

Unlocking labour laws

In each edition *Labour Bulletin* takes queries from trade unionists and workers on matters of labour law. You are welcome to send in your queries and we will get a labour lawyer to give an opinion. Here **Shanta Reddy** answers a query about access to information from a municipality.

The manager of the *Ethekwini municipality has issued a circular blocking the release of documents in the municipality's possession without the permission of the municipality's information officer or a court order. How does this affect the rights of those in dispute with the municipality, who need documents that might help resolve the dispute?*

A municipality may, at times, have a valid reason to limit access to documents, but the circular casts a sweeping net over all documents.

In some cases, the content of documents may be privileged or

confidential, for example when the salaries of third parties may be revealed. Section 9 of the Promotion of Access to Information Act balances the rights of the requester with the reasonable protection of rights of third parties which are, or may be, affected by the disclosure of information that is private, of a confidential commercial nature or central to good governance but not necessarily for public consumption.

Sections 34, 35, 37 and 38 of the Act disallow the release of certain information. These provisions generally protect information of a confidential nature.

On the other hand, the Act allows for the disclosure of documents where the blacking out of confidential information leaves relevant information available to the requester.

The conduct of a municipality must be transparent, as it wears the hats of both an employer and a government structure or public body.

The municipal manager's decision not to release the documents in terms of the Access to Information Act is not unlawful. It may, however, contravene the objects of the Labour Relations Act, the Constitution and the Promotion of Administrative Justice Act.

The latter promotes the right to administrative action that is lawful, reasonable and procedurally fair. It also seeks to create a culture of accountability, openness and transparency in public administration or in the exercise of public power or the performance of

a public function, by enforcing the right to just administrative action. A municipality is bound by these principles of transparency as a public body and employer.

Section 32(1)(b) of the Constitution provides for the application of the right of access to information held by another person to everyone when that information is required for the exercise or protection of any right. An employee in dispute with an employer is entitled to exercise this right.

The Access to Information Act enforces the common law insofar as it protects an employee's right to information. However, it places restrictions on the time taken to release documents.

The Act gives a public body or person holding information 30 days to respond to a request for the release of documents. In that time the public body can raise difficulties over the release of information, for example that it cannot be found. Under section 26, it can request an extension of the 30-day limit.

If the public body fails to respond to the request, the requester must wait for the expiry of the 30-day limit, or an agreed extension of the limit, before asking the public body for its reasons for not releasing the documents. The public body has 30 days to respond to the appeal.

If the request is unhindered, the requester receives the documents in 30 days, but if the documents are not released, he or she has to wait at least 60 days before approaching a court for relief. How does this affect the speedy resolution of disputes?

Ordinarily in disputes, including dismissal disputes, an employee's common law right to natural justice allows him or her to prepare, to have access to and examine all relevant documents and to have his or her version properly aired. This enables the employee to properly present a version and test the employer's version.

If attorneys represent the parties, they agree between themselves the time periods for the release of information. This generally does not take more than a month and the dispute resolution process proceeds as normal.

Where, however, the employer representative is instructed not to release the documents, for example, the employer alleges that the documents are not relevant or privileged, the parties can place this issue before the presiding officer in the dispute resolution process. The officer will decide on the relevance of the documents, and may even suggest ways in which to protect privileged or confidential information.

This issue may not take long to resolve and the dispute resolution process may proceed with little delay. Often the presiding officer is best placed to determine the relevance of documents to each party's case.

But not all documents requested for the resolution of disputes are privileged or contain the personal information of third parties. Often they are pertinent to the requester. It can usually be said that ownership of these documents vests jointly in

the employer and requester. Often, however, only the employer has copies of the documents.

Section 11 of the Access to Information Act gives greater protection to information personal to the requester. The requester's right to such information is not affected by his reasons for the request or the information officer's belief as to these reasons. In other words, once the procedural requirements are fulfilled, the public body must release the information.

Strategically, however, an employer can refuse to release these documents, especially when they reveal weaknesses in the employer's version.

Where the information officer (rightly or wrongly) refuses to release the documents, the employee will have to wait at least 60 days before approaching a court for relief.

If the documents are lawfully withheld, the court will confirm this. Where they are unlawfully withheld, exhausting the time periods stipulated in the Access to Information Act and the delays in awaiting a court date will have the effect of tiring out the requester.

The court process to determine the non-release of documents, as an opposed application, is in itself lengthy.

So while an employee may eventually receive the documents, the time this takes frustrates the speedy resolution of the dispute – generally a primary aim of labour law. The requester is often emotionally, financially and psychologically drained and 'throws

in the towel'.

The right of access to information held by a public or private body may also be limited to the extent that this is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, under section 36 of the Constitution.

In addition to the above difficulties, the decision to force a requester to obtain a court order directing the release of information takes away from a presiding officer, in resolving a dispute, his ordinary discretion to deal with applications for information disclosure.

Not only does this further delay dispute resolution and increase litigation costs, it taxes an already over-burdened court system.

The Ethekwini municipal manager's decision undermines the Promotion of Administrative Justice Act by making it possible to avoid transparency and accountability.

The Access to Information Act seeks to protect South African citizens from "the system of government in South Africa before 27 April 1994, which amongst other things, resulted in a secretive and unresponsive culture in public and private bodies which often led to an abuse of power and human rights violations".

Ironically, recourse to this Act may result in a secretive, unresponsive culture in the municipality, the abuse of power and human rights violations. LB

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