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LEGAL OPINION
[Confidential]

MEMORANDUM

TO: Hon Dr D Nkosi, MP [Chairperson, Portfolio Committee on Trade and Industry]

COPY: Acting Secretary to Parliament [Ms P N Tyawa]

FROM: Constitutional and Legal Services Office
[Adv Z Adhikarie, Chief Parliamentary Legal Adviser]

DATE: 25 June 2020

REF. NO.: 66 / 2020

RE: Opinion - Access to Information on Allocation of Funding by National Lotteries Commission

Introduction

1. Our Office was requested to advise the Chairperson of the Portfolio Committee on Trade and Industry ("the Committee") whether the assertion by the National Lotteries Commission (NLC), that previous publications of lists of beneficiaries, had been done erroneously, is correct.
2. The Committee further enquires:

- a) What the processes and/or parameters are, within which Parliament may access this type of information?
 - b) Are there limitations in how Parliament may use this information / must this information be treated confidentially?
 - c) Under what circumstances, if at all, may the public access this type of information?
3. On 8 June 2020, the Committee received a response from the NLC, pursuant to a request from a Member of the Committee for the submission of a list of all the non-profit organisations that had received funding from the NLC.
 4. The response from the NLC cited pieces of legislation, which, it avers, prohibit it from continuing to furnish the information to the Committee and to the public. The response indicated that the information requested is “classified as grant information as defined in the Regulations of the Lotteries Act, No. 57 of 1997 (Lotteries Act), as amended.” The NLC indicated in their response that the request has been assessed and “is dealt with in strict accordance with Section 67 of the Lotteries Act, Regulation 8 and relevant legislation governing access to private information.”

Background

5. The South African National Lottery (SANL) was launched in 1999 in terms of the Lotteries Act. The purpose of the SANL is to provide an alternative fund-raising mechanism for “good causes” where state expenditure is insufficient.
6. The NLC has purportedly, for the first time in 18 years not disclosed the list of grant beneficiaries in its 2019 annual report.
7. The Chairperson of the Committee has indicated that there have been requests by both Members of the Committee and by members of the public for the publication of the lists of beneficiaries of the National Lotteries Distribution Trust Fund (NLDTF) over the year.
8. The NLC however has recently argued that whilst they have in the past published such lists, upon consideration of the laws governing private information, coupled with complaints by some beneficiaries of alleged extortion and harassment, it has determined that the publication of this information was done erroneously.

Regulatory framework

9. The NLC relies on section 67 of the Lotteries Act, as amended, to bolster their refusal to provide the Members of Portfolio Committee and members of the public with the information sought. Section 67 deals with access to information. Section 67 (1) states:

“Subject to the Constitution, any legislation which may be enacted in pursuance of sections 32 (2) or 33 (3) of the Constitution or any other relevant law (our emphasis), no person, including the Minister, a member or employee of the board or the Department, or a former member or employee of the board or the Department, may—

(a) in any way disclose any information submitted by any person in connection with any application for any licence, certificate or appointment under this Act; or

(b) publish any information obtained in contravention of paragraph (a), unless ordered to do so by a court of law or unless the person who made such application consents thereto in writing.

(2) Any person who contravenes subsection (1) shall be guilty of an offence.”

10. The NLC further relies on section 2 of the Protection of Personal Information Act, No. 4 of 2013 (POPI) stating that one of its purposes is to give effect to the constitutional right to privacy in keeping with section 14 of the Constitution.

11. Section 14 of the Constitution states that everyone has the right to privacy, which includes the right not to have: their person or home searched, their property searched, their possessions seized, and not to have their privacy of their communications infringed.

12. The NLC cites the Promotion of Access to Information Act, No. 2 of 2000 (“PAIA”) and Promotion of Administrative Justice Act, No. 3 of 2000 (“PAJA”), the Protected Disclosures Act, No. 26 of 2000 (“PDA”) and POPI as relevant legislation that deal with the disclosure of the information.

13. Section 32 of the Constitution enshrines the right of access to information held by both public and private bodies. Section 32 also states that legislation must be enacted to give effect to the right of access to information by detailing the ways in which information from public and private bodies can be accessed, and by providing grounds on which a public and private body could refuse access to information.

14. Section 195 of the Constitution sets out the basic values and principles governing public administration. It stipulates that:

“1. Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

a. A high standard of professional ethics must be promoted and maintained.

b. Efficient, economic and effective use of resources must be promoted.

c. Public administration must be development-oriented.

d. Services must be provided impartially, fairly, equitably and without bias.

e. People's needs must be responded to, and the public must be encouraged to participate in policy-making.

f. Public administration must be accountable.

g. Transparency must be fostered by providing the public with timely, accessible and accurate information.

h. Good human-resource management and career-development practices, to maximise human potential, must be cultivated.

i. Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.

2. The above principles apply to

a. administration in every sphere of government;

b. organs of state; and

c. public enterprises.”

15. Section 56 of the Constitution deals with evidence or information before the National Assembly.

It stipulates that the National Assembly or any of its committees may :

a) summon any person to appear before it to give evidence on oath or affirmation, or to produce documents;

b) require any person or institution to report to it;

- c) compel, in terms of national legislation or the rules and orders, any person or institution to comply with a summons or requirement in terms of paragraph (a) or (b);
and
 - d) receive petitions, representations or submissions from any interested persons or institutions.
16. In 2000, PAIA was enacted, fulfilling the provision of section 32 of the Constitution which requires the enactment of legislation relating to access to information.
17. PAIA allows access to any information held by the State, and any information held by private bodies that is required for the exercise and protection of any rights. Section 9 of PAIA recognises that the right of access to information is subject to certain justifiable limitations aimed at, amongst others:
- (a) the reasonable protection of privacy;
 - (b) commercial confidentiality;
 - (c) effective, efficient and good governance.
18. In terms of rule 227 of the Rules of the National Assembly, the functions of a portfolio committee include maintaining oversight of the national executive within its portfolio. This includes oversight on the implementation of relevant legislation.
19. Rule 227(1)(c) also authorises portfolio committees to “*monitor, investigate, enquire into and make recommendations concerning any such executive organ of state, constitutional institution or other body or institution.*”
20. Parliament exercises this oversight through mechanisms that are provided for in its rules and procedures. Rules that are applicable for oversight in the National Assembly include:
- (i) rule 132, which deals with statements by members;
 - (ii) rule 85, which deals with reflections upon members, the President and Ministers or Deputy Ministers who are not members of the Assembly;
 - (iii) rule 138, which deals with questions to Ministers;
 - (iv) rule 139, which deals with questions to Deputy President;
 - (v) rule 140, which deals with questions to President;
 - (vi) rule 141, which deals with urgent questions;
 - (vii) chapter 12, which deals with Parliamentary oversight within the oversight committees; and
 - (viii) rule

360, which provides for summoning of witnesses- read with sections 14 to 17 of the Powers and Privileges Act.

21. Rule 167 of the National Assembly rules stipulates that for the purposes of performing its functions a committee may, subject to the Constitution, legislation, the other provisions of these rules and resolutions of the Assembly —
 - (a) summon any person to appear before it to give evidence on oath or affirmation, or to produce documents;
 - (b) receive petitions, representations or submissions from interested persons or institutions;
 - (c) permit oral evidence on petitions, representations, submissions and any other matter before the committee.

22. In the *Certification of the Constitution of the Republic of South Africa*, 1996 (10) BCLR 1253 (CC), the Constitutional Court of South Africa examined the position of the right of access to information and noted that ‘freedom of information [was] ‘not a universally accepted fundamental human right”, but is directed at promoting good government’.

23. In the case of *Brümmer v Minister for Social Development and Others* Case CCT 25/09, [2009] ZACC, the Constitutional Court further illuminated its understanding of the significance of the right of access to information: The Court held that, “The importance of this right(. . .) in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the State. Indeed, one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency ‘must be fostered by providing the public with timely, accessible and accurate information.’ Apart from this, access to information is fundamental to the realisation of the rights guaranteed in the Bill of Rights. For example, access to information is crucial to the right to freedom of expression which includes freedom of the press and other media and freedom to receive or impart information or ideas. (. . .) Access to information is crucial to accurate reporting and thus to imparting accurate information to the public.”

Discussion

24. PAIA aims to promote the free flow of information that should be public information whilst POPI aims to protect the flow of information that should not be in the public domain.
25. The purpose of PAIA is to promote transparency, accountability and governance both in the private and public sectors. In the Brummer judgement, Ngcobo CJ held that “the application of section 78 of PAIA (which dealt with a 30-day legislative time limit for parties who wish to challenge a denial of a request for information in court) meant that “many of the requestors whom it hits are not afforded an adequate and fair opportunity to seek judicial redress” (para. 56), and that it was therefore a limitation to the rights of access to court and of access to information (para. 57).”
26. The Constitutional Court held that a 30-day legislative time limit for parties who wish to challenge a denial of a request for information in court was an unjustifiable limitation to the rights to access to court and to access to information. Ngcobo CJ then examined whether the limitation was reasonable and justifiable in an open and democratic society, as required by section 36 of the Constitution. In this limitation analysis, he highlighted the importance of the right to access to information and explained that in order to give effect to the foundational values of accountability, responsiveness and openness “the public must have access to information held by the state” (para. 62). He added that access to information is “fundamental to the realisation of the rights guaranteed in the Bill of Rights” (para. 63), and linked it specifically to the right to freedom of expression. It is clear that the flow of information and any limitation thereof must be reasonable and justifiable in terms of section 36 of the Constitution.
27. The purpose of POPI is “to give effect to the constitutional right to privacy, by safeguarding personal information when processed by a responsible party, subject to justifiable limitations that are aimed at balancing the right to privacy against other rights, particularly the right of access to information and protecting important interests, including the free flow of information within the Republic and across international borders”.
28. A purposeful interpretation of the Lotteries Act together with Section 195 (g) show that a culture of openness and transparency is required. The general requirement under Section 195(g) of the Constitution, being that that transparency must be fostered.

29. The National Lotteries Commission is a public entity with the National Department of Trade and Industry as the overseeing governmental body.
30. Parliament has established mechanisms to achieve its oversight and accountability mandates in terms of the Constitution and under its own rules. Committees interact with the public, civil society organisations, businesses, experts and professional bodies as a way of augmenting accountability. Committees may call Ministers and departmental heads to account on any issue relating to any matter over which they are effecting accountability within the ambit of the provisions of sections 56 and 69 of the Constitution and legislation.
31. As envisaged in section 55 of the Constitution, which enables the National Assembly to maintain oversight over all organs of state, and section 92, which enables Parliament to hold the Cabinet accountable, organs of state at national level and Ministers and their departments are held to account by Parliament. At national level, there is direct accountability to Parliament by national departments, national public entities and national bodies such as commissions.

Advice

32. As to whether the assertion by the National Lotteries Commission (NLC) that previous publications of lists of beneficiaries, had been done erroneously, is correct, we submit that the assertion is incorrect and would not in our view withstand constitutional scrutiny. The NLC does not indicate whether the information concerning the beneficiaries fall within the information “submitted by any person in connection with any application for any licence, certificate or appointment under this Act” as envisaged in section 67 of the Lotteries Act. Furthermore, the NLC does not indicate whether any of the reasons for refusing access to information in PAIA applies to the information concerning beneficiaries.
33. The default position is that there should be disclosure of information unless prohibited. The legislation cited by the NLC does not provide a basis to refuse the said information. The NLC must clearly and precisely specify the grounds and the reasons for refusal of the information. The Committee must be directed to specific grounds of refusal together with the details which prevent its disclosure. The stance of the NLC seems to be that, there is a blanket prohibition on the provision of this information, which is untenable.

34. As to the processes and/or parameters within which Parliament may access this type of information, we submit that Parliament may through its committees, by virtue of its rules subpoena the information if the information is not forthcoming. Should there be a need for the information to be treated as confidential, NA rules 184 and 189 regulate the treatment of confidential information before a committee.
35. As to the question whether this information must be treated confidentially, and under what circumstances, the public may access this type of information, we submit that the financial statements of the NLC must disclose the information and that this information must be available to the Auditor General as the NLC is subject to the PFMA.
36. The constitutional right to privacy is not an absolute right but may be limited in terms of laws of general application and must be balanced with other rights entrenched in the Constitution.
37. In protecting a person's personal information, consideration should therefore also be given to competing interests such as the administering of national social programmes, governmental transparency and accountability, maintaining law and order, the need to root out corruption within government and protecting the rights, freedoms and interests of others, including the commercial interests.
38. Legislation affecting the access or flow of information should be purposively interpreted in line with Parliament's constitutional mandate of oversight in conjunction with constitutional principles of accountability and transparency.

SIGNED ELECTRONICALLY

Adv Z Adhikarie
Chief Parliamentary Legal Adviser