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**BRIEFING NOTE ON THE RULES OF PROCEDURE FOR APPLICATION TO COURT
IN TERMS OF THE PROMOTION OF ACCESS TO INFORMATION ACT 2 OF 2000¹**

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1. INTRODUCTION

The Department of Justice and Correctional Services will be briefing the Select Committee on Security and Justice on the Rules of Procedure for Application in Court in terms of the Promotion of Access to Information Act 2 of 2000 (**PAIA**). These Rules have been made by the Rules Board for Courts of Law in terms of Section 79 of the Promotion of Access to Information Act 2 of 2000. Below we provide a background against which these Rules need to be understood.

2. BACKGROUND

The **Promotion of Access to Information Act 2 of 2000 (PAIA)** is intended to give effect to the constitutional right of access to information in terms of Section 32 of the Constitution. This Act was enacted to foster a culture of transparency and accountability in private and public bodies, in an effort to prevent the secretive and unresponsive culture that led to an abuse of power and human rights violations in the apartheid era. This Act is one of the progressive laws that extends the right to know beyond the state to privately-held information, and allows the right of access to information to be exercised by people who wish to exercise or protect their rights in that regard. It was also drafted with an express intention of encouraging proactive disclosures of information by government departments in an effort to absolve them of having to deal with individual requests for information that is already in the public domain.

The Rules Board for Courts of Law, a statutory body that falls under the Department of Justice and Correctional Services, recently proposed amendments to the Rules of Procedure for Application to Court in terms of the Promotion of Access to Information Act 2 of 2000. The purpose of these amendments is to bring uniformity to the Court rules in all courts, including Magistrates' Courts, in respect of litigation on access to information requests in South Africa.

These proposed amendments seek to place greater reliance on the Rules Regulating the Conduct of Proceedings in the Magistrates Courts of South Africa (Magistrates Court Rules)

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and the Uniform Rules of Court, with the hope that this will bring uniformity, and more importantly, compliance with the requirements in terms of Section 79 of the PAIA. The Rules Board for Courts of Law proposes the amendments on the basis that different procedures are likely to cause problems to applicants, and give respondents dilatory or obstructive defences.

The implementation of the Promotion of Access to Information Act has revealed challenges that include a basic lack of awareness and understanding of both the right and the law, as well as access to the means to test and expand freedom of information through the courts. Unfortunately, for the man in the street, the promise of this lauded transparency has not translated into any meaningful tool for justice, in the absence of accessible means for exercising or protecting the right of access to information.

While the man in the street has been on the periphery in the 'paper wars', several NGOs, civil society organisations and the media have used this piece of legislation as a 'meaningful tool for justice, transparency and accountability'. To this end, they have collected information that includes PAIA shadow reports, training programmes, tracking tools/systems and have been involved in litigation relating to PAIA. It must also be understood that PAIA litigation is the only mechanism to appeal against decisions or private or public bodies, especially in the light of a growing increase in deemed refusal by public bodies. Any efforts to remove obstacles to applicants bringing PAIA applications before courts are vital to strengthening openness and transparency in our country.

A PAIA Civil Society Network 2013 Shadow Report paints a disappointing picture regarding the release of requested information by information-holders, with a steady decrease in the release of such information from 35% in 2009 to an all-time low of 13% in the 2012/13 reporting period. This report also notes that refusal of requests for access is also on the rise, with 66% of initial requests refused, as well as a 54% substantial increase in deemed refusals.

The Rules Board for Courts of Law recently called for submissions to proposed amendments to the Rules.

3. CLAUSE-BY-CLAUSE ANALYSIS OF THE RULES

Ad Clause 1: Definitions

This clause provides for definitions.

Ad Clause 2: Procedure in an application in terms of the Act

This clause provides that the procedure prescribed in terms of these Rules must be followed in all applications contemplated in terms of Section 78 of PAIA, and that, unless otherwise provided for in the Rules, the rules governing the procedures in the court to which an application in terms of these rules is made shall apply with appropriate changes, unless directed otherwise by the Court



Ad Clause 3: Applications

This clause directs that all applications contemplated in terms of Section 78 of PAIA must be brought on notice of motion and must correspond substantially in accordance with the form set out in Annexure 1 of the Rules. The Clause also sets out other procedural requirements regarding providing addresses for accepting notice of service or process, the filing of notices of opposition and affidavits (and attachments), setting down of applications etc.

Ad Clause 4: Representations

This clause directs that representations contemplated in Section 80 (3)(a) of the Act must be made in writing, under oath, and must be supported by documentary proof, where applicable and must be filed with the clerk of the court at least 5 days before the hearing of the application

Ad Clause 5: Repeal of Rules

This clause provides that the Promotion of Access to Information Act Rules published under Government Notice No R965 OF 9 October 2009 are now repealed.

Ad Clause 6 & 7

These clauses provide for the short title and commencement date

4. KEY ISSUES FOR CONSIDERATION BY THE COMMITTEE

The proposed Rules are expected to provide practical and well-understood arrangements that will not serve as any barrier to individuals or communities who wish to exercise their constitutional right of access to information. However, the following issues may be of concern to the Committee:

- The training and designation of Magistrates to deal with PAIA litigation in the Magistrates' Courts.
- Closely linked to this is the issue of capacitating Magistrates' Courts to deal with a possible substantial increase in PAIA litigation.
- Also linked to this is the concern about possible cost implications that come with this added responsibility of PAIA litigation.
- Possible roles for institutions like the SA Human Rights Commission or Legal Aid South Africa, for example, in providing legal assistance or representation to individuals or communities involved in PAIA litigation. It must also be appreciated that these institutions are buckling under the weight of increased caseloads and dwindling resources.
- Why has it taken so long to promulgate these Rules?
- The previous Rules which are now being repealed provided for the exercise of discretion by Courts in determining of court fees. Why has that clause been omitted in these new Rules?

