

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

Strasbourg, 18 December 2014

T-PD(2014)10

**THE CONSULTATIVE COMMITTEE OF THE CONVENTION FOR THE PROTECTION OF  
INDIVIDUALS WITH REGARD TO AUTOMATIC PROCESSING OF PERSONAL DATA  
(T-PD)**

**OPINION ON THE REQUEST FOR ACCESSION OF THE GOVERNMENT OF MAURITIUS**

Directorate General Human Rights and Rule of Law

## Introduction

By letter dated 8 October 2014 the Minister of Foreign Affairs, of Regional Integration and International Trade of the Republic of Mauritius expressed to the Secretary General of the Council of Europe the interest of the Republic of Mauritius to be invited to accede to the Convention for the protection of individuals with regard to automatic processing of personal data (hereafter “Convention 108”) and to its Additional Protocol regarding supervisory authorities and transborder data flows.

The Consultative Committee of Convention 108 (T-PD) recalls that, in 2008, it invited the Committee of Ministers to take note of its recommendation to allow non-member States with data protection legislation in accordance with Convention 108 to accede to this Convention. The Ministers' deputies took note of this recommendation and agreed to examine any accession request in light of this recommendation (1031<sup>st</sup> meeting - 2 July 2008).

## Opinion

In accordance with Article 4 of Convention 108, each Party shall take the necessary measures in its domestic law to give effect to the basic principles for data protection set out in the Convention (Chapter II). In accordance with Article 3.1 of the Additional Protocol, the provisions of Articles 1 and 2 of the Protocol shall be regarded by the Parties as additional articles to the Convention and all the provisions of the Convention shall apply accordingly.

Having examined the Constitution and relevant law (Data Protection Act 13/2004 as it has been amended in 2009 – hereafter “the Data Protection Act”) of the Republic of Mauritius, the T-PD notes the following:

1. **Object and purposes** (Article 1 of Convention 108): the Data Protection Act of Mauritius guarantees the right to private life in its introduction which States that the Act: “... provides for the protection of the privacy rights of individuals in view of the developments in the techniques used to capture, transmit, manipulate, record or store data relating to individuals”.

The T-PD notes that, it would be a good interpretation to extend the scope of the law in order to include all processing operations. While it may be taken into consideration that “Privacy” is certainly the basic right to be protected where personal data are in the hands of others or where

electronic means are used to process such data, aiming at protecting only the right to privacy could be considered to be restrictive with regard to the provisions of Article 1 of Convention 108. Indeed, the purpose of article 1 is to “respect for individuals’ rights and fundamental freedoms, and in particular his right to privacy with regard to automatic processing of personal data relating to him (“data protection”)”.

## 2. **Definitions**

a) **Personal data** (article 2.a of Convention 108): the Data Protection Act defines under Section 2 personal data as data which relate to an individual who can be identified from those data; or data or other information, including an opinion forming part of a database, whether or not recorded in a material form, about an individual whose identity is apparent or can reasonably be ascertained from the data, information or opinion. This definition, while being more detailed than the wording of Convention 108 does not correspond exactly to the Convention’s definition. Taking into consideration the interests at stake and the technological advances enabling to identify a person, initially appearing to be non-identifiable, the T-PD recommends including in the definition of personal data the concept of identifiable, in the same manner as it is provided for in Article 2.a of Convention 108.

b) **Special categories** of data (article 6 of Convention 108): the definition of sensitive data under section 2 of the Data Protection Act includes all data referred to in article 6 of Convention 108 (racial, ethnic origin, political opinion, religious belief, membership of trade union, health, sexual preference or practices, offence, sentences).

c) **Processing** (article 2.c of Convention 108): it is defined under section 2 as “any operation or set of operations which is performed on the data wholly or partly by automatic means, or otherwise than by automatic means, and includes collecting, organising or altering the data; retrieving, consulting, using, storing or adapting the data; disclosing the data by transmitting, disseminating or otherwise making it available; or aligning, combining, blocking, erasing or destroying the data;”, which while being more detailed than the wording of Convention 108, corresponds to it.

d) **Controller** (2.d of Convention 108): the definition of the controller is provided under section 2 of the Data Protection Act. It means “a person who, either alone or jointly with any other person, makes a decision with regard to the purposes for which and in the manner in

which any personal data are, or are to be, processed;”. This definition reflects the notion of the “controller of the file” contained in Article 2.d of Convention 108.

3. **Scope of the data protection regime** (Articles 3 of Convention 108): Mauritius legislation has a comprehensive scope which covers all personal data relating to (living) individuals processed by wholly or partly by automatic means, by any natural or legal person resident of Mauritius or by public bodies, whether as data processing controllers or processors. Section 3 also provides for the application of the Data Protection Act to personal data processing, operated by persons non-established in Mauritius but who use “equipment” on the territory of Mauritius for their personal data processing. The T-PD recommends that Data Protection Act should specify in its Article 3 that the law should apply to every individual, “whatever his or her nationality or residence”.

4. **Quality of data** (Article 5 of Convention 108): sections 22 to 23, 26 and 28 of the Data Protection Act give effect to the fundamental principles of data protection such as limitation of purposes, quality, lawfulness and good faith, proportionality, accuracy of data and limited time of the retention. According to the Act, the data must be processed for only legitimate and specified purposes; collected and processed in a proportional way - only data necessary for the purpose (adequate, and not excessive for that purpose); collected and processed in a “fair” way, meaning in particular, in a transparent manner; moreover, the data must be accurate (incorrect, misleading, incomplete or obsolete) and kept up dated; and finally retained only the time necessary to fulfil the purposes. These principles comply with Convention 108. Moreover before collecting and processing any personal data, the data controller must request consent from the data subject. However, Section 24 provides for a number of exceptions to this general rule including where the processing is necessary for the performance of a “contract” or to “in order to protect the vital interests of the data subject” or “for compliance with any legal obligation to which the data controller is subject” or “for the administration of justice”; or “in the public interest”.

5. **Special categories of data** (Article 6 of Convention 108): The prohibition set forth in Convention 108 for the processing of sensitive data, except in conformity to safeguard provided by national law, is provided in the Data Protection Act under section 25. However, the T-PD notes that clarifications are needed with regard to the cases of “employment” and performance

of a “contract”, about the safeguards not identified in the Data Protection Act, which should be provided according to article 6 of Convention 108.

6. **Data security** (Article 7 of Convention 108): In accordance with Section 27 of the Data Protection Act the data controllers - and the processors- have the duty to take all necessary organisational and technical measures, as provided for in Article 7 of Convention 108 to prevent any unlawful access, alteration, disclosure, accidental loss, and destruction of personal data.

7. **Right of information and transparency** (Articles 5.a and 8.a of Convention 108): Mauritius legislation lays down the general obligation to inform the data subject on the processing. The following information must be provided to the data subject:

- (a) the fact that the data is being collected;
- (b) the purpose or purposes for which the data is being collected;
- (c) the intended recipients of the data;
- (d) the name and address of the data controller;
- (e) whether or not the supply of the data by that data subject is voluntary or mandatory;
- (f) the consequences for that data subject if all or any part of the requested data is not provided;
- (g) whether or not the data collected shall be processed and whether or not the consent of the data subject shall be required for such processing; and
- (h) his right of access to, the possibility of correction of and destruction of, the personal data to be provided.

According to section 22(2), the information should be provided at the time of collecting the personal data. The controller should further inform the data subject on the possible transfer of his or her data abroad and the measures taken for the protection of the data.

8. **Additional safeguards for the data subject** (Article 8.b to 8.d of Convention 108): Mauritius legislation provides for the rights of access, rectification and deletion under sections 41 to 44.

a) **Right of access** to personal data: according to section 41 of the Data Protection Act, a data subject or a relevant person may request to know if a data controller holds data related to her or him and in such a case to receive information on the purposes, the recipients or categories of recipients, and to receive a copy of the data in an intelligible form on payment

of prescribed fees. The Law does not specify the criteria for setting the fee for exercising the right of access. The T-PD suggests that the Data Protection Act should specify in section 41 that the right of access can be exercised by every individual, whatever their nationality or residence. Furthermore, with regards to the prescribed fees, the law should provide that the fees are not excessive, i.e. that they are not deterrents in the exercise of this right.

- b) **Derogations:** section 43 provides for restrictions to the right of access to personal data, in particular when those data are under confidentiality duty provided by law. Clarification is needed as regards the scope of such confidentiality duty and other redress mechanism should be provided. If the denial relates to national security files, the data subject should be able for instance to submit a request to the Commissioner who could have access to the data in order to ensure it is “accurate and processed lawfully” and inform the data subject on the result of the investigation.
  
- c) **Right of rectification or deletion:** according to section 44 of the Data Protection Act the data subject has the right to have her/his data corrected, blocked or erased. The controller should inform on the rectification any third party who received such inaccurate data and the latter has to act accordingly (otherwise he commits an offense). If the controller does not comply, the data subject may appeal to the Commissioner who may provide guidance to the controller to act as appropriate.

As regards the additional safeguards, the T-PD notes the following elements which should be clarified 1) criteria for deciding on the fee for exercising the right of access; 2) the current amount of the “prescribed fee”, in order to evaluate if it meets the criteria laid down in Convention 108 “without excessive expense”; 3) in case of inaccurate data, or of unlawful processing the fee should be reimbursed to the data subject 4) no fees should apply for the exercise of the right of rectification or deletion, and 5) the “compensation” in case of denying access based on a confidentiality duty laid down by law. It should be further noted that the right to object is not provided for by the Data Protection Act.

9. **Exceptions and restrictions** (Article 9 of Convention 108): Section 45 of the Data Protection Act on exemptions for national security raises the need for clarifications. The scope of the exemption appears broader than the one required by Convention 108 as all provisions of the Data Protection Act may be exempted from application. There is no reference made to the

principle of “as far as necessary”, nor to the principle of lawfulness “provided by law”, which are the legal basis for allowing derogations from any provision. The principle of necessity is only implied with regards to a decision of the Prime Minister on a matter laid down in a certificate under her/his hands.

Section 46 providing for exemptions in the area of crime and taxation, covers the exceptions provided for under Article 9.2 of Convention 108: the prevention or detection of crime, the apprehension or prosecution of offenders, the assessment or collection of any tax. As is the case for section 45, the scope of the exemptions appears to be excessively broad.

Exemption on the conciliation of privacy with freedom of speech: while for journalism, literature and art it is all the more necessary to provide exemptions from many of the data protection principles where information to be published is in the public interest (section 49), it is doubtful that the scope of exceptions is appropriate in particular regarding the security principle that should be applied to the data processing. Moreover, no exception is provided from the data subject’s right of access to preserve the confidentiality of the sources.

Exemption based on legal obligations or in connection with legal proceedings: Section 51 provides for coherent exception needed to balance the right to privacy with legal obligations and with the need for legal proceedings.

Exemptions with regard to legal professional privilege: section 53 provides coherent exception with regard to information in respect of which a claim to legal professional privilege or confidentiality as between client and legal practitioner could be maintained in legal proceedings, including prospective legal proceedings.

With regard to the exemptions provided for in Part VII of the Data Protection Act, the T-PD underlines the following:

- a) The scope of section 45 in relation to national security is excessively broad and in a democratic society exemptions should not be based solely on the opinion of the Prime Minister;
- b) The scope of the exemptions appears broader than the one required by article 9 of Convention 108;

c) It is essential that exemptions are reconsidered based on the provisions of Convention 108 and, as a first step a statement could be prepared identifying the legal basis for each exemption.

10. **Sanctions and remedies** (Article 10 of Convention 108): Mauritius legislation lays down sanctions in case of violation of the data protection legislation (Sections 61-63). However, it should be specified for each sanction whether it is a criminal or an administrative sanction.

11. **Transborder data flows** (Article 12 of Convention 108 and Article 2 of its additional Protocol): The Data Protection Act provides under section 31 for a prohibition of any transfer of personal data abroad, except with the written authorisation of the Commissioner or under exceptions of section 31.2. Nonetheless, the legal basis for the Commissioner's power on providing such an authorisation is not expressly laid down. The T-PD notes that the Commissioner's authorisation could be based on the criteria for the evaluation of « an adequate level of protection » laid down in section 31 (3): the rules of law, the purpose, nature of the data, duration of the processing abroad, the country of origin and of final destination, codes of conducts enforced. These criteria are rather similar to the criteria set forth in the Additional Protocol of Convention 108.

Two exemptions from the principle of « adequacy of the level of protection in a foreign country » are provided in section 31 (2) similar to those provided for in the Additional Protocol: a partial exemption for transfer for which the controller is able to provide safeguards (i.e. contractual clauses with the recipient in a foreign country) and complete exemptions leading to no protection. However, clarifications would be needed with regard to the transfers with no protection, subject to the condition of the consent of data subject, or for the performance of a contract, or for public interest.

12. **Supervisory authority** (Article 1 of the additional Protocol): The Commissioner's missions and powers are in conformity to those laid down in the Additional Protocol (mission of ensuring compliance of the Data Protection Act, power of investigation, power to hear claims, to bring violations to competent judicial authorities, her/his decision may be appealed against through court, power to cooperate with DP authorities in foreign countries). In addition the Commissioner has the power to issue or to approve code of conducts and to present a report annually to the National Assembly on the data protection Office including recommendations.



However the T-PD notes that the Commissioner's modalities of designation should be clarified in the Data Protection Act. Such provision would be necessary in order to ensure that the Commissioner does not receive any instructions, in compliance with article 3.1 of the Additional Protocol of the Convention, which specifically provides that "the supervisory authorities shall exercise their functions in complete independence".

## **Conclusion**

In light of the above, the T-PD:

- 1) Considers that, on the whole, the Data Protection Act of Mauritius meets the principles giving effect to Convention 108 and to its additional Protocol, including important means of enforcement.
- 2) Invites the Government of Mauritius to engage in the future to put in line with the provisions of Convention 108 the issues raised in this opinion, particularly those of paragraphs 2.a, 8, 9 and 12.
- 3) Recommends to the Committee of Ministers to invite the Republic of Mauritius to accede to Convention 108 and to its Additional Protocol.