

## **DATA PROTECTION IN BOTSWANA: HIGHLIGHTS OF THE NEW DATA PROTECTION BILL** **– Simon Bathusi (Associate)**

Historically, when it comes to protection for individuals in respect of the processing of their personal data, Botswana has been lagging behind international trends. This is notwithstanding that there are some data protection laws for individuals, albeit limited, under the common law, the Constitution and certain specific pieces of legislation. These laws do not however, offer clear and comprehensive protection of data which adequately safeguards the rights and interests of individuals in line with the latest trends.

With the new Data Protection Bill (“Bill”) having been recently introduced by the Parliament of Botswana, these gaps will be a thing of the past and the Bill will give Botswana an opportunity to be internationally competitive in the information age era, where well over 100 countries around the world already have data protection legislation. This article captures the major highlights of the new Bill.

The Bill seeks to provide for the protection of personal data obtained in the processing of an individual's personal information by providing the necessary security safeguards required in the processing of such personal data in Botswana. To achieve this, the Bill, among other things, sets conditions for lawful processing of personal data and sensitive personal data, provides for rights for data subjects, establishes channels for complaints by data subjects against contraventions of the Bill by data controllers, and also provides for sanctions in the form of fines and imprisonment for contraventions of the Bill.

The Bill will be administered by the Data Protection Commission, which is a public office created under the Bill. The application of the Bill will be excluded from processing data for purely personal or household activity or by the State or on behalf of the State where the processing is for, *inter alia*, national security, defense or public security, for the prevention, investigation or proof of offenses, prosecution of offenders and execution of sentences.

The Bill defines data subject, personal data, sensitive personal data, processing, and data controller referred to above, in the following terms;

- (a) The data subject: an individual who is the subject of personal data.
- (b) Personal data: information relating to an identified or identifiable individual, who can be identified directly or indirectly, in particular by reference to an identification number, or to one or more factors specific to the individual's physical, physiological, mental, economic, cultural or social identity.
- (c) Sensitive personal data; personal data relating to a data subject which reveals his or her (a) racial or ethnic origin; (b) political opinions; (c) religious beliefs or philosophical beliefs; (d) membership of a trade union; (e) physical or mental health or condition; (f) sexual life; (g) filiation ; or (h) personal financial information, and includes - any commission or alleged commission by him or her of any offence; any proceedings for any offence committed or alleged to have been committed by him or her, the disposal of such proceedings, or the sentence of any Court in such proceedings; and genetic data, biometric data and the personal data of minors.
- (d) Processing; means any operation or a set of operations which is taken in regard to personal data, whether or not it occurs by automatic means, and includes the collection, recording, organisation, storage, adaptation, alteration, retrieval, gathering, use, disclosure by transmission, dissemination or otherwise making information available, alignment or combination, blocking, erasure or destruction of such data; and
- (e) Data controller: a person who alone or jointly with others, determines the purpose and means of which personal data is to be processed, regardless of whether or not such data is processed by such person or agent on that person's behalf.

In terms of the Bill, a data controller is required, *inter alia*, to ensure that: -

- (a) personal data is processed fairly and lawfully, and where appropriate, the data is obtained with the knowledge or consent of the data subject.
- (b) personal data is collected for specific, explicitly stated and legitimate purposes.
- (c) personal data is not processed for any purpose that is incompatible with the specified, explicitly stated and legitimate purposes.
- (d) personal data is protected by reasonable security safeguards against risks such as loss, unauthorised access, destruction, use, modification or disclosure; and
- (e) personal data is not kept for a period longer than is necessary, having regard to the purposes for which it is processed.

In terms of the Bill, personal data may be processed, *inter alia*, where: -

- (a) the data subject has given his or her consent in writing;
- (b) processing is necessary for the performance of an activity that is carried out in the public interest or in the exercise of an official authorisation vested in the data controller or in a third party to whom the data is disclosed; or
- (c) processing is necessary for a purpose that concerns a legitimate interest of the data controller, or of a third party to whom personal data is provided, except where such interest is overridden by the interest to protect the fundamental rights and freedoms of the data subject and in particular the right to privacy.

The Bill further provides that personal data shall not be disclosed, made available or otherwise used for purposes other than those specified, except with the consent of the data subject; or as may be authorised by any written law. Furthermore, the data subject has a right in terms of the Bill to revoke, in writing, his/her consent for the processing of his personal data.

With regards to sensitive personal data, the Bill prohibits its processing, except in certain circumstances, including the data subject's consent, where the data subject made the data public, or for national security, authorised by written law, for legal purposes, research and statistics purposes, or health purposes.

The Bill further provides that a person may submit a complaint in writing, to the Commissioner, alleging interference with the protection of personal data or against a decision made under the Bill.

The Bill also establishes an Information and Data Protection Appeals Tribunal to adjudicate over matters involving the breach of any of the provisions of the Bill and to adjudicate appeals of the decisions taken by the Commissioner in terms of the Bill.

Lastly, the Bill creates offenses for contraventions of the provisions of the Bill with fines ranging between BWP100,000 and BWP1 million; and imprisonment terms between 3 years and 12 years.

This proposed piece of legislation will definitely put Botswana on the map alongside countries which have laws protecting the processing of personal data and it would most certainly be of great interest to the public and international investors seeking to know the laws affecting doing business in Botswana.