THE PRESIDENCY

No. 122 22 January 2003

It is hereby notified that the President has assented to the following Act, which is hereby published for general information:

No. 70 of 2002: Regulation of Interception of Communications and Provision of Communication-related information Act, 2002.
GENERAL EXPLANATORY NOTE:

[ ] Words in bold type in square brackets indicate omissions from existing enactments.

Words underlined with a solid line indicate insertions in existing enactments.

(English text signed by the President.)
(Assemted to 30 December 2002.)

ACT

To regulate the interception of certain communications, the monitoring of certain signals and radio frequency spectrums and the provision of certain communication-related information; to regulate the making of applications for, and the issuing of, directions authorising the interception of communications and the provision of communication-related information under certain circumstances; to regulate the execution of directions and entry warrants by law enforcement officers and the assistance to be given by postal service providers, telecommunication service providers and decryption key holders in the execution of such directions and entry warrants; to prohibit the provision of telecommunication services which do not have the capability to be intercepted; to provide for certain costs to be borne by certain telecommunication service providers; to provide for the establishment of interception centres, the Office for Interception Centres and the Internet Service Providers Assistance Fund; to prohibit the manufacturing, assembling, possessing, selling, purchasing or advertising of certain equipment; to create offences and to prescribe penalties for such offences; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

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CHAPTER 1
INTRODUCTORY PROVISIONS

Definitions and interpretation
1. (1) In this Act, unless the context otherwise indicates—

"Agency" means the Agency as defined in section 1 of the Intelligence Services Act;

"applicant" means—

(a) an officer referred to in section 33 of the South African Police Service Act, if the officer concerned obtained in writing the approval in advance of another officer in the Police Service with at least the rank of assistant-commissioner and who has been authorised in writing by the National Commissioner to grant such approval;

(b) an officer as defined in section 1 of the Defence Act, if the officer concerned obtained in writing the approval in advance of another officer in the Defence Force with at least the rank of major-general and who has been authorised in writing by the Chief of the Defence Force to grant such approval;

(c) a member as defined in section 1 of the Intelligence Services Act, if the member concerned obtained in writing the approval in advance of another member of the Agency or the Service, as the case may be, holding a post of at least general manager;

(d) the head of the Directorate or an Investigating Director authorised thereto in writing by the head of the Directorate;

(e) a member of a component referred to in paragraph (e) of the definition of "law enforcement agency", authorised thereto in writing by the National Director; or

(f) a member of the Independent Complaints Directorate, if the member concerned obtained in writing the approval in advance of the Executive Director;

"archived communication-related direction" means a direction issued under section 18(3)(a) or 19(3) in terms of which a telecommunication service provider is directed to provide archived communication-related information in respect of a customer;

"archived communication-related information" means any communication-related information in the possession of a telecommunication service provider and which is being stored by that telecommunication service provider in terms of section 30(1)(b) for the period determined in a directive referred to in section 30(2)(a), beginning on the first day immediately following the expiration of a period of 90 days after the date of the transmission of the indirect communication to which that communication-related information relates;

"authorised person" means any—

(a) law enforcement officer who may, in terms of section 26(1)(a)(i), execute a direction; or

(b) law enforcement officer or other person who may, in terms of section 26(1)(a)(ii), assist with the execution of a direction;
"Authority" means the Independent Communications Authority of South Africa established by section 3 of the Independent Communications Authority of South Africa Act, 2000 (Act No. 13 of 2000);

"business" means any business activity conducted by any person, including activities of any private or public body;

"cellular phone" means any fixed or mobile cellular apparatus or terminal which is capable of connection to a cellular telecommunication system and which is used by a customer to transmit or receive indirect communications over such telecommunication system;

"communication" includes both a direct communication and an indirect communication:

"communication-related information" means any information relating to an indirect communication which is available in the records of a telecommunication service provider, and includes switching, dialling or signalling information that identifies the origin, destination, termination, duration, and equipment used in respect of each indirect communication generated or received by a customer or user of any equipment, facility or service provided by such a telecommunication service provider and, where applicable, the location of the user within the telecommunication system;

"Constitution" means the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996);

"contents", when used with respect to any communication, includes any information concerning the substance, purport or meaning of that communication;

"customer" means any person—

(a) to whom a telecommunication service provider provides a telecommunication service; or

(b) who has entered into a contract with a telecommunication service provider for the provision of a telecommunication service, including a pre-paid telecommunication service;

"decryption assistance" means to—

(a) allow access, to the extent possible, to encrypted information; or

(b) facilitate the putting of encrypted information into an intelligible form;

"decryption direction" means a direction issued under section 71(3) in terms of which a decryption key holder is directed to—

(a) disclose a decryption key; or

(b) provide decryption assistance in respect of encrypted information, and includes an oral decryption direction issued under section 23(7);

"decryption key" means any key, mathematical formula, code, password, algorithm or any other data which is used to—

(a) allow access to encrypted information; or

(b) facilitate the putting of encrypted information into an intelligible form;

"decryption key holder" means any person who is in possession of a decryption key for purposes of subsequent decryption of encrypted information relating to indirect communications;

"Defence Act" means the Defence Act, 1957 (Act No. 44 of 1957);

"Defence Force" means the defence force referred to in section 199(2) of the Constitution;

"designated judge" means any judge of a High Court discharged from active service under section 3(2) of the Judges' Remuneration and Conditions of Employment Act, 2001 (Act No. 47 of 2001), or any retired judge, who is designated by the Minister to perform the functions of a designated judge for purposes of this Act;

"direct communication" means an—

(a) oral communication, other than an indirect communication, between two or more persons which occurs in the immediate presence of all the persons participating in that communication; or

(b) utterance by a person who is participating in an indirect communication, if the utterance is audible to another person who, at the time that the indirect communication occurs, is in the immediate presence of the person participating in the indirect communication;

"direction" means any interception direction, real-time communication-related direction, archived communication-related direction or decryption direction issued
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under this Act, and includes an oral direction issued under section 23(7), but, for purposes of section 20, excludes an archived communication-related direction; “Director” means the Director: Office for Interception Centres, seconded in terms of section 34(1); “Directorate” means the Directorate of Special Operations referred to in section 1 of the National Prosecuting Authority Act; “encrypted information” means any electronic data which, without the decryption key to that data—
(a) cannot, or cannot readily, be accessed; or
(b) cannot, or cannot readily, be put into an intelligible form; “entry warrant” means a warrant issued under section 22(3) and which authorises entry upon any premises for purposes of—
(a) intercepting a postal article or communication on the premises; or
(b) installing and maintaining an interception device on, and removing an interception device from, the premises and includes an oral entry warrant issued under section 23(7); “Executive Director” means the Executive Director appointed in terms of section 51 of the South African Police Service Act; “fixed date” means the date of commencement of this Act; “Fund” means the Internet Service Providers Assistance Fund established by section 38(1); “Identification Act” means the Identification Act, 1997 (Act No. 68 of 1997); “identification document” means, in the case of a person who is—
(a) a South African citizen or is lawfully and permanently resident in the Republic has attained the age of 16 years—
(i) an identity card or temporary identity certificate as defined in the Identification Act;
(ii) a green, bar-coded identity document issued in accordance with the Identification Act, 1986 (Act No. 72 of 1986), until such identity document is replaced by an identity card as contemplated in section 25 of the Identification Act; or
(iii) a South African passport as defined in the South African Passports and Travel Documents Act, 1994 (Act No. 4 of 1994);
(b) a South African citizen or is lawfully and permanently resident in the Republic and has not attained the age of 16 years, a birth certificate referred to in section 13 of the Identification Act: and
(c) not a South African citizen or is not permanently resident in the Republic—
(i) a travel document as defined in the South African Passports and Travel Documents Act, 1994: or
(ii) a passport or travel document as contemplated in paragraphs (b), (c) and (d) of the definition of “passport” in the Immigration Act, 2002 (Act No. 13 of 2002); “Independent Complaints Directorate” means the Independent Complaints Directorate established by section 50(1) of the South African Police Service Act; “indirect communication” means the transfer of information, including a message or any part of a message, whether—
(a) in the form of—
(i) speech, music or other sounds;
(ii) data;
(iii) text;
(iv) visual images, whether animated or not;
(v) signals; or
(vi) radio frequency spectrum; or
(b) in any other form or in any combination of forms, that is transmitted in whole or in part by means of a postal service or a telecommunication system; “Intelligence Services Act” means the Intelligence Services Act, 1994 (Act No. 38 of 1994); “intelligible form” means the form in which electronic data was before an encryption or similar process was applied to it; “intercept” means the aural or other acquisition of the contents of any communication through the use of any means, including an interception device, so as to make some or all of the contents of a communication available to a person
other than the sender or recipient or intended recipient of that communication, and includes the—

(a) monitoring of any such communication by means of a monitoring device;
(b) viewing, examination or inspection of the contents of any indirect communication; and
(c) diversion of any indirect communication from its intended destination to any other destination.

and “interception” has a corresponding meaning;

“interception centre” means an interception centre established by section 32(1)(a);
“interception device” means any electronic, mechanical or other instrument, device, equipment or apparatus which is used or can be used, whether by itself or in combination with any other instrument, device, equipment or apparatus, to intercept any communication, but does not include—

(a) any instrument, device, equipment or apparatus, or any component thereof—
(i) furnished to the customer by a telecommunication service provider in the ordinary course of his or her business and being used by the customer in the ordinary course of his or her business;
(ii) furnished by such customer for connection to the facilities of such telecommunication service and used in the ordinary course of his or her business; or
(iii) being used by a telecommunication service provider in the ordinary course of his or her business; or
(b) a hearing aid or similar device being used to correct below normal hearing to not better than normal.

and a reference to an “interception device” includes, where applicable, a reference to a “monitoring device”;

“interception direction” means a direction issued under section 16(3) or 18(3)(a) and which authorises the interception, at any place in the Republic, of any communication in the course of its occurrence or transmission, and includes an oral interception direction issued under section 23(7);

“Internet” means the international computer network known by that name;

“Internet service provider” means any person who provides access to, or any service related to, the Internet to another person, whether or not such access or service is provided under and in accordance with a telecommunication service licence issued to the first-mentioned person under Chapter V of the Telecommunications Act;

“law enforcement agency” means—
(a) the Police Service;
(b) the Defence Force;
(c) the Agency or the Service;
(d) the Directorate; or
(e) any component of the prosecuting authority, designated by the National Director to specialise in the application of Chapter 6 of the Prevention of Organised Crime Act;

“law enforcement officer” means any member of—
(a) the Police Service;
(b) the Defence Force, excluding a member of a visiting force;
(c) the Agency or the Service;
(d) the Directorate; or
(e) any component referred to in paragraph (e) of the definition of “law enforcement agency”;

“listed equipment” means any equipment declared to be listed equipment under section 44(1)(a), and includes any component of such equipment;

“Minister” means the Cabinet member responsible for the administration of justice, except in Chapter 6 where it means the Cabinet member responsible for intelligence services;

“monitor” includes to listen to or record communications by means of a monitoring device, and “monitoring” has a corresponding meaning;

“monitoring device” means any electronic, mechanical or other instrument, device, equipment or apparatus which is used or can be used, whether by itself or in combination with any other instrument, device, equipment or apparatus, to listen to or record any communication;
"National Commissioner" means the National Commissioner referred to in section 6(1) of the South African Police Service Act;

"National Director" means the National Director of Public Prosecutions contemplated in section 179(1)(a) of the Constitution;

"National Prosecuting Authority Act" means the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998);

"Office" means the Office for Interception Centres established by section 33;

"oral direction" means any direction issued under section 23(7);

"oral entry warrant" means an entry warrant issued under section 23(7);

"party to the communication", for purposes of—

(a) section 4, means, in the case of—

(i) a direct communication, any person—

(aa) participating in such direct communication or to whom such direct communication is directed; or

(bb) in whose immediate presence such direct communication occurs and is audible to the person concerned, regardless of whether or not the direct communication is specifically directed to him or her; or

(ii) an indirect communication—

(aa) the sender or the recipient or intended recipient of such indirect communication;

(bb) if it is intended by the sender of an indirect communication that such indirect communication be received by more than one person, any of those recipients; or

(cc) any other person who, at the time of the occurrence of the indirect communication, is in the immediate presence of the sender or the recipient or intended recipient of that indirect communication; and

(b) section 5, means, in the case of—

(i) a direct communication, any person participating in such direct communication or to whom such direct communication is directed; or

(ii) an indirect communication—

(aa) the sender or the recipient or intended recipient of such indirect communication;

(bb) if it is intended by the sender of an indirect communication that such indirect communication be received by more than one person, any of those recipients;

"Police Service" means the South African Police Service established by section 5(1) of the South African Police Service Act;

"postal article" means any postal article as defined in the Postal Services Act;

"postal service" means a postal service as defined in the Postal Services Act, and includes any—

(a) private postal service; and

(b) service which is offered or provided as a service of which the main purpose, or one of the main purposes, is to make available, or to facilitate, a means of transmission from one place to another place of postal articles containing indirect communications:

"Postal Services Act" means the Postal Services Act, 1998 (Act No. 124 of 1998);

"postal service provider" means any person who provides a postal service;

"premises" includes any land, building, structure, vehicle, ship, boat, vessel, aircraft or container;


"private body" means—

(a) a natural person who carries on any trade, business or profession, but only in such capacity;

(b) a partnership which carries on any trade, business or profession; or

(c) any juristic person, but excludes a public body;

"prosecuting authority" means the national prosecuting authority established by section 179 of the Constitution;

"public body" means any—

(a) department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or

(b) other functionary or institution when—
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(i) exercising a power or performing a duty in terms of the Constitution or a provincial constitution; or
(ii) exercising a public power or performing a public function in terms of any legislation;

"real-time communication-related direction" means a direction issued under section 17(3) or 18(3) in terms of which a telecommunication service provider is directed to provide real-time communication-related information in respect of a customer, on an ongoing basis, as it becomes available, and includes an oral real-time communication-related direction issued under section 23(7);

"real-time communication-related information" means communication-related information which is immediately available to a telecommunication service provider—
(a) before, during, or for a period of 90 days after, the transmission of an indirect communication; and
(b) in a manner that allows the communication-related information to be associated with the indirect communication to which it relates;

"relevant Ministers" means the Cabinet members responsible for—
(a) communications;
(b) defence;
(c) intelligence services; and
(d) policing.

except in Chapter 6 where it means the Cabinet members referred to in paragraphs (a), (b) and (d) and the Cabinet member responsible for the administration of justice.

"serious offence" means any—
(a) offence mentioned in the Schedule; or
(b) offence that is allegedly being or has allegedly been or will probably be committed by a person, group of persons or syndicate—
(i) acting in an organised fashion which includes the planned, ongoing, continuous or repeated participation, involvement or engagement in at least two incidents of criminal or unlawful conduct that has the same or similar intents, results, accomplices, victims or methods of commission, or otherwise are related by distinguishing characteristics;
(ii) acting in the execution or furtherance of a common purpose or conspiracy; or
(iii) which could result in substantial financial gain for the person, group of persons or syndicate committing the offence,

including any conspiracy, incitement or attempt to commit any of the above-mentioned offences;

"Service" means the Service as defined in section 1 of the Intelligence Services Act;

"SIM-card" means the Subscriber Identity Module which is an independent, electronically activated device designed for use in conjunction with a cellular phone to enable the user of the cellular phone to transmit and receive indirect communications by providing access to telecommunication systems and enabling such telecommunication systems to identify the particular Subscriber Identity Module and its installed information;

"South African Police Service Act" means the South African Police Service Act, 1995 (Act No. 68 of 1995);

"system controller" of, or in relation to—
(a) a private body, means, in the case of a—
(i) natural person, that natural person or any person duly authorised by that natural person;
(ii) partnership, any partner of the partnership or any person duly authorised by the partnership; or
(iii) juristic person, the—
(aa) chief executive officer or equivalent officer of the juristic person or any person duly authorised by that officer; or
(bb) person who is acting as such or any person duly authorised by such acting person; and

(b) a public body, means, in the case of—
(i) a national department, provincial administration or organisational component—