



# MEMORANDUM

## DATA PROTECTION ACT NO. 3 OF 2021

**31st March 2021**

# MEMORANDUM ON THE DATA PROTECTION ACT NO. 3 OF 2021

## Executive Summary

On 23rd March 2021, the Zambian legislature enacted the Data Protection Act No. 3 of 2021 (the “Data Protection Act”). Please note that the Data Protection Act is not yet operational and shall only come into effect on the date appointed by the Minister by statutory instrument. We shall keep you updated once it comes into effect.

The Data Protection Act was enacted for the purposes of providing an effective system for the use and protection of personal data. Prior to its enactment, there was no legislation in Zambia that expressly dealt with the use and protection of personal data.

We now highlight below significant aspects of the Data Protection Act which include, but are not limited to, the following:

- (a) The establishment of the Office of Data Protection Commissioner;
- (b) The Inspectorate;
- (c) The principles and rules relating to the processing of personal data;
- (d) The creation and regulation of data controllers, data processors and data auditors;
- (e) The duties of data controllers and data processors;
- (f) The rights of data subjects;
- (g) The transfer of data outside of Zambia; and
- (h) Our Limitations

## Introduction

Please take note that this Memorandum is not to be relied upon in making any legal decisions relating to your business as a result of the enactment of the Act. This Memorandum further does not address the legality of the enactment of the Act and whether the Act is indeed valid law. Any decisions to be made should be made after seeking professional legal advice relating to the Act and its application which legal advice, we are available to provide.

## **The establishment of the Office of the Data Protector**

The Data Protection Act has established an Office of the Data Protection Commissioner under the Ministry of Transport and Communications. This office is tasked with the regulation of data protection and privacy in Zambia. The primary functions of the Office of the Data Protection Commissioner include, but are not limited to, the registration of data controllers and data processors, the licensing of data auditors, ensuring proper and effective coordination and collaboration with similar regional and international authorities and to advise the Government of Zambia on matters relating to data protection.

## **The Inspectorate**

The Data Protection Act permits the Civil Service Commission to appoint a suitably qualified person to be an inspector for the purposes of ensuring compliance with the Act. The powers of inspectors include but are not limited to, entering and inspecting the business premises of data controllers or data processors, inspect, audit and examine documents, books or records of the data controller or processor and to remove from the premises, any equipment, commodity or product used in contravention of the Data.

## **The principles and rules relating to the processing of personal data**

The Data Protection Act requires data controllers and data processors to ensure that personal data is processed in a manner that is lawful, fair and transparent. Further, all personal data should be collected for explicit, specified and legitimate purposes and only processed in a manner that is compatible with those purposes. The collection of personal data must be adequate, relevant and limited to what is necessary in relation to the purposes for which it is being processed.

Data controllers are only permitted to process personal data in three instances:

- i. Where the data subject has given consent to the processing of their personal data;
- ii. Where the processing is necessary for:
  - a. the performance of a contract to which the data subject is a party;
  - b. for compliance with a legal obligation to which the data controller is subject;
  - c. in order to protect the vital interests of the data subject or another natural person;
  - d. for the performance of a task carried out in the public interest or in the exercise of official authority vested in the data controller; or
  - e. for the purposes of the legitimate interests pursued by the data controller or a third party, except where such interests are overridden by the interest or fundamental rights and freedoms of the data subject which require protection of personal data; or
- iii. the processing relates to personal data which is manifestly made public by the data subject. .

Persons are not permitted to process sensitive personal data unless doing so is necessary for them to establish, exercise or defend a legal claim, processing is necessary for the purposes of preventive or occupational medicine or processing is necessary for reasons of public interest.

Under the Data Protection Act, data controllers must have the consent of the data subject in order to process their personal information. Prior to giving consent, the data subject must be informed of their right to withdraw said consent.

The Data Protection Act requires data controllers to collect personal information directly from the data subject. They are only permitted to collect personal information from other sources where the data is contained in or derived from a public record or has been made public by the data subject, if the data subject consents to the collection from another source, if the collection of data from another source would not prejudice the interest of the data subject or if the collection is required under the Data Protection Act or any other law of Zambia.

The processing of personal data of children and vulnerable persons can only be done with the consent of their parents, legal guardians or persons exercising parental responsibility for them.

Persons that fail to adhere to the principles and rules relating to the processing of personal data will be considered to have committed an offence and are liable to the following on conviction:

- i. For a body corporate: a fine not exceeding one hundred million penalty units (ZMW 33,000,000.) or two percent of annual turnover of the preceding financial year, whichever is higher; and
- ii. For a natural person: a fine not exceeding one million penalty units (ZMW 300,000.00) or imprisonment for a term not exceeding five years or both.





## **The creation and regulation of data controllers, data processors and data auditors**

All data controllers and data processors are required to register with the Data Protection Commissioner before they can control or process personal data. Failure to do so is an offence under the Data Protection Act and may result, on conviction, to a fine not exceeding five hundred thousand penalty units (ZMW 150,000.00) or to imprisonment for a term not exceeding five years or to both.

Applications for registration as a data processor or data controller must be approved by Data Protection Commissioner within fourteen days of receipt if the applicant meets the prescribed requirements. The certificate of registration must be displayed by the data processor or data controller in a conspicuous place at their principal place of business and a certified copy at every premises where they carry on business.

The Data Protection Act empowers the Data Protection Commissioner to licence all persons who intend to provide data auditing services. Persons who intend to provide these services must submit an application in the prescribed form. The Data Protection Commissioner is required to make a decision on such applications within sixty days of receipt of the same.

The functions of data auditors include, but are not limited to, the following:

- i. To promote adherence to the principles of data protection by data controllers and data processors;
- ii. To ensure that data controllers and data processors implement adequate policies and procedures to regulate the processing of personal data;
- iii. To enhance public and stakeholder awareness of data protection principles and rights; and
- iv. To check that data controllers implement adequate safeguards to prevent data leaks and data breaches from data controllers and data processors.



## **The duties of data controllers and data processors**

The Data Protection Act requires data controllers to keep and maintain written records of the processing activities and meta data under their responsibility and all categories of processing activities carried out by them.

Where data controllers intend to use novel technologies to process data, they must submit a data protection impact assessment to the Data Protection Commissioner. The impact assessment is required where personal data is processed using an automated processing system, there is processing on a large scale of sensitive personal data or there is a systemic monitoring of a publicly accessible area on a large scale.

Data controllers or data processors are required to provide guarantees regarding the technical and organisational security measures that they use to protect personal data. As such, data controllers and data processors are required to appoint a data protection officer within their organizations.

The Data Protection Commissioner must be notified of all security breaches affecting personal data within twenty-four hours of such a breach. Further, the data subjects must be notified of any security breaches pertaining to their personal information as soon as practicable.

Data controllers and data processors are not permitted to disclose personal data that has been collected unless they have the consent of the data subject. Such consent must be sought by informing the data subject when and to whom their personal data will be disclosed, the purpose of the disclosure, the security practices that will protect it and the procedure for recourse in the case of any grievance in relation to the disclosure. Failure to obtain consent prior to disclosure is an offence under the Data Protection Act and, upon conviction, may result in a fine not exceeding two hundred thousand penalty units (ZMW 60,000.00) or to imprisonment for a term not exceeding two years or to both.

## The rights of data subjects

The Data Protection Act permits data subjects to obtain confirmation as to whether or not their personal data is being processed. Where such personal data is being processed, the data subject may access the following information:

- i. the purpose of the processing;
- ii. the envisaged period for which the personal data shall be stored;
- iii. the data being processed; and
- iv. any information about the basic logic involved in any automatic processing of data.

The rights of data subjects include, but are not limited to, the following:

- i. the right to notification of all third parties to whom their personal data has been disclosed and the measures put in place to safeguard that information;
- ii. the right to the rectification of inaccurate personal data concerning the data subject;
- iii. the right to the erasure of personal data as soon as practicable;
- iv. the right to object the processing of their personal data;
- v. the right to restrict the processing of their personal data; and
- vi. the right to receive their personal data in a structured, commonly used, machine readable or otherwise legible format.

The aforementioned rights of data subjects are not applicable where the processing is done for compliance with legal obligations, for the performance of a task carried out in the public interest, for the exercise of official authority vested in the data controller, for scientific or historical research purposes or for the establishment, exercise or defence of legal claims.

Where a data subject has complaints pertaining to the processing of their personal data by a data controller or a data processor, they may lodge such a complaint with the Data Protection Commissioner. A person aggrieved with the decision of the Data Protection Commissioner may appeal to the High Court for Zambia within thirty days of said decision. **T**

## The transfer of data outside of Zambia

The Data Protection Act requires data controllers to process and store personal data on a server or data centre located within Zambia. The Minister may prescribe the categories of personal data that may be stored outside of Zambia. Where personal data does not fall into a category expressly provided for by the Minister, such personal data may only be transferred out of Zambia if the data subject has consented to the transfer and the Data Protection Commissioner approves of the transfer.

### OUR LIMITATIONS

Kindly note that this brief is not exhaustive and does not constitute legal advice. In the event that you would like us to render a comprehensive legal opinion, kindly contact our

- Mr. Michael M. Mundashi, SC: [mmundashi@mmlp.co.zm](mailto:mmundashi@mmlp.co.zm)
- Mr. Mulenga Chiteba: [mchiteba@mmco.co.zm](mailto:mchiteba@mmco.co.zm)

Alternatively, you may call any of the following numbers:  
Tel: +260 211 254248/50 | Direct: +260 211 254266.