

Legal Report July 2021

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Newsletter of Sanlam Corporate: Legal

1. Extension for compilation of manual in terms of the Promotion of Access to Information Act, 2000

In terms of section 51 of the Promotion of Access to Information Act, 2000 (“PAIA”) all private bodies (including retirement funds) must prepare a PAIA manual (“the manual”), containing among others the following information:

- address and contact details of the head of the body;
- a notice regarding the categories of records of the body which are available without a person having to request access in terms of PAIA;
- a description of the records of the body which are available in accordance with any other legislation;
- sufficient detail to facilitate a request for access to records;
- a description of the subjects on which the body holds records and the categories of records held on each subject.

Section 51 of PAIA has further been amended with effect from 30 June 2021 to stipulate that the manual must also include provisions relating to the processing of personal information in terms of the Protection of Personal Information Act.

The Information Regulator has in a media statement issued on 29 June 2021 said that in order to simplify the compilation process of PAIA manuals, it will, as a guide, shortly publish PAIA manual templates.

The manual must be updated on a regular basis, and must be made available:

- on the website, if any, of the private body;

- at the principal place of business of the private body for public inspection during normal business hours;
- to any person upon request and upon the payment of a reasonable amount; and
- to the Information Regulator upon request.

The date of commencement of section 51 was 15 February 2002, but the Minister of Justice and Constitutional Development has granted an exemption from the requirement of compiling the manual and has from time to time extended the exemption. The last extension would have expired on 30 June 2021. The Minister of Justice and Correctional Services has however on 29 June 2021 further extended the exemption for all private bodies, except for certain categories of companies, until 31 December 2021. Retirement funds accordingly now have until 31 December 2021 to comply with the requirements regarding the manual.

2. Guidance Note on exemption from the conditions for lawful processing of personal information

The Information Regulator (“the Regulator”) may in terms of section 37 of the Protection of Personal Information Act (“POPIA”) grant an exemption to a responsible party to process personal information, even if that processing is in breach of a condition for the processing of such information, if the Regulator is satisfied that:

- the public interest in the processing outweighs, to a substantial degree, any interference with the privacy of the data subject that could result from such processing; or
- the processing involves a clear benefit to the data subject or a third party that outweighs, to a substantial degree, any interference with the privacy of the data subject or third party that could result from such processing.

The Regulator has issued a Guidance Note to provide guidance to responsible parties who intend applying for an exemption as aforesaid. Applications for exemption must be made by way of the exemption application form attached to the Guidance Note.

3. Guidance Note on processing of personal information of children

A responsible party is in terms of section 34 of the Protection of Personal Information Act (“POPIA”) prohibited from processing personal information of children, except under the circumstances set out in section 35(1) of POPIA. The Information Regulator (“the Regulator”) may however, upon application by a responsible party, authorise the processing of the personal information of children if the processing is in the public interest and appropriate safeguards have been put in place to protect the personal information of the child.

The Regulator has issued a Guidance Note to guide responsible parties who are required to obtain authorisation from the Regulator to process personal information of children. Applications for authorisation must be made by way of the application form attached to the Guidance Note.

4. Guidance Note on processing of special personal information

Section 26 of the Protection of Personal Information Act (“POPIA”) prohibits the processing of special personal information as set out in section 26, subject to the exceptions provided for in section 27(1). The Information Regulator (“the Regulator”) may however, upon application by a responsible party, authorise the processing of special personal information if such processing is in the public interest and appropriate safeguards have been put in place to protect the personal information of the data subject.

The Regulator has issued a Guidance Note to guide responsible parties who are required to obtain authorisation from the Regulator to process special personal information. Applications for authorisation must be made by way of the application form attached to the Guidance Note.

5. The FSCA’s quarterly feedback on regulatory developments

The Financial Sector Conduct Authority (FSCA) has issued its quarterly feedback on regulatory developments. Aspects that are of interest to the employee benefits industry include the following:

- The FSCA and Prudential Authority (PA) are in the process of developing a Joint Standard relating to outsourcing by insurers. The Standard is largely based on the current prudential outsourcing standard, but has been amended to incorporate various conduct specific requirements.
- Further amendments to the Policyholder Protection Rules and Long-term insurance regulations have been developed. The amendments will, amongst other things, be focused on accommodating various Retail Distribution Review (RDR) developments,

such as carving out advice from intermediary services to facilitate the charging of advice fees, as well as a prohibition on paying commission on investment policies.

6. Appeal to the Financial Services Tribunal in respect of a death benefit allocation

In terms of section 230 of the Financial Sector Regulation Act “a person aggrieved” by a determination of the Pension Funds Adjudicator (“the Adjudicator”) may take the determination on appeal to the Financial Services Tribunal (“the Tribunal”).

The Tribunal has in the matter of Momentum Retirement Annuity Fund v Botha and others ruled that if the Adjudicator orders a retirement fund to re-exercise its discretion with regard to the allocation of a death benefit, the fund does not have a right of appeal to the Tribunal. This is because the fund is not in these circumstances a person aggrieved by the Adjudicator’s determination as contemplated in section 230 of the Financial Sector Regulation Act. The Tribunal in this regard said that “*the decision affects the Fund in the sense that it must reconsider the matter and exercise its discretion again, but it has no legal interest in the allocation*”.

The Tribunal has not dealt with the question what the situation would be if the fund has already made payment to the beneficiaries, and is then subsequently ordered by the Adjudicator to re-exercise its discretion. It is however submitted that the fund should under these circumstances be able to appeal to the Tribunal. The fund would namely suffer a loss if it has to pay the death benefit to different beneficiaries, or in different proportions, and should therefore qualify as a person aggrieved by the Adjudicator’s determination as contemplated in section 230 of the Financial Sector Regulation Act.

The Tribunal in support of its decision amongst others referred to the matter of FundsAtWork Umbrella Provident Fund v Ngobeni, which concerned the withholding of a member’s benefit pending legal action against the member by the employer. The Tribunal in this matter ruled that a fund cannot appeal to the Tribunal against a decision by the Adjudicator that the fund is, in the circumstances of a specific case, not entitled to withhold the benefit. The Tribunal in this regard inter alia said the following:

“The Fund is not in respect of the withholding of the withdrawal benefits a person aggrieved as required by sec 230(1)(a) of the latter Act (the Financial Sector Regulation Act) and has, accordingly, no legal standing.”

“The Fund is not the agent of the employer and is not supposed to act in the interests of the employer and as far as issues between employer and member are concerned, it should act independently.”

7. Draft Prudential Standard – public disclosures by insurers

Section 45 of the Insurance Act provides that insurers must on an annual basis publicly disclose certain information in the form and manner prescribed by the Prudential Authority (PA). The PA has released a draft Prudential Standard for public consultation which sets out the information that insurers are required to disclose to the public in this regard. The purpose of the disclosure is to promote market discipline and an understanding of the risks to which insurers are exposed to, as well as the manner in which those risks are managed.

Insurers must disclose the relevant information through a website that is publicly accessible. The information must be appropriately detailed in order to provide policyholders and market participants with a view of the business activities, risks, performance and financial soundness position, risk exposures and risk management as well as the governance framework of the insurer. Where an insurer deems certain of the information required to be disclosed as confidential or proprietary, the insurer may apply to the PA for the non-disclosure of the relevant information.

Inter alia an insurer must disclose the following information:

- claims from insurance events;
- losses from insurance events which will take place in the future;
- information on the assumed decrement rates used and the method of deriving future mortality and disability rates;
- the assumptions and methodologies employed to value significant guarantees and options;
- the nature, scale and complexity of risks arising from its insurance contracts;
- its risk management objectives and policies, and models and techniques for managing insurance risks, including underwriting processes;
- its use of reinsurance or other forms of risk transfer;
- its insurance risk concentrations;
- a description of the insurer's risk appetite;

- the insurer's overall reinsurance arrangements.

Comments on the draft Standard can be submitted to the PA until 1 September 2021.

Retirement funds or other clients requiring more information should not hesitate to contact their consultant.