

30 APRIL 2020

ENVIRONMENTAL ALERT

IN THIS ISSUE >

A climate change response balancing act – disclosure of commercial greenhouse gas information

In the combat against climate change, the reporting and processing of information on greenhouse gas (GHG) emissions is considered fundamental. This sentiment lies at the heart of the United Nations Framework Convention on Climate Change (UNFCCC), which was further fortified at COP 21 upon the adoption of the international Paris Agreement. Globally, this has rapidly translated into greater accountability and transparency, with corporate actors facing reputational harm absent evidence of increased efforts to combat climate change. Locally, it has filtered through in the promulgation of, amongst others, the Greenhouse Gas Emission Reporting Regulations (GHG Regulations) and National Pollution Prevention Plan Regulations (PPP Regulations). The question that, however, arises in the disclosure of GHG reporting information is whether enhanced transparency in the interest of climate change mitigation trumps the need to protect commercially sensitive or confidential information.

FOR MORE INSIGHT INTO OUR
EXPERTISE AND SERVICES

CLICK HERE 



CLIFFE DEKKER HOFMEYR

A climate change response balancing act – disclosure of commercial greenhouse gas information

It is a conundrum that has recently been at the forefront of the South African climate change transparency dialogue, with the Minister of Environment, Forestry and Fisheries ordering the disclosure of previously redacted GHG emission information of 16 large-scale emitters

In the combat against climate change, the reporting and processing of information on greenhouse gas (GHG) emissions is considered fundamental. This sentiment lies at the heart of the United Nations Framework Convention on Climate Change (UNFCCC), which was further fortified at COP 21 upon the adoption of the international Paris Agreement. Globally, this has rapidly translated into greater accountability and transparency, with corporate actors facing reputational harm absent evidence of increased efforts to combat climate change. Locally, it has filtered through in the promulgation of, amongst others, the Greenhouse Gas Emission Reporting Regulations (GHG Regulations) and National Pollution Prevention Plan Regulations (PPP Regulations). The question that, however, arises in the disclosure of GHG reporting information is whether enhanced transparency in the interest of climate change mitigation trumps the need to protect commercially sensitive or confidential information.

It is a conundrum that has recently been at the forefront of the South African climate change transparency dialogue, with the Minister of Environment, Forestry and Fisheries (Minister) ordering the disclosure of previously redacted GHG emission information of 16 large-scale emitters (the Emitters).

Background

The Minister's decision (Decision) was made in relation to an appeal lodged by the non-profit organisation, Centre for Environmental Rights (CER), in terms of the Promotion of Access to Information Act 2 of 2000 (PAIA) against the decision of Department of Environment, Forestry and Fisheries' (DEFF) Deputy Director General: Climate Change, Air Quality and Sustainable Development (DDG) to grant partial access to specific GHG emission-related information of the Emitters.

The CER's initial PAIA request sought access to, amongst other things, information required to be submitted by the Emitters to DEFF in terms of the GHG Regulations and PPP Regulations, including GHG emission data reports (GHG Reports), pollution prevention plans (PPPs) and annual progress reports (APRs).

Whilst the DDG granted full access to APRs available for some of the Emitters, the remainder of the APRs, available PPPs and submitted GHG Reports were redacted prior to their release to protect "financial or commercial interest(s)" and avoid compromising any "competitive advantage" that has or may be achieved in the future.

Although the Minister agreed with the release of redacted GHG Reports, she ordered disclosure of certain information

CDH is a Level 1 BEE contributor – our clients will benefit by virtue of the recognition of 135% of their legal services spend with our firm for purposes of their own BEE scorecards.

A climate change response balancing act – disclosure of commercial greenhouse gas information...*continued*

Although still balancing commercial interest against that of the public, the Decision demonstrates the increasingly moderate approach to providing access to emission-related information of corporate entities.

not previously made available by the DDG in relation to the PPPs and APRs, including projected emissions and a breakdown of annual anticipated and actual emission reductions.

In reaching her Decision in relation to the GHG Reports, the Minister noted that the value of activity data (including information on raw materials utilised, fuel consumed, production rates etc.) had justifiably not been disclosed, as it *“provides process related information which may be related to competition issues such as company investment decisions, market share, competitive advantage and trade secrets”*.

On the other hand, she found that releasing the previously redacted PPP and APR information serves the public interest, which is paramount under PAIA, and aligns with PAIA's object of transparency, accountability and effective governance.

Although still balancing commercial interests against that of the public, the Decision demonstrates the increasingly moderate approach to providing access to emission-related information of corporate entities – an approach that is evidently supported by the applicable regulatory framework and international reporting standards.

Regulatory framework on GHG reporting

The purpose of the GHG Regulations is essentially to create a national database by introducing a single national GHG emissions reporting system for the transparent reporting of GHG emissions.

This information will go towards informing policy formulation and legislation and will be used to ensure that South Africa meets its reporting obligations under the UNFCCC and treaties to which it is bound.

In further enhancing transparency and accountability, the PPP Regulations regulate the submission and approval of pollution prevent plans aimed at the mitigation of priority air pollutants at company level.

The GHG Regulations and PPP Regulations require entities conducting or controlling activities identified by the Intergovernmental Panel on Climate Change (which includes activities such as electricity and heat production; petroleum refining and mining; and industrial processes such as cement production) to submit emissions data, monitoring methodologies and mitigation measures in relation to priority GHGs to DEFF.

Data gathered through the GHG Regulations and PPP Regulations is integral to and will continue to inform South Africa's climate change response, especially in determining whether South Africa is meeting its obligations under the Paris Agreement and achieving the objectives of its Nationally Determined Contribution.

Regulatory framework on disclosure of commercial information

PAIA distinguishes between disclosure of information by public and private bodies, providing specific grounds for refusing

A climate change response balancing act – disclosure of commercial greenhouse gas information...*continued*

Under PAIA, reliance on the Commercial Grounds of Refusal is subject to the proviso that a PAIA Request may not be refused if it includes environmental testing results and its disclosure would reveal a serious public safety or environmental risk.

access. In both instances, access to “commercial information” may be refused if it contains trade secrets of a third party or private body; financial, commercial, scientific or technical information which, if exposed, would be likely to cause harm to the entity’s commercial or financial interests; or information which could reasonably be expected to disadvantage the entity in contractual or other negotiations or prejudice it in commercial competition if disclosed (Commercial Grounds of Refusal). It must be noted, however, that these grounds are extensively qualified in PAIA’s other regulatory provisions.

Under PAIA, reliance on the Commercial Grounds of Refusal is subject to the proviso that a PAIA request may not be refused if it includes environmental testing results and its disclosure would reveal a serious public safety or environmental risk. Additionally, PAIA imposes a mandatory obligation on public and private bodies to disclose information where it would *inter alia* reveal evidence of substantial legal non-compliance or an imminent and serious environmental risk, and the public interest in the disclosure thereof clearly outweighs the harm contemplated – the latter which the Minister agreed in her Decision mandated the release of the redacted PPP and APR information.

Although the GHG Regulations and PPP Regulations protect the information submitted to DEFF as confidential, both allow for the disclosure of information where such disclosure is in compliance with the provisions of any law (which would include PAIA); the disclosure has been ordered by a court of law; or the disclosure is required for purposes of the administration of justice. What may constitute confidential information in terms of the GHG Regulations appears to be subject to ensuring that such disclosure of information in the public domain does not promote unfair competition in terms of the Competition legislation; does not contravene section 36 of PAIA (being the mandatory protection of commercial information); or does not contravene section 17 of the Statistics Act 6 of 1999. The National Environmental Management Act 107 of 1998 also provides that “commercially confidential information” must not be considered to include details of emission levels despite the provision of any other law.

We have also seen these sentiments of environmental information disclosure in the public interest infiltrate practice, with both the DEFF and Department of Human Settlements, Water and Sanitation previously making environmental authorisations, waste management licenses, atmospheric emission licenses and water use licences automatically available under section 15 of PAIA.

A climate change response balancing act – disclosure of commercial greenhouse gas information...*continued*

Whilst it is evident that the applicable regulatory framework calls for responsible information dissemination in the interest of protecting commercial interests, it is equally apparent that it is extensively qualified by environmental considerations and the public interest.

Conclusion

Whilst it is evident that the applicable regulatory framework calls for responsible information dissemination in the interest of protecting commercial interests, it is equally apparent that it is extensively qualified by environmental considerations and the public interest.

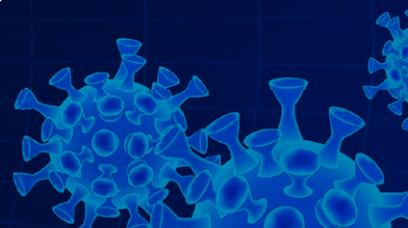
The Decision should therefore alert all qualifying industrial operators or other large-scale emitters of the material importance of ensuring compliance with their reporting obligations under the GHG Regulations and PPP Regulations, with some of this information potentially being open to public access. Additionally,

keeping and regularly updating PAIA manuals is necessary to ensure that commercial interests are sufficiently protected from the outset. This is particularly considering the international movement towards companies providing information on climate change in their corporate reporting; and increased climate change activism amongst non-governmental organisations and private persons against sectors whose activities and operations result in greenhouse emissions, including energy production, mining, manufacturing and refineries.

Alecia Pienaar, Laura Wilson and Margo-Ann Werner

CDH'S COVID-19 RESOURCE HUB

Click here for more information 



OUR TEAM

For more information about our Environmental practice and services, please contact:



Allan Reid
Mining & Minerals Sector Head
Director
Corporate & Commercial
T +27 (0)11 562 1222
E allan.reid@cdhlegal.com



Margo-Ann Werner
Senior Associate
T +27 (0)11 562 1560
E margo-ann.werner@cdhlegal.com



Alecia Pienaar
Associate
T +27 (0)11 562 1017
E alecia.pienaar@cdhlegal.com

BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 1 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdh Stellenbosch@cdhlegal.com

©2020 8886/APR

