

26 September 2022

Our Ref: RCC_CSOS_Directive No1 of 2022

Adv Boyce Mkhize
The Chief Ombud
CSOS

Email: Boyce.Mkhize@csos.org.za
Johlene.Wasserman@csos.org.za

**Re: PRACTICE DIRECTIVE ON PROTECTION OF PERSONAL INFORMATION AND
ACCESS TO INFORMATION IN A COMMUNITY SCHEME No1 of 2022**

Annexure A: Practice Directive on Protection of Personal Information and Access to Information
in a Community Scheme No 1 of 2022

1. We wish to submit that the proposed directive needs to be amended for HOA's in para 8 (8.4) which reads as follows:
 - 8.4 Should no provision be made in the Scheme Governance Documentation then similar documents as listed in paragraph 7.4, above for Sectional Title Developments can be requested from the Scheme.
2. It is proposed that the para be amended as follows:

“Should no provision be made in the Scheme Governance Documentation then the provisions of section 26 of the Companies Act prevails.”
3. Section 26 provides for “automatic” access by a member of a company to information on:
 - 3.1. The company's Memorandum of Incorporation and any amendments to it, as well as the Rules made by the company. In other words, the documents which we commonly refer to as “the governing documents” of the company. The records in respect of the company's directors, as prescribed by section 24(3)(b) of the Act.
 - 3.2. The reports to annual meetings, and annual financial statements. **Note:** A member does not have access right to reports which were tabled and considered by the Board in Board meetings.

- 3.3. The notices and minutes of annual meetings, as well as communications regarding resolutions and supporting documents to resolutions which were dealt with at a general meeting. **Note:** A member does not have access right to minutes of Board meetings.
- 3.4. The register of members of the company
4. Section 26(3) allows for a company to expand the categories of information to which the members shall have access. If the MOI does not include any clause which expands the members' rights to access information, they cannot ask for more.
5. Section 26(7) of the Act provides that any person may still have access to information in circumstances where the Constitution of South Africa and the Promotion of Access to Information Act (Act 2 of 2000) would allow such access.
6. Where the information sought relates specifically to financial information, section 31 of the Act expands the rights of members as follows:
 - 6.1. To receive without demand a notice of the publication of any annual financial statements of the company required by this Act, setting out the steps required to obtain a copy of those statements
 - 6.2. On-demand to receive without charge one copy of any annual financial statements of the company required by this Act.
7. In the absence of any provision in the MOI, the statutes are mainly allowing members to have access to information, which would generally be available to all members of the company. Such information includes the governing documents of the HOA, Annual Financial Statements of the company, resolutions considered or adopted by members in general meetings (including the documents or reports in support of such resolutions), minutes of general meetings, notices of general meetings, registers of members and registers of directors.
8. It follows that when members require additional information regarding the affairs of the company (HOA), such members do not have a right to do so in terms of the governing documents or the provisions of the Companies Act. Members must then fall back on the provisions of the Promotion of Access to Information Act (2 of 2000) ("PAIA") to seek access to information that falls outside of the categories of information to which members have "automatic" access. That is the main reason, if not the only reason, why an HOA is required by law to have a PAIA Manual which explains to members which information members access may as of right and what the process is for members to gain access to information which is not readily available in terms of the Companies Act.
9. It needs to be noted, that PAIA does not "create additional rights" for members to have access to specific information. PAIA rather provides a process that is to be followed by any person who seeks information about a company or institution. At best PAIA provides the right to apply to a company or to a Court to gain access to information.
10. Access to records of a private non-profit company such as an HOA is regulated by the provisions of section 50 of PAIA. This section provides that a person requesting access to information from a private body MUST be given access to a record IF the record is required

for the exercise or protection of any rights, and the applicant or requester complies with the procedural requirements in PAIA, and the company does not refuse access to the record based on the grounds provided in the Act.

11. The person or persons seeking access to the information of an HOA must be able to demonstrate which right they are seeking to protect, and why the information is required to protect that right.
12. Therefore, a member can as of right have access to the information as prescribed by the Companies Act, but any request for other information must first be explained in terms of which right the member seeks to protect, which information is reasonably necessary to do that, and how will the information requested assist to achieve the protection of the individual's rights.

We hope that the above clarifies the position of HOA's and that we cannot be regulated by the Sectional Title Management Act as proposed in Para 8 (8.4)

On a point of correctness of the document, in para 4.16, the reference is incorrect "the information in 4.10" must read 4.15

4.16 All the information in 4.10 above is classified as personal information in terms of POPIA and therefore consent must be obtained from the Data Subject unless the exemptions in section 18(4) and/or section 38 of POPIA apply.

Regards

(this carries no signature as it is transferred electronically)

Hannes Hendriks
Chairman RCC

Distr to:

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