

# TECHNOLOGY

## MEDIA AND TELECOMMUNICATIONS

### ALERT

8 May 2013

#### THE OBLIGATION OF ELECTRONIC COMMUNICATIONS SERVICE PROVIDERS TO PROVIDE INFORMATION TO THE STATE

*The Protection from Harassment Act, No 17 of 2011 (the Act), came into effect on 27 April 2013.*

Under the Act, district magistrate's courts may now issue directives to electronic communications service providers to provide information regarding the perpetrators of harassment.

The powers given to magistrates under the Act supplement existing powers of the state to obtain information in terms of Criminal Procedure Act, No 51 of 1977, and the Regulation of Interception and Provision of Communication Related Information Act, No 70 of 2002 (RICA) from electronic communications service providers.

Whilst fundamental rights such as the right to privacy are limited by these statutes, the limitation is nevertheless reasonable and justifiable as these statutes provide measures to the state to protect victims of harassment, to investigate and even prevent crimes associated with harassment.

#### The Protection from Harassment Act

The purpose of the Act is to afford victims of harassment an effective remedy against harassing behaviour and introduce measures which seek to enable organs of state to give full effect to the provisions of the Act.

'Harassment', in terms of the Act, is conduct that causes harm (whether it be mental, psychological, physical or economic) or the reasonable belief that harm may be caused to a person (the complainant). The unreasonable exchange of electronic communication with the complainant or a 'related person' or the sending of faxes or emails to the complainant or a related person amounts to harassment under the Act. A 'related person' is defined in the Act as any member of the family or household of the complainant or any person in a close relationship to the complainant.

Under the Act, a district magistrate's court may issue a protection order to a complainant if it is satisfied that the respondent to the proceedings (whose identity may or may not be known) is engaged

or has engaged in harassment and that harm is being or may be suffered by the complainant or a related person as a result.

What is noteworthy for electronic communication service providers is that if a protection order is issued as a result of harassment of the complainant or related persons by means of electronic communications or email and the identity or address of the respondent is not known, the magistrate's court may issue a direction directing an electronic communications service provider (be it licensed or exempt) to furnish it with an affidavit containing the following information:

- the electronic communications identification number (such as a telephone number, email address, web address or subscriber number) from which the harassing electronic communications or email originated;
- the name, surname, identity number and address of the respondent to whom the electronic communications identity number has been assigned;
- any information which indicates the electronic communications or email were or were not sent from the electronic communications identity number of the respondent to the electronic communications identity number of the complainant; and
- any other information that is available to an electronic communications service provider which may be of assistance to the court to identify the respondent or the electronic communications service provider which provides a service to the respondent.

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A direction from the magistrate's court must be served on the electronic communications service provider and the electronic communications service provider has five ordinary court days within which to respond. The electronic communications service provider may apply for an extension of time or the cancellation of the direction on the grounds that it does not have the information sought by the court.

Simultaneously with the proclamation of the effective date of the Act, the Minister of Justice and Constitutional Development published regulations in terms of the Act prescribing the forms to be used in applying for a protection from harassment order. The Regulations include the prescribed forms to be used by electronic communications service providers when providing requested information on affidavit.

## RICA

The powers of magistrates to issue directions are not equivalent to those afforded to designated judges in terms of RICA. The directions that may be issued by a magistrate are issued pursuant to an application by a complainant for a protection order. The power of a magistrate to issue a direction under the Act is confined to obtaining information where the identity or address of the respondent is not known in instances where harassment takes place by means of electronic communications or email.

Electronic communications (including email) may only be lawfully intercepted by law enforcement officials pursuant to a designated judge's directive in terms of RICA. A directive from a designated judge in terms of RICA will also be required for the state to obtain access to electronic communication-related information over and above that which may be obtained under the Act.

In the context of harassment, the law enforcement official applying for the directive must have reasonable grounds to believe that a serious offence has been or is being or will probably be committed and that evidence of this will be obtained by intercepting electronic communications or accessing communications-related information as the case may be.

## Criminal Procedure Act

Any complainant who is the victim of harassment also has the right to lodge a criminal complaint including, as applicable, complaints of crimen injuria, assault, rape, attempted murder, trespass, extortion or any other offence which has a bearing on the person or property of the complainant or related persons.

Where an alleged offence has taken place, a judge or magistrate may, in terms of s205 of the Criminal Procedure Act, upon the request of a Director of Public Prosecutions or a duly authorised public prosecutor, require the attendance of any person who is likely to give material or relevant information as to the alleged offence, whether or not it is known by whom the offence was committed.

Where a complainant has laid criminal charges a prosecutor may obtain information relevant to the alleged offence (regardless of its severity) from an electronic communications service provider by using s205. The electronic communication service provider's representative must appear at court on the date specified in the s205 subpoena or provide the information prior to the date specified in which event they will be excused from appearing in court.

The state does not have power to intercept real time communications in terms of the Criminal Procedure Act. Information may not be obtained from an electronic communications service provider in terms of s205 of the Criminal Procedure Act on the basis that an offence is likely to be committed in future. In both instances, the provisions of RICA must be used.

## The Constitution

Legislation that affords the state the power to intercept and monitor electronic communications and to obtain electronic communications-related information from electronic communications service providers often give rise to concerns that constitutionally protected rights to freedom of expression and privacy are being infringed upon to serve the interests of the state.

The Bill of Rights in the Constitution of South Africa, in addition to protecting the rights of all people to freedom of expression and privacy, also enshrines the rights of all people in South Africa to dignity, freedom and security of person which incorporates the right to be free from all forms of violence.

Rights to freedom of expression and privacy are not absolute. Legislation that permits the state to intercept electronic communications and gain access to electronic communications-related information subject to judicial oversight is a reasonable and justifiable limitation on the rights to freedom of expression and privacy particularly where the aim of the legislation is to give effect to the rights of all persons in South Africa to dignity and freedom from all forms of violence.

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