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GENERAL NOTICE

GENERAL NOTICE 43 OF 2011

DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

INVITATION FOR PUBLIC COMMENTS ON

THE PROMOTION OF ACCESS TO INFORMATION AMENDMENT BILL, 2011

1. INVITATION

- 1.1 The Department of Justice and Constitutional Development invites interested parties to submit written comments on the draft Promotion of Access to Information Amendment Bill, 2011 (the draft Bill), which is attached as Annexure A. The draft Bill and a note, explaining the background of the proposed amendments, are also available on the website of the Department at the following address: <http://www.doj.gov.za>.
- 1.2 The comments on the draft Bill must be submitted not later than **28 February 2011**, marked for the attention of **Ms T Skhosana**, and –
- (a) if it is forwarded by post, be addressed to –
The Director-General: Justice and Constitutional Development
Private Bag X81
Pretoria
0001
 - (b) if delivered by hand, be delivered at –
Momentum Building
329 Pretorius Street
Pretoria
 - (c) if it is delivered by email, be emailed to thskhosana@justice.gov.za
 - (d) if it is faxed, be faxed to **086 648 7875**
- 1.3 For further information, please do not hesitate to contact Ms T Skhosana at (012) 315 1724 or Ms I Botha at 012 315 1702.

2. BACKGROUND NOTE

- 2.1 The Promotion of Access to Information Act, 2000 (Act No. 2 of 2000) (the Act), was enacted to give effect to the right of access to information held by the State and any other person as contemplated in section 32(2) of the Constitution of the Republic of South Africa, 1996. The Act regulates, among others, its application *vis-à-vis* other legislation. Sections 6 and 86 of the Act are relevant for the purposes of the draft Bill.
- 2.2 Section 6 of the Act provides that nothing in the Act prevents the giving of access to–
- (a) a record of a public body in terms of any legislation referred to in Part 1 of the Schedule; or
 - (b) a record of a private body in terms of any legislation referred to in Part 2 of the Schedule.
- Part 1 of the Schedule lists two Acts, namely, the National Environmental Management Act, 1998 (Act No. 107 of 1998) and the Financial Intelligence Centre

Act, 2001 (Act No. 38 of 2001). Part 2 of the Schedule only lists the National Environmental Management Act, 1998.

- 2.3 Section 86(1) of the Act provides that the Minister of Justice and Constitutional Development must within 12 months after the commencement of the Act introduce a Bill into Parliament amending Parts 1 and 2 of the Schedule to include legislation which provide for or promote access to a record of a public body or a private body, respectively. Section 86(2) of the Act is a transitional provision and provides that until the amendment referred to above takes effect access may be obtained in terms of any other legislation which is not mentioned in the Schedule, but which provides for access to records of a public body or private body in a manner, including the payment of fees, which is not more onerous than the manner in which access may be obtained in terms of the Act.
- 2.4 When reading section 86(2) of the Act it appears that –
- (a) only legislation which provides for access to a record of a public body or private body in a manner that is less onerous than the manner in which access may be obtained in terms of the Act, may be included in the Schedule; and
 - (b) access to records of a public body or private body in terms of legislation not listed in the Schedule, although it meets the criteria in paragraph (a), is only allowed until the amendment of the Schedule in terms of section 86(1) of the Act.
- 2.5 The aim of the Schedule is to provide an individual who wishes to request access to records held by a public body or private body and who is faced with a choice between utilising the Act or another piece of legislation, with an efficient form of reference to enable him or her to make a choice.
- 2.6 Soon after the promulgation of the Act, the Department started a process of collating information to be able to amend the Act as required by section 86(1). In this process a number of practical and legal challenges were experienced, examples of which are the following:
- (a) The word “legislation” in sections 6 and 82 of the Act covers subordinate legislation, such as rules and regulations. This means that all subordinate legislation providing for less onerous measures to obtain access to records must be reflected in the Schedule. If not, these provisions may not be used, which would be unfortunate.
 - (b) It has also proven to be an almost impossible task to identify all such subordinate legislative provisions.
 - (c) Since South Africa has not yet reached a stage where the legislative framework is completed and fully aligned with the Constitution new legislation, containing provisions that promote access to information, is regularly enacted and outdated legislation is regularly repealed. The effect is that the Schedule will continuously be outdated.
 - (d) It has also been noticed that the mere reference in the Schedule to legislation which can be used in addition to the Act will not assist members of the public much since the Schedule only indicates the section and the Act that will apply without indicating which government Department to approach, which records are accessible and what procedure must be followed.
 - (e) Other options have been explored to attain the aim contemplated in the Schedule, such as requiring information officers to list the required legislation in the manuals required in terms of section 14 of the Act, but some of the same problems indicated above will arise.

3. The aim of the Amendment Bill is to –

- (a) delete section 86 of the Act, which contains the transitional provisions;
- (b) delete the Schedule to the Act; and
- (c) provide in section 6 of the Act for access to records of private bodies and public bodies in terms of other legislation.

Annexure

PROMOTION OF ACCESS TO INFORMATION AMENDMENT BILL

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

BILL

To amend the Promotion of Access to Information Act, 2000, so as to further regulate the position of access to records in terms of other legislation; and to provide for matters connected therewith.

PARLIAMENT of the Republic of South Africa enacts as follows:—

Substitution of section 6 of Act 2 of 2000

1. The following section is hereby substituted for section 6 of the Promotion of Access to Information Act, 2000 (hereinafter referred to as the principal Act):

“6. Application of other legislation providing for access

Nothing in this Act prevents the giving of access to[—

(a)]a record of a public body or a private body in terms of any legislation [referred to in Part 1 of the Schedule; or

(b) a record of a private body in terms of any legislation referred to in Part 2 of the Schedule] which provides for access to a record of the said bodies in a manner which, including, but not limited

to, the payment of fees, is not materially more onerous than the manner in which access may be obtained in terms of Part 2 or Part 3 of this Act.”.

Repeal of section 86 of Act 2 of 2000

2. Section 86 of the principal Act is hereby repealed.

Repeal of Schedule to Act 2 of 2000, as amended by section 79 of Act 38 of 2001

3. The Schedule to the principal Act is hereby repealed.

Short title

4. This Act is called the Promotion of Access to Information Amendment Act, 2011.