

REPUBLIC OF SOUTH AFRICA

**REGULATION OF INTERCEPTION
OF COMMUNICATIONS AND
PROVISION OF
COMMUNICATION-RELATED
INFORMATION AMENDMENT
BILL**

*(As introduced in the National Assembly (proposed section 75); explanatory summary
of Bill and prior notice of its introduction published in Government Gazette No. 49189 of
25 August 2023)*
(The English text is the official text of the Bill)

(MINISTER OF JUSTICE AND CORRECTIONAL SERVICES)

[B 28—2023]

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- (d) by the deletion of the definition of “Telecommunications Act”;
- (e) by the substitution for the full stop at the end of the definition of “Telecommunications Act” of the expression “; and”; and
- (f) by the addition after the definition of “Telecommunications Act” the following definition: 5
- “**this Act**’ includes the regulations made in terms of this Act.”.

Insertion of Chapter 2A in Act 70 of 2002

2. The following Chapter is hereby inserted after Chapter 2 of the principal Act:

“CHAPTER 2A

DESIGNATION AND TENURE OF DESIGNATED AND REVIEW JUDGE, POWERS AND FUNCTIONS OF REVIEW JUDGE, AND AUTOMATIC REVIEWS 10

“Designated judge 15

15A. (1) Any judge of a High Court—

- (a) discharged from active service under section 3(2) of the Judges’ Remuneration and Conditions of Employment Act, 2001 (Act 47 of 2001); or 15
- (b) who is retired, 20
- may, subject to subsection (2), be designated as a designated judge for purposes of this Act.

(2) The Minister must designate a judge as contemplated in subsection (1) in consultation with the Chief Justice, by notice in the *Gazette*.

(3) A designated judge must perform all the functions conferred upon him or her by this Act, independently and without fear, favour or prejudice. 25

(4) The designated judge has all the powers and functions as set out in this Act.

(5) The designated judge must, in respect of an application in terms of sections 16, 17, 18, 19, 20, 21 or 22, within five days of a decision to issue an order, judgment, direction, entry warrant, deferral order, declaratory order, subpoena, notice or other process, refer the information or documentation considered in arriving at his or her decision together with a copy of the decision to the review judge. 30

(6) The designated judge must, in respect of an application in terms of section 23— 35

- (a) immediately after issuing a direction or entry warrant under section 23(3), refer a copy of his or her decision to the review judge; or
- (b) immediately after issuing an oral direction or an oral entry warrant under section 23(7), refer his or her decision to the review judge and in terms of section 23(10)(b), immediately refer a copy of the written confirmation of the decision to the review judge; and 40
- (c) immediately after a decision under section 23(11) to confirm, vary or cancel a direction, entry warrant, oral direction or oral entry warrant, refer the written application and any information or documentation in terms of section 23(4)(b) together with a copy of the decision to the review judge. 45

(7) Any decision made by the designated judge may be executed immediately upon receipt thereof by the applicant, pending the review thereof by the review judge in terms of section 15C(1).”.

“Review judge 50

15B. (1) Any judge of a High Court—

- (a) discharged from active service under section 3(2) of the Judges’ Remuneration and Conditions of Employment Act, 2001 (Act 47 of 2001); or

(b) who is retired,
may, subject to subsection (2), be designated as a review judge for purposes of this Act.

(2) The Minister must designate a judge as contemplated in subsection (1) in consultation with the Chief Justice, by notice in the *Gazette*.

(3) A review judge must perform all the functions conferred upon him or her by this Act, independently and without fear, favour or prejudice.”.

“Powers and functions of review judge

15C. (1) The review judge must consider and either confirm, vary or set aside any decision made by the designated judge in terms of this Act and in respect of an application in terms of section 16, 17, 18, 19, 20, 21 or 22, do so within five days of receipt of the information or documentation considered by the designated judge and the copy of the decision of the designated judge.

(2) The review judge must consider and either confirm, vary or set aside any decision made by the designated judge in terms of this Act and in respect of an application in terms of section 23, do so immediately or as soon as practicable upon receipt of a decision by the designated judge in terms of section 15A(6).

(3) Any decision contemplated in subsection (1) must be served or delivered in the manner provided for in this Act or as directed by the review judge to the designated judge, who must inform the applicant of the decision of the review judge.

(4) Any decision by the review judge must be executed immediately upon receipt thereof by the applicant.

(5) The review judge must keep record of—

(a) the exercise of any power; and

(b) the performance of any function.”.

“Tenure of designated and review judges

15D. (1) The tenure of a designated and review judge is for a non-renewable period not exceeding seven years.

(2) The designation of a judge contemplated in sections 15A and 15B comes to an end upon the—

(a) completion of the period contemplated in subsection (1);

(b) acceptance by the Minister, in consultation with the Chief Justice, of a request to resign; or

(c) death of the judge.”.

Insertion of section 23A in Act 70 of 2002

3. The following section is hereby inserted after section 23 of the principal Act:

“Disclosure that person in respect of whom direction, extension of direction or entry warrant is sought is journalist or practising lawyer

23A. (1) Where the person in respect of whom a direction, extension of a direction or entry warrant is sought in terms of section 16, 17, 18, 19, 20, 21, 22 or 23, whichever is applicable, is a journalist or practising lawyer, the application must disclose to the designated judge the fact that the intended subject of the direction, extension of a direction or entry warrant is a journalist or practising lawyer.

(2) If the designated judge issues the direction, extension of a direction or entry warrant, she or he may do so subject to such conditions as may be necessary, in the case of a journalist, to protect the confidentiality of her or his sources, or, in the case of a practising lawyer, to protect the legal professional privilege enjoyed by her or his clients.”.

Insertion of section 25A in Act 70 of 2002

4. The following section is hereby inserted after section 25 of the principal Act:

“Post-surveillance notification

25A. (1) Within 90 days of the date of expiry of a direction or extension thereof issued in terms of section 7, 8, 16, 17, 18, 19, 20, 21 or 23, whichever is applicable, the applicant that obtained the direction or, if not available, any other law enforcement officer within the law enforcement agency concerned must notify, in writing, the person who was the subject of the direction and, within 15 days of doing so, certify in writing to the designated judge, Judge of a High Court, Regional Court Magistrate or Magistrate that the person has been so notified. 5 10

(2) If the notification contemplated in subsection (1)—

- (a) cannot be given without jeopardising the purpose of the surveillance, the designated judge, Judge of a High Court, Regional Court Magistrate or Magistrate may, upon application by a law enforcement officer, direct that the giving of notification be withheld for a period which must not exceed 90 days at a time or two years in aggregate; or 15
- (b) has the potential to impact negatively on national security, the designated judge may, upon application by a law enforcement officer, direct that the giving of notification be withheld for such period as may be determined by the designated judge.”. 20

Amendment of section 35 in Act 70 of 2002

5. Section 35 of the principal Act is hereby amended—

- (a) by the deletion in subsection (1) of paragraph (f); and 25
- (b) by the deletion in subsection (1) of paragraph (g).

Amendment of section 37 in Act 70 of 2002

6. Section 37 of the principal Act is hereby amended by the substitution of subsection (1) for the following subsection:

“(1) The head of an interception centre must keep or cause to be kept proper records of such information as may be prescribed [by the Director in terms of section 35(1)(f)].” 30

Insertion of section 37A in Act 70 of 2002

7. The following section is hereby inserted after section 37 in the principal Act:

“Management of data 35

37A. (1) The procedures to be followed for the processing, examining, copying, sharing, disclosing, sorting through, using, storing or destroying of any data obtained pursuant to, and resulting from the interception of communications in terms of this Act and section 205 of the Criminal Procedure Act, 1977, must be in the prescribed manner and on the prescribed conditions. 40

(2) The development of procedures in terms of subsection (1) must take into account principles for the safeguarding of data, including—

- (a) accountability, together with conditions for lawful processing, examining, copying, sharing, disclosing, sorting through, using, storing or destroying; 45
- (b) processing limitations, including processing in a lawful and reasonable manner and not processing more data than what is required in respect of the purpose;

- (c) purpose-specific processing of data, including processing for a lawful purpose which is explicit, not retaining data for longer than is necessary in connection with the purpose for which it was obtained and reviewing compliance with destruction instructions;
- (d) limitation on the use of data for a lawful purpose, including restricting access to data on certain conditions, conditions for sharing and disclosing data and limitations on the copying of data, including the keeping of relevant records;
- (e) openness and transparency;
- (f) conditions for the storage of data, including the type of data stored and the manner of storage;
- (g) security safeguards, including controlled access to data, processes to prevent unlawful modification and unauthorised disclosure, procedures to identify any foreseeable internal and external risks, and policies and procedures to safeguard information; and
- (h) participation of the data subject, through post-surveillance notification.”.

Insertion of section 62D in Act 70 of 2002

8. The following section is hereby inserted after section 62C of the principal Act:

“Regulations 20

62D. (1) The Minister may make regulations prescribing—

- (a) any matter required or permitted by this Act to be prescribed;
 - (b) any matter necessary to be prescribed for carrying out or giving effect to this Act.
- (2) Any regulation made in terms of this section— 25
- (a) which may result in the expenditure of State monies must be made in consultation with the Minister of Finance; or
 - (b) which has a bearing on a designated or review judge, must be made in consultation with the Chief Justice.”.

Laws amended 30

9. The laws referred to in the second column of the Schedule are hereby amended to the extent indicated in the third column of the Schedule.

Transitional provisions

10. (1) Any judge whose designation prior to the commencement of the Regulation of Interception of Communications and Provision of Communication-related Information Amendment Act, 2023, is still in force, will remain in force for five years from the date of commencement of the Regulation of Interception of Communications and Provision of Communication-related Information Amendment Act, 2023. 35

(2) Any order, judgment, direction, entry warrant, deferral order, declaratory order, oral direction, oral entry warrant, subpoena, notice or other process issued or made prior to the commencement of the Regulation of Interception of Communications and Provision of Communication-related Information Amendment Act, 2023 which is still in force on the date of commencement of that Act, must be regarded as having been issued under that Act and remains in force until the period or extended period for which that order, judgment, direction, entry warrant, deferral order, declaratory order, oral direction, oral entry warrant, subpoena, notice or other process was issued or made, lapses. 40

(3) As from the date of the commencement of the Regulation of Interception of Communications and Provision of Communication-related Information Amendment Act, 2023, all pending matters must be further dealt with in terms of the Regulation of Interception of Communications and Provision of Communication-related Information Amendment Act, 2023. 45

Amendment of Arrangements of Sections of Act 70 of 2002

- 11.** The Arrangement of Sections of the principal Act is hereby amended—
 (a) the insertion after item 15 of the following heading and items:

“CHAPTER 2A

DESIGNATION AND TENURE OF DESIGNATED AND REVIEW JUDGE, POWERS AND FUNCTIONS OF REVIEW JUDGE, AND AUTOMATIC REVIEWS 5

15A. Designated judge	
15B. Review judge	} 10
15C. Powers and functions of review judge	
15D. Tenure of designated and review judges”;	

- (b) by the insertion after item 23 of the following item:
 “23A. Disclosure that the person in respect of whom a direction, extension of a direction or entry warrant is sought is a journalist or practising lawyer”;
- (c) by the insertion after item 25 of the following item:
 “25A. Post-surveillance notification”;
- (d) by the insertion after item 37 of the following item:
 “37A. Management of data”; and
- (e) by the insertion after item 62C of the following item: 20
 “62D. Regulations”.

Short title and commencement

- 12.** This Act is called the Regulation of Interception of Communications and Provision of Communication-related Information Amendment Act, 2023, and comes into operation on a date fixed by the President by proclamation in the *Gazette*. 25

SCHEDULE**AMENDMENTS***(Section 9)*

Number and year of law	Short title	Extent of amendment
Act No. 40 of 1994	Intelligence Services Oversight Act, 1994	<p>The amendment of section 3 by the substitution in paragraph (a) for subparagraph (iii) of the following subparagraph:</p> <p>“(iii) any designated judge and review judge as [defined in section 1] designated in terms of sections 15A and 15B of the Regulation of Interception of Communications and Provision of Communication-related Information Act, 2002 (Act 70 of 2002), a report regarding the functions performed by him or her in terms of that Act, including statistics regarding such functions, together with any comments or recommendations which such designated judge and review judge may deem appropriate: Provided that such report shall not disclose any information contained in an application or direction referred to in that Act;”.</p>