1) This Act shall bind the State.

(2) For the purposes of this Act, each Ministry or Government department shall be treated as separate from any other Ministry or Government department.

(3) Subject to Part VII, this Act shall apply to a data controller -

(a) who is established in Mauritius and processes data in the context of that establishment; and

(b) who is not established in Mauritius but uses equipment in Mauritius for processing data, other than for the purpose of transit through Mauritius.

(4) A data controller, falling within subsection (3)(b) shall nominate for the purposes of this Act, a representative established in Mauritius.

(5) For the purposes of subsection (3)(a) any person who -

(a) is ordinarily resident in Mauritius;

(b) carries out data processing activities through an office, branch or agency in Mauritius,

shall be treated as being established in Mauritius.

PART II - DATA PROTECTION OFFICE

4. Data Protection Office

(1) There is established for the purposes of this Act a Data Protection Office which shall be a public office.

(2) The head of the office shall be known as the Data Protection Commissioner.

(3) The Commissioner shall be a barrister with at least 5 years standing at the Bar.

(4) The Commissioner shall be assisted by such public officers as may be necessary.

(5) Every public officer referred to in subsection (4) shall be under the administrative control of the Commissioner.

5. Functions of Commissioner

The Commissioner shall -

- (a) ensure compliance with this Act, and any regulations made under the Act;
- (b) issue or approve codes of practice or guidelines for the purposes of this Act;
- (c) create and maintain a register of all data controllers;
- (d) exercise control on all data processing activities, either of its own motion or at the request of a data subject, and verify whether the processing of data is in accordance of this Act or regulations made under the Act;
- (e) promote self-regulation among data controllers;
- (f) investigate any complaint or information which give rise to a suspicion that an offence, under this Act may have been, is being or is about to be committed;
- (g) take such measures as may be necessary so as to bring to the knowledge of the general public the provisions of this Act;
- (h) undertake research into, and monitor developments in, data processing and computer technology, including data-matching and data linkage, ensure that any adverse effects of such developments on the privacy of individuals are minimised, and report to the Prime Minister the results of such research and monitoring;
- (i) examine any proposal for data matching or data linkage that may involve an interference with, or may otherwise have adverse effects on the privacy of individuals and, ensure that any adverse effects of such proposal on the privacy of individuals are minimised;
- (j) do anything incidental or conducive to the attainment of the objects of, and to the better performance of his duties and functions under this Act.

6. Confidentiality and oath

(1) The Commissioner, and every officer of the office shall take the oath specified in the Second Schedule.

(2) The Commissioner and every authorised officer shall not, except –

- (a) in accordance with this Act or any other enactment;
- (b) upon a Court order; or
- (c) as authorised by the order of a Judge,

divulge any information obtained in the exercise of a power or in the performance of a duty under this Act.

(3) The Commissioner or any authorised officer, who otherwise than in the course of his duties, uses or records personal data or sensitive personal data, that comes to his knowledge or to which he has access by reason of his position as Commissioner or authorised officer, shall commit an offence.

(4) Any person, who without lawful excuse, contravenes subsection (2), shall commit an offence and shall, on conviction, be liable to a fine not exceeding 50,000 rupees and to imprisonment for a term not exceeding 2 years.

PART III - POWERS OF COMMISSIONER

7. Powers of Commissioner

The Commissioner shall have power, for the purpose of carrying out his functions to do all such acts as appear to him to be requisite, advantageous or convenient for, or in connection with the carrying out of these functions.

8. Powers to obtain information

(1) The Commissioner may, by notice in writing served on any person, request from that person, information as is necessary or expedient for the performance of his functions and exercise of his powers and duties under this Act.

(2) Where the information requested by the Commissioner is stored in a computer, disc, cassette, or on microfilm, or preserved by any mechanical or electronic device, the person named in the notice shall produce or give access to the information in a form in which it can be taken away and in which it is visible and legible.

9. Delegation of powers by Commissioner

The Commissioner may delegate any of his investigating and enforcement powers conferred upon him by this Act to any officer of his office and to any police officer designated for that purpose by the Commissioner of Police.

10. Contents of notice

- (1) Subject to subsection (2) -

- (a) the notice specified in section 8 shall state that the person to whom the notice is addressed has a right of appeal conferred under section 59; and
- (b) the delay granted for compliance shall not be less than 21 days.

(2) Where a notice of appeal against a decision made under section 8, is lodged with the Commissioner, the information required need not be furnished, pending the determination or withdrawal of the appeal.

(3) Where the Commissioner considers that the information is required urgently for the proper performance of his functions and exercise of his powers under this Act, the Commissioner may apply to the Judge in Chambers for communication of the information.

(4) Any person, who without reasonable excuse, fails or refuses to comply with a requirement specified in a notice, or who furnishes to the Commissioner an information which he knows to be false or misleading in a material particular, shall commit an offence, and shall on conviction, be liable to a fine not exceeding 50,000 rupees and to imprisonment for a term not exceeding 2 years.

11. Complaints

Where a complaint is made to the Commissioner that this Act or any regulations made under it, has been, is being or is about to be contravened, the Commissioner shall -

- (a) investigate the complaint or cause it to be investigated by an authorised officer, unless he is of the opinion that such complaint is frivolous or vexatious; and
- (b) as soon as reasonably practicable, notify the complainant in writing of his decision in relation to the complaint and that the complainant may, if he is aggrieved by the Commissioner's decision, appeal to the Tribunal.

12. Enforcement of notice

(1) Where the Commissioner is of opinion that a data controller or a data processor has contravened, is contravening or is about to contravene this Act, the Commissioner may serve an enforcement notice on the data controller or the data processor, as the case may be, requiring him to take such steps within such time as may be specified in the notice.

(2) Notwithstanding subsection (1), where the Commissioner is of the opinion that a person has committed an offence under this Act, he may investigate the matter or cause it to be investigated by an authorised officer.

(3) An enforcement notice shall -

- (a) specify any provision of this Act which has been, is being or is likely to be contravened;
- (b) specify the measures that shall be taken to remedy or eliminate the matter, as the case may be, which makes it likely that a contravention will arise;
- (c) specify a time limit which shall not be less than 21 days within which those measures shall be implemented; and
- (d) state the right of appeal conferred under section 58.

(4) In complying with an enforcement notice served under subsection (1), a data controller or a data processor, as the case may be, shall as soon as practicable and in any event not later than 21 days after such compliance, notify -

- (a) the data subject concerned; and
- (b) where such compliance materially modifies the data concerned, any person to whom the data was disclosed during the period beginning 12 months before the date of the service of the enforcement notice and ending immediately before such compliance,

of any amendment.

(5) Where the Commissioner considers that any provision of the enforcement notice need not be complied with to ensure compliance with the data protection principles to which the notice relates, he may vary the notice and, where he does so, he shall notify in writing the person on whom the notice was served.

(6) Any person who, without reasonable excuse, fails or refuses to comply with an enforcement notice shall commit an offence, and shall, on conviction, be liable to fine not exceeding 50,000 rupees and to imprisonment for a term not exceeding 2 years.

13. Preservation Order

(1) The Commissioner may apply to a Judge in Chambers for an order for the expeditious preservation of data, including traffic data, where he has

reasonable grounds to believe that such data is vulnerable to loss or modification.

(2) Where the Judge in Chambers is satisfied that an order may be made under subsection (1), he shall issue a preservation order specifying a period which shall not be more than 90 days during which the order shall remain in force.

(3) The Judge in Chambers may, on application made by the Commissioner, extend the period specified in subsection (2) for such time as the Judge thinks fit.

14. Power to carry out prior security checks

(1) Where the Commissioner is of the opinion that the processing or transfer of data by a data controller entails specific risks to the privacy rights of data subjects, he may inspect and assess the security measures taken under section 27 prior to the beginning of the processing or transfer.

(2) The Commissioner may, at any reasonable time during working hours, carry out further inspection and assessment of the security measures imposed on a data controller under section 27.

15. Compliance audit

The Commissioner may carry out periodical audits of the systems of data controllers to ensure compliance with data protection principles specified in the First Schedule.

16. Powers to request assistance

(1) For the purposes of gathering information or for the proper conduct of any investigation concerning compliance with this Act, the Commissioner may seek the assistance of such persons or authorities, as he thinks fit and that person or authority may do such things as are reasonably necessary to assist the Commissioner in the performance of the Commissioner's functions.

(2) Any person assisting the Commissioner pursuant to subsection (1), shall for the purposes of section 6 be deemed to an officer of the office.

17. Powers of entry and search

(1) An authorised officer may, at any time, enter any premises other than a dwelling house, for the purpose of discharging any functions or duties under this Act or any regulations made under this Act.

(2) An authorised officer shall not enter a dwelling house unless he shows to the owner or occupier of the house, a warrant issued by a Magistrate

authorising the officer to exercise his power under this Act in respect of the house.

- (3) An authorised officer may, on entering any premises –
 - (a) request the owner or occupier to produce any document, record or data;
 - (b) examine any such document, record or data and take copies or extracts from them;
 - (c) request the owner of the premises entered into, or any person employed by him, or any other person on the premises, to give to the authorised officer all reasonable assistance and to answer all reasonable questions either orally or in writing.

(4) Where the information requested by the authorised officer pursuant to subsection (3) is stored in a computer, disc, cassette, or on microfilm, or preserved by any mechanical or electronic device, the person to whom the request is made shall be deemed to require the person to produce or give access to it in a form in which it can be taken away and in which it is visible and legible.

(5) For the purpose of carrying out his duties under this section, the authorised officer may be accompanied by such person as the Commissioner thinks fit.

18. Warrant to enter and search dwelling house

(1) A Magistrate may, on being satisfied on an information upon oath, that the authorised officer has to exercise the powers and duties conferred upon him under section 17 in respect of a dwelling house, issue a warrant authorising the authorised officer to exercise those powers and duties.

(2) A warrant issued under subsection (1) shall be valid for the period stated in the warrant.

- (3) The Magistrate may attach and specify any condition to a warrant.

19. Obstruction of authorised officer

Any person who, in relation to the exercise of powers conferred by section 17 and 18 –

- (a) obstructs or impedes an authorised officer in the exercise of any of his powers;

- (b) fails to provide assistance or information requested by the authorised officer;
- (c) refuses to allow an authorised officer to enter any premises or to take any person with him in the exercise of his functions;
- (d) gives to an authorised officer any information which is false and misleading in a material particular,

shall commit an offence and shall, on conviction, be liable to a fine not exceeding 50,000 rupees and to a term of imprisonment not exceeding 2 years.

20. Referral to police

On completion of an investigation under this Act, the Commissioner shall, where the investigation reveals that an offence has been committed under this Act or any regulations made under the Act, refer the matter to the Police.

21. Directions by Prime Minister

(1) Subject to subsection (2), the Prime Minister may give in writing such directions of a general character to the Commissioner, not inconsistent with this Act, which he considers to be necessary in the public interest, and the Commissioner shall comply with those directions.

- (2) The Prime Minister shall not -
 - (a) give any direction in relation to any specific matter which is the subject of an investigation by the office; and
 - (b) question the Commissioner or an authorised officer, or otherwise enquire into, a matter which is under investigation by the office.

PART IV - OBLIGATION ON DATA CONTROLLERS

22. Collection of personal data

(1) Subject to Part VII, a data controller shall not collect personal data unless -

- (a) it is collected for a lawful purpose connected with a function or activity of the data controller; and
- (b) the collection of the data is necessary for that purpose.

(2) Where a data controller collects personal data directly from a data subject, the data controller shall at the time of collecting personal data ensure that the data subject concerned is informed of -

- (a) the fact that the data is being collected;
- (b) the purpose or purposes for which the data is being collected;
- (c) the intended recipients of the data;
- (d) the name and address of the data controller;
- (e) whether or not the supply of the data by that data subject is voluntary or mandatory;
- (f) the consequences for that data subject if all or any part of the requested data is not provided;
- (g) whether or not the data collected shall be processed and whether or not the consent of the data subject shall be required for such processing; and
- (h) his right of access to, the possibility of correction of and destruction of, the personal data to be provided.

(3) A data controller shall not be required to comply with subsection (2) –

- (a) in respect of a data subject where –
 - (i) compliance with subsection (2) in respect of a second or subsequent collection will be to repeat, without any material difference, what was done to comply with that subsection in respect of the first collection; and
 - (ii) not more than 12 months have elapsed between the first collection and this second or subsequent collection.
- (b) where –
 - (i) compliance is not reasonably practicable at the time of collection, provided that the data controller makes available to the data subject all the relevant information specified in subsection (2) as soon as practicable; or
 - (ii) the data is used in a form in which the data subject concerned cannot or could not reasonably expect to be identified.

(4) Where data is not collected directly from the data subject concerned, the data controller or any person acting on his behalf shall ensure that the data subject is informed of the matters specified in subsection (2).

(5) Subsection (3) shall not operate to prevent a second or subsequent collection from becoming a first collection where the data controller has complied with subsection (2) in respect of the second or subsequent collection.

23. Accuracy of personal data

A data controller shall take all reasonable steps to ensure that personal data within his possession is -

- (a) accurate; and
- (b) kept up to date where such data requires regular updating.

24. Processing of personal data

(1) No personal data shall be processed, unless the data controller has obtained the express consent of the data subject.

(2) Notwithstanding subsection (1), personal data may be processed without obtaining the express consent of the data subject where the processing is necessary -

- (a) for the performance of a contract to which the data subject is a party;
- (b) in order to take steps required by the data subject prior to entering into a contract;
- (c) in order to protect the vital interests of the data subject;
- (d) for compliance with any legal obligation to which the data controller is subject;
- (e) for the administration of justice; or
- (f) in the public interest.

25. Processing of sensitive personal data

(1) No sensitive personal data shall be processed unless the data subject has –

- (a) given his express consent to the processing of the personal data; or

- (b) made the data public.
- (2) Subsection (1) shall not apply where the processing –
- (a) is necessary –
 - (i) for the purposes of exercising or performing any right or obligation which is conferred or imposed by law on the data controller in connection with his employment;
 - (ii) in order to protect the vital interests of the data subject or another person in a case where consent cannot be given by or on behalf of the data subject, or the data controller cannot reasonably be expected to obtain the consent of the data subject;
 - (iii) in order to protect the vital interests of another person, in a case where consent by or on behalf of the data subject has been unreasonably withheld;
 - (iv) for the performance of a contract to which the data subject is a party;
 - (v) in order to take steps required by the data subject prior to entering into a contract;
 - (vi) for compliance with a legal obligation to which the data controller is subject;
 - (b) is carried out by any entity or association –
 - (i) in the course of its legitimate activities;
 - (ii) which is not established, and whose activities are not carried on, or conducted for profit; and
 - (iii) which exists for political, philosophical, religious or trade-union purposes.
 - (c) is carried out with appropriate safeguards for the protection of the privacy of data subjects;
 - (d) is related only to individuals who either are members of the body or association or have regular contact with it in connection with its purposes;
 - (e) does not involve disclosure of the personal data to a third party without the consent of the data subject;

- (f) is in respect of the information contained in the personal data made public as a result of steps deliberately taken by the data subject;
- (g) is required by law.

26. Use of personal data

The data controller shall ensure that personal data is -

- (a) kept only for one or more specified and lawful purposes for which such data has been collected and processed;
- (b) not used or disclosed in any manner incompatible with the purposes for which such data has been collected and processed;
- (c) adequate, relevant and not excessive in relation to the purposes for which such data has been collected and processed; and
- (d) not kept for longer than is necessary for the purposes for which such data has been collected and processed.

27. Security of personal data

(1) A data controller shall –

- (a) take appropriate security and organisational measures for the prevention of unauthorised access to, alteration of, disclosure of, accidental loss, and destruction of the data in his control; and
- (b) ensure that the measures provide a level of security appropriate to –
 - (i) the harm that might result from the unauthorised access to, alteration of, disclosure of, destruction of the data and its accidental loss; and
 - (ii) the nature of the data concerned.

(2) A data controller or a data processor shall take all reasonable steps to ensure that any person employed by him is aware of and complies with the relevant security measures.

(3) Where a data controller is using the services of a data processor, he shall choose a data processor providing sufficient guarantees in respect of security and organisational measures for the purposes of complying with subsection (1).

(4) Where the data controller is using the services of a data processor under subsection (3) the data controller and the data processor shall enter into a written contract which shall provide that -

- (a) the data processor shall act only on instructions received from the data controller; and
- (b) the data processor shall be bound by obligations devolving on the data controller under subsection (1).

(5) Without prejudice to subsection (1), in determining the appropriate security measures, in particular, where the processing involves the transmission of data over an information and communication network, a data controller shall have regard to –

- (a) the state of technological development available;
- (b) the cost of implementing any of the security measures;
- (c) the special risks that exist in the processing of the data; and
- (d) the nature of the data being processed.

28. Duty to destroy personal data

(1) Where the purpose for keeping personal data has lapsed, the data controller shall –

- (a) destroy such data as soon as reasonably practicable; and
- (b) notify any data processor holding such data.

(2) Any data processor who receives a notification under subsection (1) (b) shall, as soon as reasonably practicable, destroy the data specified by the data controller.

29. Unlawful disclosure of personal data

(1) Any data controller who, without lawful excuse, discloses personal data in any manner that is incompatible with the purposes for which such data has been collected shall commit an offence.

(2) Any data processor who, without lawful excuse, discloses personal data processed by him without the prior authority of the data controller on whose behalf such data is or has been processed shall commit an offence.

(3) Subject to subsection (4), any person who -

- (a) obtains access to personal data, or obtains any information constituting such data, without prior authority of the data controller or data processor by whom such data is kept; and
- (b) discloses the data or information to another person,

shall commit an offence.

(4) Subsection (3) shall not apply to a person who is an employee or agent of a data controller or processor and is acting within his mandate.

(5) Any person who offers to sell personal data where such personal data has been obtained in breach of subsection (1) shall commit an offence.

(6) For the purposes of subsection (5), an advertisement indicating that personal data is or may be for sale, constitutes an offer to sell the personal data.

30. Processing of personal data for direct marketing

(1) A person may, at any time, by notice in writing, request a data controller –

- (a) to stop; or
- (b) not to begin,

the processing of personal data in respect of which he is a data subject, for the purposes of direct marketing.

(2) Where the data controller receives a request under subsection (1)(a), he shall, as soon as reasonably practicable and in any event not more than 28 days after the request has been received –

- (a) where the data are kept only for purposes of direct marketing, erase the data; and
- (b) where the data are kept for direct marketing and other purposes, stop processing the data for direct marketing.

(3) Where the data controller receives a request under subsection (1)(b), he –

- (a) shall, where the data are kept only for the purpose of direct marketing, as soon as reasonably practicable and in any event not more than 28 days after the request has been received, erase the data; or

- (b) shall not, where the data are kept for direct marketing and other purposes, process the data for direct marketing after the expiry of 28 days.

(4) The data controller shall notify the data subject in writing of any action taken under subsections (2) and (3) and, where appropriate, inform him of the other purposes for which the personal data is being processed.

(5) Where a data controller fails to comply with a notice under subsection (1), the data subject may appeal to the Tribunal.

(6) Where a data controller fails to comply with an order of the Tribunal, he shall commit an offence.

31. Transfer of personal data

(1) Subject to subsection (2), no data controller shall, except with the written authorisation of the Commissioner, transfer personal data to a third country.

(2) The Eighth data protection principle specified in the First Schedule shall not apply where –

- (a) the data subject has given his consent to the transfer;
- (b) the transfer is necessary –
 - (i) for the performance of a contract between the data subject and the data controller, or for the taking of steps at the request of the data subject with a view to his entering into a contract with the data controller;
 - (ii) for the conclusion of a contract between the data controller and a person, other than the data subject, which is entered at the request of the data subject, or is in the interest of the data subject, or for the performance of such a contract;
 - (iii) in the public interest, to safeguard public security or national security.
- (c) the transfer is made on such terms as may be approved by the Commissioner as ensuring the adequate safeguards for the protection of the rights of the data subject.

(3) For the purpose of subsection (2)(c), the adequacy of the level of protection of a country shall be assessed in the light of all the circumstances surrounding the data transfer, having regard in particular to -

- (a) the nature of the data;
- (b) the purpose and duration of the proposed processing;
- (c) the country of origin and country of final destination;
- (d) the rules of law, both general and sectoral, in force in the country in question; and
- (e) any relevant codes of conduct or other rules and security measures which are complied with in that country.

32. Data matching

(1) No data controller shall carry out a data matching procedure unless –

- (a) the data subject whose personal data is the subject to that procedure has given his consent to the procedure being carried out;
- (b) the Commissioner has consented to the procedure being carried out; and
- (c) is carried out in accordance with such conditions as the Commissioner may impose; or
- (d) it is required or permitted under any other enactment.

(2) Subject to subsection (3), a data controller shall not take any adverse action against any data subject as a consequence of the carrying out of a data matching procedure –

- (a) unless the data controller has served a notice in writing on the data subject –
 - (i) specifying the adverse action it proposes to take and the reasons therefor;
 - (ii) stating that the data subject has 7 days after the receipt of the notice to show cause why the adverse action should not be taken; and
- (b) until the expiry of the 7 days specified in paragraph (a).

(3) Subsection (2) shall not preclude a data controller from taking any adverse action against any data subject if compliance with the requirements of that subsection shall prejudice any investigation into the commission of any offence which has been, is being or is likely, to be committed.

PART V - THE DATA PROTECTION REGISTER

33. Register of data controllers

(1) There shall be a register of data controllers to be known as the Data Protection Register, which shall be kept and maintained by the office.

(2) Subject to Part VII, a data controller shall register himself with the office.

34. Application for registration

(1) An application for registration as a data controller shall be made in writing to the Commissioner and the person shall furnish such particulars as requested under section 35.

(2) Where a data controller intends to keep personal data for 2 or more purposes, he shall make an application for separate registration in respect of any of those purposes and, entries shall be made in accordance with any such applications.

(3) Subject to subsection (4), the Commissioner shall grant an application for registration, unless he reasonably believes that –

- (a) the particulars proposed for inclusion in an entry in the register are insufficient or any other information required by the Commissioner either has not been furnished, or is insufficient;
- (b) appropriate safeguards for the protection of the privacy of the data subjects concerned are not being, or will not continue to be, provided by the data controller; or
- (c) the person applying for registration is not a fit and proper person.

(4) Upon registration of an application, the applicant shall pay such fee as may be prescribed.

(5) Where the Commissioner refuses an application for registration, he shall, as soon as reasonably practicable, notify in writing the applicant of the refusal –

- (a) specifying the reasons for the refusal; and
- (b) informing the applicant that he may appeal against the refusal under to section 58.

(6) The Commissioner may, at any time, at the request of the person to whom an entry in the register relates, remove his name from the register.

35. Particulars to be furnished

(1) A data controller who wishes to be registered with the office shall provide the following particulars -

- (a) his name and address;
- (b) if he has nominated a representative for the purposes of this Act, the name and address of the representative;
- (c) a description of the personal data being, or to be processed by or on behalf of the data controller, and of the category of data subjects, to which the personal data relate;
- (d) a statement as to whether or not he holds, is likely to hold, sensitive personal data;
- (e) a description of the purpose for which the personal data are being or are to be processed;
- (f) a description of any recipient to whom the data controller intends or may wish to disclose the personal data;
- (g) the names, or a description of, any country to which the data controller directly or indirectly transfers, or intends or may wish, directly or indirectly to transfer the data; and
- (h) the class of data subjects, or where practicable the names of data subjects, in respect of which the data controller holds personal data.

(2) Any data controller who, knowingly supplies false information under subsection (1), shall commit an offence and shall, on conviction, be liable to a fine not exceeding 100,000 rupees and to imprisonment for a term not exceeding 2 years.

(3) Where the data controller in respect of whom there is an entry in the register changes his address, he shall, within 15 days of the change in address, notify the Commissioner in writing.

36. Contents of register

Each entry in the register shall contain the particulars provided under section 35.

37. Inspection of register

(1) The register shall be kept in the office of the Commissioner and shall at all reasonable times be available for inspection by any person free of charge.

(2) Any person may, on payment of such fee as may be prescribed, obtain from the Commissioner a certified copy of, or of an extract from, any entry in the register.

38. Duration of registration

(1) A registration shall be for a period not exceeding one year and on the expiry of such period, the relevant entry shall be cancelled unless the registration is renewed.

(2) The period specified under subsection (1) shall be calculated -

- (a) in the case of a first registration, from the date on which the relevant entry was made in the register; and
- (b) in the case of a registration which has been renewed, from the date on which it was renewed.

(3) The Commissioner may, subject to this Act, renew a registration upon application by the data controller, and on payment of such fee as may be prescribed.

39. Failure to register or to renew registration

Any data controller, who without reasonable excuse, processes any personal data without being registered, shall commit an offence.

40. Certificate issued by Commissioner

In any proceedings in which the registration of a person as a data controller or a data processor is in question, a certificate under the hand of the Commissioner that there is no entry in the register in respect of the person as a data controller or data processor, shall be conclusive evidence of that fact.

PART VI - RIGHTS OF DATA SUBJECTS

41. Access to personal data

(1) Subject to section 42, a data controller shall on the written request of a data subject or a relevant person -

- (a) inform the data subject or the relevant person -

- (i) whether the data kept by him include personal data relating to the data subject;
 - (ii) the purposes for which the data are being or are to be processed;
 - (iii) the recipients or classes of recipients to whom they are or may be disclosed; and
- (b) supply the data subject or the relevant person with a copy of any data referred to in paragraph (a) on payment of the prescribed fee.

(2) A request under subsection (1)(a) and (b) shall be treated as a single request.

(3) Where any data referred to under subsection (1) is expressed in terms that are not intelligible without explanation, the data controller shall supply the information with an explanation of those terms.

(4) A fee paid by any person to a data controller under this section shall be returned to him where a request under subsection (1) is not complied with.

(5) The information to be supplied pursuant to a request under this section shall be supplied by reference to any personal data at the time when the request is received, except that it may take account of any amendment or deletion made between that time and the time when the information is supplied, being an amendment or deletion that would have been made regardless of the receipt of the request.

42. Compliance with request for access to personal data

(1) Subject to subsection (2) and section 43 and to the payment of the prescribed fee, a data controller shall comply with a request under section 41 not later than 28 days after the receipt of the request.

(2) Where a data controller is unable to comply with the request within the period specified in subsection (1), he shall –

- (a) before the expiry of the specified period –
 - (i) inform the data subject or the relevant person who has made the request on behalf of the data subject, that he is unable to comply with the request and shall, if required, state the reasons therefor;

- (ii) endeavour to comply with the request in such time reasonably practicable, and
- (b) as soon as practicable after the expiry of the specified period, comply with the request.

43. Denial of access to personal data

(1) A data controller may refuse a request under section 41 where –

- (a) he is not supplied with such information as he may reasonably require in order to satisfy himself as to the identity of the person making the request, and to locate the information which the person seeks;
- (b) compliance with such request will be in contravention with his confidentiality obligation imposed under any other enactment.

(2) Where a data controller cannot comply with a request under section 41 without disclosing personal data relating to another person, he may refuse the request unless -

- (a) the other individual has consented to the disclosure of the his personal data to the person making the request; or
- (b) he obtains the written approval of the Commissioner.

(3) In determining for the purposes of subsection (2)(b) whether it is reasonable for the Commissioner to approve a request without the consent of the other individual concerned, regard shall be had, in particular, to-

- (a) any duty of confidentiality owed to the other individual;
- (b) any steps taken by the data controller with a view to seeking the consent of the other individual;
- (c) whether the other individual is capable of giving consent; and
- (d) any express refusal of consent by the other individual.

(4) (a) Where a data controller has previously complied with a request made under section 41 by a data subject, the data controller is not obliged to comply with a subsequent identical or similar request under that section by that data subject unless a reasonable interval has elapsed between compliance with the previous request and the making of the current request.

(b) In determining, for the purposes of paragraph (a), whether requests under section 41 are made at reasonable intervals, regard shall be had to -

- (i) the nature of the data;
- (ii) the purpose for which the data are processed; and
- (iii) the frequency with which the data are altered.

(5) A data controller shall not comply with a request under section 41 where –

- (a) he is being requested to disclose information given or to be given in confidence for the purposes of -
 - (i) the education, training or employment, or prospective education, training or employment, of the data subject;
 - (ii) the appointment, or prospective appointment, of the data subject to any office; or
 - (iii) the provision, or prospective provision, by the data subject of any service;
- (b) the personal data requested consist of information recorded by candidates during an academic, professional or other examination;
- (c) such compliance would, by revealing evidence of the commission of any offence other than an offence under this Act, expose him to proceedings for that offence.

44. Inaccurate personal data

(1) A data controller shall, upon being informed as to the inaccuracy of personal data, by a data subject to whom such data pertains, cause such data to be rectified, blocked, erased or destroyed, as appropriate.

(2) Where a data controller is aware that a third party holds inaccurate personal data, he shall, as soon as reasonably practicable, require the third party to rectify, block, erase or destroy the data, as appropriate.

(3) Where the third party specified in subsection (2) fails to comply with the requirement under that subsection, he shall commit an offence.

(4) Where a data controller fails to rectify, block, erase or destroy inaccurate personal data, a data subject may apply to the Commissioner to have such data rectified, blocked, erased or destroyed, as appropriate.

(5) Upon being satisfied by an application under subsection (4) that the personal data is incorrect, the Commissioner shall, where he is satisfied, direct the data controller to rectify, block, erase or destroy those data and any other personal data in respect of which he is the data controller.

(6) Where the Commissioner –

(a) issues a direction under subsection (5); or

(b) is satisfied on the application by an individual that personal data of which the individual is the data subject were inaccurate and have been rectified, blocked, erased or destroyed,

he may direct the data controller to notify third parties to whom the data have been disclosed, of the rectification, blocking, erasure or destruction.

PART VII - EXEMPTIONS

45. National security

(1) Personal data are exempt from any provision of this Act where the non-application of such provision would, in the opinion of the Prime Minister be required for the purpose of safeguarding national security.

(2) In any proceedings in which the non-application of the provisions of this Act on grounds of national security is in question, a certificate under the hand of the Prime Minister referred in subsection (1) certifying that such is the case, shall be conclusive evidence of that fact.

46. Crime and taxation

The processing of personal data for the purposes of -

(a) the prevention or detection of crime;

(b) the apprehension or prosecution of offenders; or

(c) the assessment or collection of any tax, duty or any imposition of a similar nature,

shall be exempt from -

(i) the Second, Third, Fourth and Eighth data protection principles;

- (ii) sections 23 to 26; and
- (iii) Part VI of this Act in respect of blocking personal data,

to the extent to which the application of such provisions would be likely to prejudice any of the matters specified in paragraphs (a) to (c).

47. Health and social work

(1) A data controller shall be exempt from the application of section 41 where the personal data to which access is being sought relates to the physical or mental health of the data subject and the application of that section is likely to cause serious harm to the physical or mental health of the data subject or of, any other person.

(2) The Prime Minister may, by notice in the *Gazette* or by regulations, waive the obligations imposed under section 41, on a public authority, voluntary organisations and any other similar body as may be prescribed, where such public authority, voluntary organisation or other body carries out social work in relation to a data subject or any other individual, and the application of that section is likely to prejudice the carrying out of the social work.

48. Regulatory activities

The processing of personal data for the purpose of discharging any of the relevant functions -

- (a) designed for protecting members of the public against -
 - (i) financial loss due to dishonesty, malpractice or other serious improper conduct, or by the unfitness or incompetence of, persons concerned in the provision of banking, insurance, investment or other financial services or in the management of bodies corporate;
 - (ii) financial loss due to the conduct of discharged or undischarged bankrupts; or
 - (iii) dishonesty, malpractice or other seriously improper conduct by, or the unfitness or incompetence of, persons authorised to carry on any profession or other activity;
- (b) conferred on the Bank of Mauritius, the Financial Services Commission and the Financial Intelligence Unit, by or under any enactment;

- (c) for protecting charitable trusts and other bodies involved in charitable work against misconduct or mismanagement in their administration;
- (d) for protecting the property of charitable trusts and other bodies specified in paragraph (c) from loss or misapplication;
- (e) for the recovery of the property of charitable trusts and other bodies specified in paragraph (c);
- (f) for securing the health, safety and welfare of persons at work;
- (g) for protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work; or
- (h) designed for –
 - (i) protecting members of the public against conduct which adversely affect their interests by persons carrying on a business;
 - (ii) regulating agreements or conduct which have as their object or effect the prevention, restriction or distortion of competition in connection with any commercial activity; or
 - (iii) regulating conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market,

shall be exempt from the application of sections 23 to 26 to the extent that such an application would be likely to prejudice the proper discharge of such functions.

49. Journalism, literature and art

(1) The processing of personal data for journalistic, literary and artistic purposes shall be exempt from the provisions specified in subsection (2) where -

- (a) such processing is undertaken with a view to the publication of any journalistic, literary or artistic material;
- (b) the data controller involved in such processing reasonably believes that the publication would be in the public interest; and
- (c) the data controller reasonably believes that compliance with any such provisions would be incompatible with such

purposes.

(2) For the purposes of subsection (1), the processing of personal data shall be exempt from -

- (a) the Second, Third, Fifth and Eighth data protection principles;
- (b) sections 23 to 27 and 32; and
- (c) Part VI in respect of blocking personal data.

50. Research, history and statistics

(1) Subject to subsections (2), (4), and (5), personal data which are processed only for research, historical or statistical purposes shall be exempt from the Fifth data protection principle.

(2) The exemption provided for under subsection (1) shall not be applicable where -

- (a) such personal data are not processed to support measures or decisions with respect to particular individuals; and
- (b) such personal data are not processed in such a way that such processing would substantially damage or substantially distress any data subject or will likely cause such damage or distress.

(3) For the purposes of -

- (a) the Second data protection principle; and
- (b) sections 23 and 27,

further processing of personal data only for research, historical or statistical purposes shall not be regarded as incompatible with the purposes for which such data was obtained provided that the conditions under subsection (2) are satisfied.

(4) The personal data processed for the purposes specified in subsection (1) shall also be exempt from the provisions of Part VI where -

- (a) the conditions under subsection (2)(a) and (b) are satisfied; and
- (b) the results of the research or any resulting statistics are not made available in a form which identifies any of the data subjects concerned.

51. Information available to the public under an enactment

Where personal data consists of information which the data controller is obliged under an enactment to make available to the public, such data shall be exempt from -

- (a) the Second, Third, Fourth, Fifth and Eighth data protection principles;
- (b) sections 23 to 29; and
- (c) Part VI in respect of blocking personal data.

52. Disclosure required by law or in connection with legal proceedings

Personal data are exempt from –

- (a) the Second, Third, Fourth and Fifth data protection principles;
- (b) sections 23 to 29; and
- (c) Part VI in respect of blocking personal data,

where –

- (i) the disclosure of such data is required under any enactment or by a Court order;
- (ii) the disclosure of such data is necessary for the purpose of, or in connection with, any on-going or prospective legal proceedings;
- (iii) the disclosure of such data is necessary for the purpose of obtaining legal advice; or
- (iv) the disclosure is otherwise necessary for the purpose of establishing, exercising or defending legal rights.

53. Legal professional privilege

Personal data are exempt from –

- (a) the Second, Third, Fourth and Fifth data protection principles; and
- (b) section 23,

where the data consist of information in respect of which a claim to legal professional privilege or confidentiality as between client and legal practitioner could be maintained in legal proceedings, including prospective legal

proceedings.

54. Domestic purposes

Personal data processed by an individual are exempt from -

- (a) the data protection principles; and
- (b) Part V and Part VI,

where such processing is only for the purposes of that individual's personal, family or household affairs or for recreational purposes.

PART VIII - MISCELLANEOUS

55. Annual report

(1) The Commissioner shall, not later than 3 months after the end of every calendar year, lay an annual report of the activities of the office before the National Assembly.

(2) Without limiting the generality of subsection (1), the report shall include –

- (a) a statement about the operation of approved and issued codes of practice;
- (b) any recommendations that the Commissioner thinks fit relating to the compliance with this Act, and in particular the data protection principles.

(3) The period starting from the commencement of this Act to the end of the year of such commencement shall be deemed to be the first calendar year.

56. Codes and guidelines

(1) The Commissioner may, for the purposes of this Act or any regulations made under this Act, issue or approve codes of practice, or issue guidelines.

(2) Before issuing or approving any code of practice, or issuing any guidelines, the Commissioner may consult such person or authority as he thinks fit.

(3) Any code of practice –

- (a) may be varied or revoked;

- (b) shall, where the code is approved under subsection (1), come into operation on a day specified by the Commissioner.

(4) The Commissioner shall keep a register of approved codes and guidelines which shall be available for public inspection.

(5) The Commissioner may, on payment of such fee as may be prescribed, provide copies of, or extracts from, the register specified in subsection (4).

57. Service of notice

(1) Any notice served by the Commissioner on an individual under this Act may be served by -

- (a) delivering it to him;
- (b) sending it to him by registered post addressed to him at his usual or last known place of residence or business.

(2) Any notice served by the Commissioner on a body corporate under this Act may be served by -

- (a) sending it by post to the registered office of the body; or
- (b) addressing it to and leaving it at the registered office of the body.

(3) Any notice served by the Commissioner on an unincorporated body of persons under this Act may be served by -

- (a) sending it by post to the place where it ordinarily carries out its activities; or
- (b) by addressing it to and leaving it at the place where it ordinarily carries out its activities.

58. Right of appeal

Any person aggrieved by a decision of the Commissioner in respect of the performance of his duties and powers under this Act shall have a right of appeal within 21 days from the date when the decision is made known to that person to the Tribunal.

59. Special jurisdiction of Tribunal

(1) Subject to subsections (2) and (3), the Tribunal shall hear and dispose of any appeal under this Act.

(2) Sections 40 to 44 of the Information and Communication Technologies Act 2001 shall, as far as appropriate, apply to an appeal made under this Act and to such decision as may be reached by the Tribunal on appeal under this Act.

(3) Sections 39 and 42(5) of the Information and Communication Technologies Act 2001 shall not apply to an appeal under this Act.

(4) Subject to subsection (5), every appeal under section 59 shall be in such form and be accompanied by such fees as may be prescribed.

(5) The Tribunal may entertain an appeal after the expiry of the period of 21 days where it is satisfied that there was sufficient cause for not lodging the appeal within that period.

(6) The Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such orders as it thinks fit, confirming, varying or setting aside the decision appealed against.

(7) The Tribunal shall send a copy of every order made by it to the parties to the appeal.

(8) Any appeal lodged with the Tribunal under this Act, shall be dealt with by it as expeditiously as possible and the Tribunal shall endeavour to dispose of the appeal within 6 weeks from the date the appeal was lodged.

(9) Any person who does not comply with an order issued by the Tribunal under subsection (6), shall commit an offence.

60. Immunity

(1) Notwithstanding the Public Officers' Protection Act, where any action has been entered before a Court pursuant to any act done by any authorised officer in the execution of his duties under this Act or any regulations made under it, and it appears to the Court that there was reasonable cause to do such act, the Court shall so declare and thereafter the authorised officer shall be immune from all proceedings, whether civil or criminal, on account of such act.

(2) No liability, civil or criminal shall attach to the Commissioner in respect of any act which he may have done or omitted to do in good faith in the execution or purported execution of his duties or powers under this Act or regulations made under it.

61. Offences and penalties

(1) Any person who contravenes this Act shall commit an offence.

(2) Where no specific penalty is provided for an offence, the person shall, on conviction, be liable to a fine not exceeding 200,000 rupees and to imprisonment for a term not exceeding 5 years.

62. Forfeiture

In addition to any penalty the Court may -

- (a) order the forfeiture of any equipment or any article used or connected in any way with the commission an offence;
- (b) order or prohibit the doing of any act to stop a continuing contravention.

63. Prosecution and jurisdiction

(1) An authorised officer may swear an information in respect of any offence under this Act or any regulations made under this Act before a Magistrate.

(2) Notwithstanding any other enactment, the Intermediate Court shall have jurisdiction to try an offence under this Act or any regulations made under this Act.

(3) No prosecution shall be instituted under this Act except by, or with the consent, of the Director of Public Prosecutions.

64. Consequential amendments

(1) The Criminal Code is amended by repealing section 300A.

(2) The Information and Communication Technologies Act 2001 is amended –

- (a) in section 2, by deleting the definitions of “code of practice” and “personal data”;
- (b) by repealing section 33;
- (c) by repealing the Fourth Schedule.

(3) The National Computer Board Act is amended –

- (a) in section 2, by deleting the definitions of “computer service person”, “data”, “data user”, and “personal data”;
- (b) in section 4, by deleting paragraph (d); and
- (c) by deleting the FIRST SCHEDULE.

65. Regulations

(1) The Prime Minister may, after consultation with the Commissioner, make such regulations as he thinks fit for this Act.

(2) Any regulations made under subsection (1) may provide -

- (a) for the requirements which are imposed on the data controller when processing data;
- (b) for the contents a notification or application to a data controller should contain;
- (c) for the information to be provided to the data subject and how such information shall be provided;
- (d) for the levying of fees and taking of charges;
- (e) for the issuing, approval of codes and guidelines;
- (f) that any person who contravenes them shall commit an offence and shall, on conviction, be liable to a fine not exceeding 100,000 rupees and to imprisonment for a term not exceeding 2 years.

(3) The Prime Minister may, by regulations, amend the Schedules.

66. Commencement

(1) Subject to subsection (2), this Act shall come into operation on a date to be fixed by Proclamation.

(2) Different dates may be fixed for the coming into operation of different sections of this Act.

FIRST SCHEDULE
(section 2, 15 and 31)

DATA PROTECTION PRINCIPLES

First principle

Personal data shall be processed fairly and lawfully.

Second principle

Personal data shall be obtained only for any specified and lawful purpose, and shall not be further processed in any manner incompatible with that purpose.

Third principle

Personal data shall be adequate, relevant and not excessive in relation to the purpose for which they are processed.

Fourth principle

Personal data shall be accurate and, where necessary, kept up to date.

Fifth principle

Personal data processed for any purpose shall not be kept longer than is necessary for that purpose or those purposes.

Sixth principle

Personal data shall be processed in accordance with the rights of the data subjects under this Act.

Seventh principle

Appropriate security and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data.

Eighth principle

Personal data shall not be transferred to a third country, unless that country ensures an adequate level of protection for the rights of data subjects in relation to the processing of personal data.

SECOND SCHEDULE
(*section 6*)

I,make oath/solemnly affirm/ declare that I will faithfully and honestly fulfil my duties as authorised officer/Commissioner in conformity with the Data Protection Act 2004 and that I shall not without the due authority in that behalf disclose or make known any matter or thing which comes to my knowledge by reason of my duties as such.

District Magistrate
Port Louis