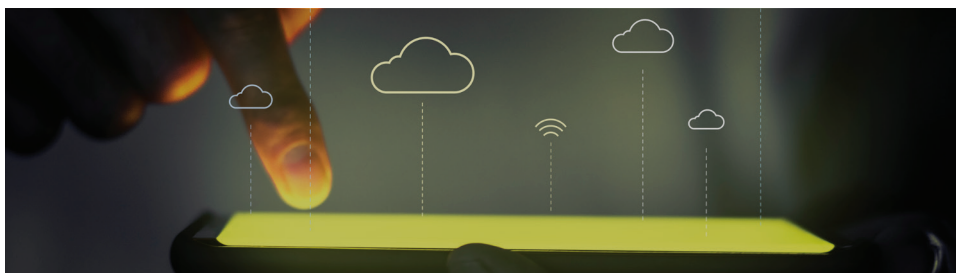


LEGAL UPDATE

16 May 2023

Q&A with

FB ATTORNEYS



The Personal Data Protection Act

Qs: What is the general law on data protection in Tanzania?

FB Attorneys:

The Personal Data Protection Act No. 11 of 2022 (the Act) is the general law that protects data and privacy in Tanzania. The Act protects people's privacy and sets minimum requirements for collecting, processing, storing, retaining, disposing, disclosing and transferring personal data across countries through any other means.

The Act operationalises the National ICT Policy (2003) that calls for changes to facilitate enacting a specific and compelling legislative instrument on privacy. This follows the initial recognition of the right to privacy and personal security under Article 16 of the Constitution of the United Republic of Tanzania (1977).

Qs: When did the Act come into effect?

FB Attorneys:

The National Assembly passed the Bill on 1 November 2022. The President signed the Bill into law on 27 November 2022. The Act came into force on 1 May 2023 through Government Notice No. 326 of 28 April 2023, published by the Minister for Information, Communication and Information Technology (Portfolio Ministry).

Qs: What are the licencing requirements?

FB Attorneys:

Any person or entity that intends to collect or process personal data in Tanzania must register with the Commission. The registration process starts by applying to the Commission. The Commission can either reject the application by giving reasons in writing or accept it by issuing a registration certificate.

The registration certificate is valid for five years from the date of issuance. All renewal applications shall be made three months before the expiry of the registration period. The Commission can cancel a registration certificate any time before the expiry of five years.

Qs: What is the territorial application of the Act?

FB Attorneys:

The Act applies to Zanzibar and Mainland Tanzania. Regarding Zanzibar, the Act is limited to the 'Union Matters' prescribed under the First Schedule of the Constitution of the United Republic of Tanzania.

Moreover, the Act has a limited extraterritorial application. It applies to the processing of personal information carried out by:

- (a) A controller residing in Tanzania or in a place where the laws of Tanzania apply per the international laws; and
- (b) A controller or processor residing outside Tanzania if the processing has occurred in Tanzania.

The Act does not apply when personal data is transferred outside Tanzania for processing purposes.

Qs: What is personal data?

FB Attorneys:

The Act applies to any information relating to an identifiable person who can be identified, whether directly or indirectly, by reference to an identifier. These include name, identification number or mark, location data, colour, nationality or tribe, religion, age, or marital status of an individual, education, medical history, crime, or employment, address, fingerprint or blood group of an individual, and any other personal or confidential information.

Qs: What is sensitive personal data?

FB Attorneys:

Sensitive personal data means information that needs extra care when processing it. This information includes DNA, children, crime, financial transactions of an individual, security and biometric information; race or tribe, political ideology, religious or philosophical beliefs, trade union membership, gender, health data or sexual relationships; and any personal information likely to affect the rights of the data subject.

Qs: Who are the targeted actors?

FB Attorneys:

The key actors under the Act are the data subject, data collector, data processor, and data controller:

First, a data subject is a person whose personal data is being processed under the Act. Second, the Act defines a 'data collector' as a person, corporate body, or public institution that, alone or in conjunction with another institution, determines the purpose and methodology of personal data processing and where such methods have been prescribed by law.

Third, a data processor entails a person, corporate body or public institution which processes personal data for and on behalf of the data collector under the guidance of the data collector, except persons under the direct control of the data collector, and includes their agents;

Lastly, a data controller is a person, individual institution, or public institution that, alone or together with other institutions, determines the purposes and methods of personal information processing. Where the purposes and processing methods are specified in the law, the controller is a person, entity, or public institution appointed under the law and will include its representative.

Qs: Who is affected by the Act?

FB Attorneys:

Any individual, public and private organisations that process and hold the personal data of Tanzanian citizens must abide by the Act. As noted above, this applies to every organisation, regardless of whether or not they reside in Tanzania. These include telecommunication companies, academic institutions, insurance companies, banks, hospitals, hotels, orphanages to mention a few.

To put the above into perspective, for example, employers collect and keep employees' data as per Sections 15(1) and 96(1)(2)(5) of the Employment and Labour Relations Act 2004; thus, they are registrable and certifiable under the Act.

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Qs: What is the regulatory framework established under the Act?

FB Attorneys:

The Act rests on two key institutions: the Personal Data Protection Commission (the Commission) and the Portfolio Ministry.

First, the Commission ensures compliance; registers data collectors and processors; investigates and takes action against violations of the Act; conducts public awareness programmes, research and follow-up on technological developments; advises the Government on privacy and data protection matters; resolves data protection disputes; and coordinates countrywide data protection efforts. Second, the Portfolio Ministry has general duties, thus mandated to enact regulations to support the implementation of the provisions of the Act.

Apart from the above institutional framework, sectoral agencies and state authorities such as the Police Force, Public Prosecutors, Tanzania Communications Regulatory Authority, Bank of Tanzania, and Financial Intelligence Unit are vital in realising the objectives of the Act.

Qs: Does the Tanzanian law provide for defences or exemptions against violations?

FB Attorneys:

Yes, it does:

First, the Act exempts the processing of personal data for household purposes. Second, the Act is less restrictive where such violation is justified under other laws or court orders or in furtherance of national security or public security (i.e., public interest or legal obligations).

Third, the Act is less stringent where such violation is effected to prevent crime, identify and prevent tax evasion, investigate the embezzlement of public funds, or perform due diligence before appointment in a public service position.

Fourth, the Act allow the Portfolio Minister to make rules to expand exempted circumstances. Fifth, the data collector or processor may claim that the violation is within the contract terms with the data subject (written consent).

Lastly, the data collector or processor could claim the violation is justified to protect the data controller or the subject's legitimate interests.

Regardless of the possible defences, the data collector must comply with the basic legal principles for collecting and processing personal data and related safeguards.

Qs: What are the consequences of violating the Act?

FB Attorneys:

First, the Commission may issue an enforcement notice directing the respective person to remedy such violation within a certain period.

Second, the Commission may issue a notice of penalty where the respective party has failed to remedy the violation within the given period. The severity of the breach determines the fine imposed.

Third, unconsented disclosure of personal data by an individual shall be punishable by a fine of not less than TZS 100,000 and not more than TZS 20,000,000 or imprisonment for a term not exceeding ten years or condemned to a fine and imprisonment. For body corporate, the Act imposes a fine of not less than TZS 1,000,000 and not more than TZS 5,000,000,000.

Fourth, unlawful destruction, deletion, concealment or conversion of personal data shall be punishable by a fine of not less than TZS 100,000 and not more than TZS 10,000,000 or imprisonment for a term not exceeding five years or condemned to a fine and imprisonment.

Fifth, the Act imposes direct liability on all officers of a corporate body who intentionally authorised or allowed a crime to be committed. Finally, where the Act does not explicitly stipulate a punishment, a general fine of not less than TZS 100,000 and not more than TZS 5,000,000 or imprisonment for a term not exceeding five years or to both (a fine and imprisonment) may be imposed.

Qs: What steps can be taken now if the right to protect personal information is violated?

FB Attorneys:

First, you can make a complaint to the Commission. If it is satisfied that there are good reasons to investigate, the Commission will initiate a confidential investigation. The investigation runs for a maximum of 90 days or beyond in case of an extension.

Second, the victim can report a crime to the police or other authorities for investigation, depending on the applicable sectoral law.

Third, the Public Prosecutor may open a criminal case if there is unlawful transfer of personal data outside the country, especially without the consent of the Commission or data subject. Finally, a data subject can engage a lawyer to institute a civil case and demand civil law remedies.

Qs: What rules should be followed to ensure compliance?

FB Attorneys:

Personal data must be collected only for specified, explicit and lawful purposes; processed lawfully, fairly and in a transparent manner; adequate, relevant and limited to what is necessary; accurate and kept up to date; kept only for as long as it is needed and no longer; and protected in a manner that ensures its security and integrity.

Qs: What rights of a data subject does the Act consider fundamental?

FB Attorneys:

The Act vests the following rights to the data subject: the right to be informed (written consent), the right to access, the right to rectification, the right to erasure, the right to restrict processing, the right to data portability, the right to object, the right not to be subjected to automated decision-making and profiling, and the right to legal remedies.

Qs: What responsibilities do individuals and entities have under the Act?

FB Attorneys:

Whenever they process personal data, individuals and organisations must, among other things, ensure that their use of personal data is lawful, fair and transparent. They should also protect it from misuse, exploitation (commercialisation), and report any data breaches or loss to the relevant authorities; seek and obtain the consent of the Commission or the person concerned to provide information about any Tanzanian abroad; and register as data collectors or processors.

Qs: Who ensures compliance in an organisation?

FB Attorneys:

Everyone in an entity must protect personal data and guarantee the privacy of a data subject. Nonetheless, it is compulsory for the data collector or the data processor (organisations) to appoint a data protection officer who will ensure data security.

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Qs: Is there sectoral legislation that supplements the Act?

FB Attorneys:

The country has several laws that complement the Act. These include the Banking and Financial Institutions Act 2006, the Anti Money Laundering Act 2006, the HIV and AIDS (Prevention and Control) Act 2008, the Hotels Act (RE 2006), the Tourism Act 2008, the National Payment System Act 2015, the Statistics Act (RE 2019), the Tax Administration Act (RE 2009), the Employment and Labour Relations Act 2004, the Tanzania Commission for Science and Technology Act (RE 2002), the Registration and Identification of Persons Act 1986, the Tanzania Passport and Travel Documents Act 2002, the Electronic and Postal Communications Act 2010, the Public Health Act 2009, the Human DNA Regulation Act 2009, the Cybercrimes Act 2015, the Law of the Child Act 2009, the Electronic Transactions Act 2022, and the Access to Information Act 2016.

The key subsidiary legislation includes the Police General Orders 2006, the Bank of Tanzania (Financial Consumer Protection) Regulations 2019, the Bank of Tanzania (Credit Reference Bureau) Regulations 2012, the Tourism (Accommodation Facility) Regulations 2015, the Electronic and Postal Communications (Consumer Protection) Regulations 2018, the Electronic and Postal Communications (Online Content) Regulations 2020, the Electronic and Postal Communications (SIM Card Registration) Regulations 2020, and the Electronic and Postal Communications (Radio Communication and Frequency Spectrum) Regulations 2018.

In a nutshell, the above laws and many others require service providers to collect, process and store customers' personal and sensitive data and impose the duty of secrecy and confidentiality upon them.

Qs: Are there international standards grandfathering the Act?

FB Attorneys:

Tanzania has domesticated several sub-regional, regional, and global legal instruments that have a bearing on data protection and the right to privacy. These include the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966), the UN Convention on the Rights of the Child (1989), the African Charter on Human and Peoples' Rights (1981), African Charter on the Rights and Welfare of the Child (1990), the African Union Convention on Cybersecurity and Personal Data Protection (the Malabo Protocol of 2014), Treaty for the establishment of the East African Community (1999), EAC Legal Framework for Cyber Laws (2008), SADC Model Law on Data Protection (2013).

Qs: Is there any subsidiary legislation made under the Act?

FB Attorneys:

Yes. There are two Regulations made under the Act, namely the Data Protection (Collection and Processing of Personal Data) Regulations, GN No. 349 and the Data Protection (Complaints Handling Procedure) Regulations, GN No 350. The two Regulations were published on 12 May 2023.

Qs: Is there any Court decision that interprets the Act?

FB Attorneys:

No, there is no such a decision.

The Act is yet to be tested in the Courts of Law. However, some relevant court decisions predate the Act and have a bearing on privacy and data protection. These decisions include *Jamii Media Company Ltd v. The Attorney General* (2017) TLS LR 447; *Deogras John Marando v Managing Director, Tanzania Beijing Huayuan Security Guard Service Co. Ltd*, High Court of Tanzania, Civil Appeal No 110 of 2018 (unreported); *Raymond Paul Kanegene and Bob Chacha Wangwe v. The Attorney General*, High Court of Tanzania, Consolidated Misc. Civil Cause No. 15 of 2019 & No. 5 of 2020; *Kisonga Ahmed Issa and Another v. Republic*, Court of Appeal of Tanzania, Consolidated Criminal Appeal No. 17 of 2016 and 362 of 2017; and *Francis Nyandindi v. Republic*, High Court of Tanzania (at Dar es Salaam), Criminal Appeal No. 173 of 2021 (unreported).

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About FB Attorneys

FB Attorneys is an all service law firm based out of Dar es Salaam, Tanzania.

We cover all aspects of the law and specialise in all corporate and commercial matters including Mining, Oil & Gas, Tax, Litigation, Competition, Banking & Intellectual Property law.

FB Attorneys has been ranked as a tier 1 law firm by the IFLR 1000 in the Energy & Infrastructure and Financial & Corporate sectors, tier 1 by Legal 500 and band 1 by Chambers and Partners General Business Law.

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