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DECEMBER 2011**

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## Your PAIA Manual – Due By 31 December 2011

In 2005, certain “smaller” private bodies were given an extension until the 31st December 2011 to compile a manual in terms of the Promotion of Access to Information Act, 2000 (PAIA). However, no further extension has been granted and if you have not already compiled your manual, it is due for publication and submission to the Human Rights Commission on or before 31st December 2011.

The stated goal of the Act is to give effect to the Constitutional right of access to information and to encourage openness, accountability and transparency, both in the public and private spheres.

This is achieved by requiring each public and private body to prepare and make available a “manual” indicating what records it has in its possession and available for perusal by the general public.

and the manner in which a request may be made for access to such records under the Act

In addition to government departments, all public and private companies, close corporations, professional companies, not for profit companies, educational institutions, as well as certain trusts, must publish and submit a manual. Individuals who carry on any trade, business or profession as sole proprietors or partnerships will also be required to comply.

Once the manual is compiled, it must be sent to the Human Rights Commission, published in the Government Gazette, sent to the controlling body of which the body is a member (if applicable), and published on the private body’s internet site, (if applicable).

## INFORMATION OFFICER

A private body is required to appoint somebody in the position of an “information officer” to be responsible for:

- drafting the information manual as required in terms of Section 51 the Act;
- formulating procedures and standard forms to ensure that requests are processed speedily, within the prescribed time limits, and that whenever required the relevant third party is informed of the request;
- formulating guidelines clearly stating when a request must be granted or declined;
- co-ordinating implementation of the required procedures between the various business units and divisions of the private body, to ensure compliance with the Act.

The information officer must possess the necessary skills, experience and qualifications to carry out these functions.

## GROUND FOR REFUSAL TO PROVIDE ACCESS TO INFORMATION

A request for the release of actual information or records can be refused on a number of grounds set out in the Act.

For example, the Act does not require that personal information about third parties or confidential and secret business information be made available and provides for the withholding of such records. Private records need only be made available where they are required for the exercise or protection of a legal right. Sections 62 to 70 list the grounds for refusal of a request in detail.



## PRESCRIBED FEES

It may be necessary to pay fees for access to records in terms of the Act. In summary, the fee structure is a requester must pay a request fee (currently R35 for private bodies). If the request is granted, then an access fee must be paid for the reproduction of the records and for time in excess of one hour to search and prepare records for disclosure.

## OFFENCES

A person who with intent to deny a right of access in terms of this Act—

- a) destroys, damages or alters a record;
- b) conceals a record; or
- c) falsifies a record or makes a false record,
- d) commits an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding two years

## HUMAN RIGHTS COMMISSION

The Commission for Human Rights (the PAIA Unit) is mandated to monitor compliance, and to provide assistance to members of the public to assert their right to information.

# Whistle-Blowers In The Workplace

You are employed on a half day basis due to the fact that you have a disability and cannot work a full day. During the course of your duties, you discover an illegal transaction occurring within the workplace. You report the transaction internally to the Board of Directors, and shortly thereafter you are advised that your position has become a full time one due to the ‘operational requirements’ of the company (and your employer knows that you cannot work full time due to your health requirements).

You make several alternative suggestions to your employer, all of which are rejected and you are dismissed based on the ‘operational requirements of the company’.

These are the very brief facts of an actual case. The matter was referred to the Labour Court, which, inter alia, found that the reason for applicant's retrenchment was a sham. The employee was awarded 24 months of remuneration as compensation.

As an employee, you are protected from any reprisals in the workplace should you blow the whistle on any employer or co-worker who is committing an offence or a malpractice in the workplace. The Protected Disclosures Act, 2000 (PDA) applies to employees in both the public and the private sector, (but does not apply to independent contractors).

Then there is now also Section 159 of the Companies Act 2008, which also protects any shareholder, director, company secretary, prescribed officer, supplier of goods or services to the company, or an employee of such a supplier.

Both provide for protected disclosures to be made about a criminal offence that has been, is being or is likely to be committed, the health or safety of an individual that has been, is being or is likely to be endangered, that the environment that has been, is being or is likely to be endangered, or unfair discrimination against a person in contravention of the Constitution is taking place.

The Companies Act also provides that an employee can report a director, company or employees to the Companies Tribunal in regard to a suspected contravention of the Companies Act.

In terms of the PDA, the employer is prohibited from subjecting the employee to what is called an "occupational detriment", for example being subjected to any disciplinary action, being suspended, demoted, harassed or intimidated, or transferred against his or her will (see the PDA Act for a full list).



The Companies Act states that such a person has qualified privilege in respect of that disclosure and will be immune from any civil or criminal proceedings if the conditions set out in Section 159 are met. If he or she is subjected to express or implied threats or conduct that causes detriment to him or her by any other person, (s)he will be entitled to compensation for damages suffered.

It is important to note that no provision in a contract of employment or other agreement which applies to an employer and employee may attempt to exclude, prevent or discourage an employee from making a protected disclosure. Such an agreement between will have no legal effect.

The employee needs to make the disclosure in good faith, and without the prospect of personal financial gain. The correct procedure must be followed when making a protected disclosure. In terms of Section 159, it is compulsory that a public company and state owned company establish a system for confidential disclosures, and routinely publish the availability of that system to all (including suppliers and employees of suppliers).

## The Consumer Protection Act And Dining Out

When you eat out, as a 'vulnerable' consumer, you have a number of protections available to you. There are two rights covered in the Act which would apply to the eating out scenario– the right to fair and honest dealing and the right to good quality and safety.

Most people have had that awful experience of food poisoning after eating out. Section 61 of the Act states that the supplier is liable for any damage, sickness, injury or death caused by the food provided. You don't need to prove negligence - all you would need to do is submit your claim to the management of the restaurant, setting out your medical expenses and proof of your illness. The claim can be in relation to direct costs but may also include economic loss caused as a result of the harm



caused (which may include loss of earnings, loss of profit or potential profit for any business whose activities might be suspended or affected by the harm, and in the event of death, for financial support for dependants left behind).

You also have a right to good quality – in terms of both the food and the service you receive. If you feel that the food you ordered is “...not reasonably suitable for the purposes for which it was intended, or is not of good quality...” , then you can demand either a refund or that the restaurant replaces the meal.

If the service you receive is of not good quality for any reason, (you may have a rude waitron serving you, or he/she makes mistakes with your order or bills you incorrectly), then you also have direct recourse to management to demand a discount based on the degree that the service fell short.

The right to fair and honest dealing protects you in that should the food you receive not match the description in

the menu or an advert for that dish, then you can ask management for a full refund or to replace the meal.

Overbooking is dealt with in Section 47. A restaurant must honour its commitment to you for your booking. Should a restaurant tell you on your arrival that there is no table available for you (even though you booked), it may be liable to compensate you for costs directly incidental to its breach (e.g. costs relating to transportation to the restaurant and parking).

In all of the above scenario's, should you receive no joy from the management of the restaurant, you can then refer the matter to the Ombudsman, the Consumer Commission, or the Restaurant Association of South Africa (Department of Health: Directorate: Food Control).

## Going Green?

As from 9 November 2011 all new buildings and all extensions to existing buildings in South Africa must conform to the new regulations on energy conservation. For example 50 percent (by volume) of hot water in a building must be heated from a source other than a geyser and alternatives include solar heating and heat pumps.

These new energy conservation measures for new and altered buildings has come about at the opportune time, with the impending COP 17 conference on climate change in Durban scheduled for the 28<sup>th</sup> November to 9 December 2011.

COP 17 coincides with general move towards a greener economy. Finance Minister Pravin Gordhan recently appealed to the World Bank for larger amounts of money and faster delivery of this money so South Africa can deliver on its green energy potential.

He is quoted as saying that it was important for green technology to become available for the greater good, and that funding like this will help contribute to cheaper energy on one hand and the reduction of carbon emissions on the other.



Business is being increasingly being called upon to incorporate a 'triple context' in which it operates – which includes social, environmental and economic impacts. The public want to understand what companies are doing, how they are improving or damaging lives, or the environment, and what they are doing to ensure resources and the businesses themselves are set up for the long-term. Taking a long-term perspective in today's economic, social and environmental climate means recognising that a business cannot operate in a viable manner over a prolonged period without due regard for long-term sustainability issues.

**IMPORTANT NOTE:** *The information contained in this newsletter is of a general nature, and may in certain circumstances be subject to misinterpretation. Consequently, we recommend that our advice be sought when acting upon the information contained herein. While every care has been taken in the compilation of this newsletter, no responsibility of any nature whatsoever shall be accepted for any inaccuracies, errors or omissions.*

*All references to the masculine gender shall include the feminine (and vice versa).*