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ALL DISTRICT COMMISSIONERS
ALL STATION COMMANDERS
ALL VISIBLE POLICING COMMANDERS
SOUTH AFRICAN POLICE SERVICE
FREE STATE PROVINCE

THE VIDEO RECORDING OR PHOTOGRAPHING OF SAPS MEMBERS IN CLIENT SERVICE CENTRES OR PRIVATE PREMISES BY MEMBERS OF THE PUBLIC: REGULATION OF INTERCEPTION OF COMMUNICATIONS AND PROVISION OF COMMUNICATION-RELATED INFORMATION ACT, 2002 (ACT NO. 70 OF 2002) AND PROTECTION OF PERSONAL INFORMATION ACT, 2013 (ACT NO. 4 OF 2013)

1. Members appear to be unfamiliar with the legal provisions which apply when members of the public photograph or video record them in either a public setting, such as the Community Service Center (CSC) at a police station, or at private premises. The purpose of this provincial circular is to instruct members on how to act when confronted with such situations.
2. Recording conversations can be a powerful tool in both business and personal lives, but it is essential to understand the legal boundaries thereof. Devices such as smartphones, tablets, etc., allow a person to record just about anything, anywhere, and at any time. A laptop and other similar devices can record online meetings, etc. Technology which enables voice and video recording is all-pervasive and provides a powerful tool for keeping accurate records, resolving disputes and gathering evidence.
3. It is crucial to understand when it is lawful to make video and photo recordings and when not, whether face-to-face, over the phone or via digital platforms like

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WhatsApp, Zoom or Teams. The requirements set out in National Instruction 6 of 2021 (Virtual meeting solutions for the South African Police Service) must be observed in respect of virtual meetings in the SAPS.

4. **The Regulation of Interception of Communications and Provision of Communication-Related Information Act, 2002 (Act No. 70 of 2002) (“RICA”)**
- 4.1 The legal framework for recording conversations and other forms of communication in South Africa is primarily governed by the Regulation of Interception of Communications and Provision of Communication-Related Information Act, 2002 (Act No. 70 of 2002) (“RICA”). RICA is aimed not only at regulating government’s surveillance of its inhabitants, but also at protecting the right to privacy.
- 4.2 Section 4(1) of RICA provides that any person, **except for a law enforcement official (including SAPS members)** may intercept any conversation if he or she is a party to the communication, unless such communication is intercepted by such person for purposes of committing an offence. A member of the public may therefore in terms of RICA record (audio and video) a conversation or communication to which he or she is a party of without the consent of the other party(ies), including communication taking place in his or her immediate presence or within an audible range. SAPS members may generally not do this. Specific rules applicably to members in as far as the interception or recording of communications are concerned.
- 4.3 The general rule is that a member of the SAPS who intends to intercept a communication must apply to a designated judge for an interception directive in terms of section 16 of RICA or obtain the consent of the person being recorded.
- 4.4 Section 4(2) of RICA allows for the inception of any communication by a member of the SAPS if he or she is —
 - a party to the communication; and
 - satisfied that there are reasonable grounds to believe that the interception of a communication of another party to the communication is necessary on a ground referred to in section 16(5)(a) of RICA, unless such communication is intercepted for purposes of committing an offence.
- 4.5 In order for section 4(2) of RICA to apply, section 16(5)(a) of RICA provides that the member of the SAPS must have reasonable grounds to believe that—
 - a serious offence has been or is being or will probably be committed;
 - the gathering of information concerning an actual threat to the public health or safety, national security or compelling national economic interests of the Republic is necessary;
 - the gathering of information concerning a potential threat to the public health or safety or national security of the Republic is necessary;
 - the making of a request for the provision, or the provision to the competent authorities of a country or territory outside the Republic, of any assistance in connection with, or in the form of, the interception of communications relating to organised crime or any offence relating to

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terrorism or the gathering of information relating to organised crime or terrorism, is in—

- accordance with an international mutual assistance agreement; or
- the interests of the Republic's international relations or obligations;
- or
- the gathering of information concerning property which is or could probably be an instrumentality of a serious offence or is or could probably be the proceeds of unlawful activities is necessary.

It is therefore clear that these are exceptional cases. If a member is in doubt and has the opportunity, an interception direction must first be obtained from a designated judge.

4.6 Notwithstanding section 4(2) of RICA, a member who is authorised in terms of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), the Cybercrimes Act, 2020 (Act No. 19 of 2020), or any other law to engage or to apprehend a suspect or to enter premises in respect of the commission or suspected commission of any offence, may during the apprehension of the suspect or during the time that he or she is lawfully on the premises, record what he or she observes or hears if—

- the recording relates directly to the purpose for which the suspect was apprehended or the law enforcement officer or person entered the premises; and
- the law enforcement officer or person has—
 - identified himself or herself as such; and
 - verbally informed any person concerned that his or her direct communications are to be recorded, before such recording is made.

5. **The Protection of Personal Information Act, 2013 (Act No. 4 of 2013) (“POPIA”)**

5.1 The POPIA regulates the processing of personal information. Its impact on recording the personal information of a person relates primarily to how such personal information is processed, including the handling, storing, accessing, and disseminating or distributing (sharing) thereof.

5.2 The general rule is that personal information can only be processed with the consent of the “data subject”.

5.3 Section 6 of POPIA provides that POPIA does not apply to the processing of personal information by or on behalf of the SAPS —

- to protect the national security or identification of financing of terrorist activities;
- in defence of the country, public safety or security measures;
- for purposes of prevention or detection of crime;
- for identification of the proceeds of crime;
- in combating money laundering;
- in investigation or proof of offences;

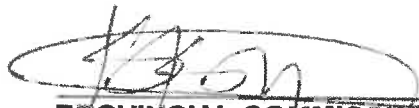
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- in the prosecution of offenders/execution of sentences, to the extent that adequate safeguards have been established in legislation.
- 5.4 The fact that personal information may in certain circumstances be processed does not make it admissible in court, it in fact has an inherent risk to the SAPS if unlawfully disclosed or not properly safeguarded.
- 5.5 Members cannot rely on POPIA to protect them and their conduct in their official capacity.
- 6. **General application of the rules relating to the above**
- 6.1 Members must remember that their conduct is under constant scrutiny from the public. Members of the public (private individuals) tend to make video recordings of members of the SAPS, especially in compromising situations (e.g. while asleep in police vehicles, eating chicken in the CSC while not attending to clients, dancing, drinking in uniform, performing illegal activities, etc.).
- 6.2 There is generally no expectation of privacy in public spaces and the recording of communications or images of people who are in the immediate presence of a person are not prohibited.
- 6.3 Communications of members and other role players and images at crime scenes are being recorded by members of the public. It is important to exercise proper control over a crime scene, to cordon off the crime scene (where practically possible) and to ensure that members of the public remain outside the cordon. Communications and the conduct of members must be professional at all times. Unnecessary information must not be shared in the presence of members of the public. Where a person interferes with a crime scene, he or she must be removed and a case of defeating or obstructing the ends of justice must be registered and investigated against such person.
- 6.4 Persons making recordings in the police station may compromise the privacy of other persons in the police station. Should the person publish such recording on for instance social media, he or she may expose him or herself to a complaint being registered with the Information Regulator in terms of POPIA.
- 6.5 Access to restricted areas must be controlled. In terms of section 154(2)(b) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) no person shall at any stage before the appearance of an accused in a court upon any charge referred to in section 153(3) or at any stage after such appearance but before the accused has pleaded to the charge, publish in any manner whatsoever any information relating to the charge in question. Furthermore, section 154(3) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) provides that no person may publish in any manner whatsoever any information which reveals or may reveal the identity of an accused under the age of eighteen years or of a witness at criminal proceedings who is under the age of eighteen years. Care must be taken that unauthorised persons do not access areas where such persons can be filmed for instance the cells area or interview rooms.
- 6.6 Making recordings (audio, videos or even photos) may compromise the security of a police station by inadvertently exposing security vulnerabilities. Police stations are increasingly being targeted by criminals. Exposing the vulnerabilities of a station by means of photographs or video recording and sharing such recordings on public platform increases the risk of harm to every

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person at a station, including members of the public. Persons making such recordings must be requested to refrain from doing so. Should the person indicate that he or she is making recordings in, for instance, the CSC as a result of being dissatisfied with the service delivery at the CSC, the CSC Commander must attempt to resolve the matter in an amicable manner. An Occurrence Book entry must be made of the dissatisfaction of the person.

7. The contents of this letter are for the information of all members under your command.



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B.B. MOTSWENYANE [SOEG]**

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