



**INFORMATION
REGULATOR
(SOUTH AFRICA)**

*Ensuring protection of your personal information
and effective access to information*

FORM H

(Sub-rule 9.2)

ENFORCEMENT NOTICE

(In terms of section 77J of Promotion of Access to Information Act 2 of 2000, as amended)

[Complaint or Any Matter]

REF NO:	CI 24/21
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NAME OF COMPLAINANT	Hardwick Trading Pty) Ltd, represented by Mr Clive Martin Hardwick
NAME OF THE RESPONDENT (BODY)	Risa Audio Visual Licensing NPC

1. **BE PLEASED TO TAKE NOTICE** that the Information Regulator (Regulator), after having considered the recommendation of the Enforcement Committee, hereby decides to-

1.1 set aside the decision which is the subject of the complaint; AND

1.2 direct the head of the private body to grant access to the records which are the subject of the complaint.

2. REASONS FOR THE NOTICE

Please note that the reasons for reaching the above-mentioned decision are as follows:

2.1 On 01 April 2021, a request was made by the complainant in terms of Promotion of Access to Information Act 2 of 2000 (PAIA), to the head of the private body for:

“Records of payment distributions made to any third party in respect of license fees or copyright royalties received by RAV from broadcasters and other users for the public performance of music videos created by Bula Records, which was assigned to Hardwick Trading on 26 February 2015.”

2.2 The complainant further clarified that:

“the records requested are for the broadcast usage reports for the years 2009, 2010, 2011, 2012, 2013 and 2014 or any prior periods for distribution payments made from 2014 to date.”

2.3 And further, that:

“this information is required for Hardwick Trading to claim license fees and royalties from third parties who have been unjustly enriched.”

2.4 On 28 April 2021, the head of the private body refused to grant access to the information to the complainant on the basis that the complainant had failed to provide a valid assignment of rights from Bula Records Pty (Ltd) to the Chieftain Family Trust. However, on 11 July 2022, the private body, through its attorneys, undertook to grant access and disclose the playlist from broadcasters to the complainant upon payment of an access fee of R615.00. The complainant paid the access fee and was given access to certain records; the complainant found that the disclosed records were inaccurate and/or incomplete. On 10 August 2022, the private body undertook to instruct its service provider to extract additional information from the playlist which relates to other broadcasters as soon as it was in the positions to do so; to no avail.

2.5 The basis for the complaint is the refusal of access to records relating to the payment of the license fees and copyright royalties collected and held by the private body on the single ground that the complainant had failed to provide a valid

assignment of rights from Bula Records to the Trust. The private body basically disputes the validity of the assignment of rights from Bula Records to the Trust.

3. Legal framework

3.1 In terms of section 32(1)(b) of the Constitution:-

“Everyone has the right of access to any information that is held by another person and that is required for the exercise or protection of any rights”,

and section 50(1) of PAIA provides that:-

“ *A requester must be given access to any record of a private body if-*

- (a) that record is required for the exercise or protection of any rights;*
- (b) that person complies with the procedural requirements in this Act relating to a request for access to that record; and*
- (c) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part.”*

3.2 The Regulator is satisfied that the complainant complied with the procedural requirements of PAIA, and that insofar as the complaint was lodged with the Regulator outside the prescribed period of one hundred and eighty (180) days, the Regulator agrees that the condonation was properly granted.

3.3 The Regulator is also satisfied that the private body did not refuse access to the complainant on one of the grounds in sections 63 to 69 of PAIA.

3.4 The Regulator rejects reliance on section 65 of PAIA. This is because the private body did not refuse access to the records because they are confidential to Gallo.

3.5 In any event Gallo did not explain why the disclosure of records would constitute breach duty of confidence. The burden of proof is upon the person relying on a ground of refusal to justify the refusal: section 81(3)(a).

3.6 The Regulator therefore had to consider whether the complainant had demonstrated the third requirement for access, namely that the records are required for the exercise or protection of any rights. As the private body had disputed a valid assignment of rights from Bula Records to the Trust, the existence of the rights is the first matter to be considered.

3.7 In *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others*, 2001 (3) SA 1013 (SCA), the Court explained this requirement for access to records in the context of section 32 of the Constitution, as follows:

“[28] Information can only be required for the exercise or protection of a right if it will be of assistance in the exercise or protection of the right. It follows that, in order to make out a case for access to information in terms of s 32, an applicant has to state what the right is that he wishes to exercise or protect, what the information is which is required and how that information would assist him in exercising or protecting that right.”

3.8 Although the impression is created that the right to which the request for information relates, must be that of the requester, in *Independent Newspapers (Pty) Ltd & Others v The African National Congress & Another*, [2011] ZAWCHC 436, the Court accepted that the “rights” that may be protected or exercised under PAIA are not confined to those of the requester only, and referred to Constitutional Law of South Africa **Woolman et al, 2nd Ed., OS 2002, Vol 3, para 62.7, n 5, in support thereof**. According to the Investigation Report, in its PAIA request form the complainant indicated that the rights to be exercised or protected are copyright and intellectual property rights as assigned to it on 26 February 2015.

3.9 The assignment of rights by Bula Records to the Trust, reads as follows:

“Assignment of copyright of sound recordings:

3.9.1 Pursuant to the unanimous decision of the directors and shareholders of Bula Records (Pty) Ltd, all copyright owned or controlled by the company is assigned to the shareholders in equal proportion.

3.9.2 It is noted that Times Media (Pty) Ltd acquired the rights to the Bula repertoire on the 20th October 2014 and is entitled to all royalties earned after this date

3.9.3 The rights being hereby assigned are the rights owned by Bula Records (Pty) Ltd as at the above-mentioned date for royalties which are paid in arrears and are still due for payment at this date.

3.9.4 These rights include, but are not limited to, public performance and broadcast rights which are payable for sound recordings and music videos.

3.9.5 It is recorded that the shareholders as at today’s date are:

a. *Harvey Wilson Roberts*

b. *Chieftain Family Trust*

3.9.6 *For the avoidance of doubt all copyright royalties which become due to Bula Records shall forthwith be collected by the above-named shareholder and shall be paid to these shareholders, or their nominees, in equal amounts.*

3.9.7 *The shareholders accept this assignment as full and final payment of any amounts payable to them by Bula Records (Pty) Ltd.”*

3.10 In terms of section 22(3) of the Copyright Act, 98 of 1978, “*No assignment of copyright and no exclusive licence to do an act which is subject to copyright shall have effect unless it is in writing and signed by or on behalf of the assignor, the licensor or, in the case of an exclusive sublicense, the exclusive sublicensor, as the case may be.*”

3.11 The head of the private body correctly submitted that in order to constitute a valid assignment, the assignment must be:-

3.11.1 in writing;

3.11.2 signed by or on behalf of the assignor;

3.11.3 sufficiently set out the subject-matter of the assignment (*Comcorp (Pty) Ltd v Quipmor CC*, 1998 (2) SA 599 (D) at 602); and

3.11.4 based on an agreement to cede and assign between the assignor and the assignee (*Accesso CC v Allforms (Pty) Ltd*, 1998 JDR 0790 (T) at [17] and [18]).

3.12 The head of the private body further submitted that as the requirements of section 22(3) were not complied with, the assignment from Bula Records to the Trust was invalid. This is because there is an inherent contradiction in the document as the heading does not correspond with paragraph 4 of the document, and the subject-matter is accordingly not sufficiently set out, and further that the document is not signed by Bula Records, but by the complainant.

3.13 There is no merit in these objections. *Ex facie* the document, the complainant signed the assignment as director of Bula Records and not in his personal capacity. Where a heading conflicts with the body of the contract, the body of the contract prevails. *Sentinel Mining Industry Retirement Fund v WAZ Props*

(Pty) Ltd, 2013 (3) SA 132 (SCA) at [10].

3.14 The assignment complies with the requirements of section 22(3) of the Copyright Act.

3.15 The Regulator further took into consideration that two payments of royalties had been made to the complainant, as well as to Mr Roberts, the other party to whom Bula Records assigned its rights, as evidence that the complainant has rights within the meaning of section 50(1)(1).

3.16 It follows that the assignment by Bula Records to the Trust is valid and the refusal to provide access to the records on this ground must fail.

3.17 Because the first assignment was valid, the Trust was the holder of the relevant rights and was able and entitled to make a further assignment thereof to the complainant.

3.18 The records sought by the complainant and the reasons given why the records are required, have been set out in paragraphs 3 to 5 above; it has also been recorded herein that the complainant has disclosed a right to copyright, to be exercised or protected in relation to any licence fees and royalties that may be due to the Trust, and subsequently assigned to the complainant.

3.19 During the public hearing conducted by the Regulator, the head of the private body was asked if any payments were made to Gallo Music (the successor to Times Media) in respect of the Bula Records repertoire post 2014, and his response was “yes”, because the catalogue is now owned by Times Media;

3.20 The head of the private body further admitted that there are instances in which claimants do not submit their claims against a playlists paid for by the broadcasters, and that the monies collected from the South African Broadcasting Corporation (SABC) would then be distributed amongst the members of the private body; and

3.21 The evidence from the SABC supports a conclusion that there may be accrued revenue due and payable to the complainant.

3.22 It is clear from the assignments, the Sale Agreement read with the Collection Agreement and the evidence recorded in the Investigation Report, that the records requested are reasonably required to enable the complainant to exercise and/or protect its copyright rights as assigned to it on 26 February 2015, and to claim

license fees and royalties, if any, from third parties, including Gallo Records under the Collection Agreement.

3.23 It is not for the Regulator to consider whether the complainant will ultimately successfully exercise or protect its rights, whether due to prescription or for any other reason.

3.24 The Regulator concludes that the complainant has satisfied the requirements of section 50(1) and should be granted access to the information requested.

4. Reliance on additional grounds

4.1 The questions for consideration are the following:

4.1.1 Can the head of the private body augment its reasons/grounds for refusing access?

4.1.2 Can the Regulator consider reasons/grounds for refusal which fall outside of what was initially submitted to the Regulator in terms of section 77A?

4.2 Section 77A of PAIA provides that a requester or third party, aggrieved by a decision of the head of a private body in relation to a request for access to a record of that body, may lodge a complaint with the Regulator within one hundred and eighty (180) days of the decision complained against.

4.3 At this point it must be remembered that:

4.3.1 Bula Records sold its business to Times Media on 20 September 2014, which included the right to all royalty payments from the effective date of the sale. It excluded the right to royalty payments prior to the effective date of the sale and provided for the conclusion of a Collection Agreement.

4.3.2 Bula Records assigned to the Chieftain Family Trust of *“the needletime and other copyright royalties due to Bula Records for the period prior to the effective date of the sale.”*

4.3.3 The Trust thereafter assigned to the complainant *“all its rights to income from sound recordings owned by it to the complainant.”*

4.3.4 The head of the private body refused to grant access to the records to the complainant “*for the following reason*:

1. *Failure to provide a valid assignment of rights from Bula Records to Chieftan Family Trust.*”

4.4 The head of the private body advanced additional grounds for the refusal of access to the records held by the private body. In this regard, the head of the private body claimed that:

4.4.1 All distributions in relation to the Bula related repertoire (after Gallo Records acquired Bula) remained confidential and was thus commercially sensitive information to Gallo Records as a member of RAV and may not be disclosed to third parties without the consent of Gallo Records;

4.4.2 The complainant requested the information for an ulterior motive; and

4.4.3 The requested information was the subject matter before the courts and the complaint lodged with the Regulator was an attempt to circumvent and undermine the autonomy and the authority of the courts.

4.4.4 A number of new arguments were also raised.

4.5 Section 56(3) enjoins the head of the private body to state adequate reasons for the refusal of access, including the provisions of PAIA relied on. The obvious purpose for this requirement is so that the requester knows and understands why access has been refused, and if he is aggrieved thereby, that he is able to formulate his complaint to the Regulator about “*the decision ... to refuse a request for access*”. (own emphasis). See: section 77A(2)(d).

4.6 It must be highlighted that the jurisdictional requirement for the investigation by the Regulator relates solely to the refusal of the head of the private body to give access to records on the grounds that the Trust had no valid assignment of rights from Bula Records. In this matter, it is exactly the notification of this decision of the head of the private body that established the competency of the Regulator to investigate the complaint in terms of section 77A.

4.7 Consequently, any new ground for refusal raised during the investigation must fall outside the scope of sections 77A and 56(1). Investigations conducted by the Regulator must therefore be limited to the original ground of refusal as notified by the head of the private body.

4.8 This was confirmed in the Referral Notice to the Enforcement Committee, and more particularly in paragraph 6 which reads as follows: “*The head of the private body, Adv Sibisi, refused access to the records on the basis that the complainant failed to provide a valid assignment of rights from Bula Records to the Chieftain Family Trust and it is the above-mentioned decision only, that is subject to review or investigation by the Regulator.*”

4.9 The Regulator finds that it will not be appropriate for it to consider the new reasons advanced by the head of the private body as this did not form the basis for the refusal which resulted in the complaint which was subsequently lodged with the Regulator.

5. Report of the Regulator’s PAIA Committee not reviewable

5.1 The head of the private body argued that the findings and recommendations in the investigation report ought to be reviewed and set aside by the Enforcement Committee.

5.2 The Enforcement Committee is established in terms of section 50 of the Protection of Personal Information Act, 4 of 2013 (“POPIA”). The Enforcement Committee is “*a creature of statute*” and derives its powers from POPIA and PAIA. Section 92 of POPIA sets out the matters that may be referred to the Enforcement Committee, and section 93 delineates the functions of the Enforcement Committee. In summary, the Committee must consider all matters referred to it by the Regulator in terms of section 92 or PAIA, and make a finding in respect thereof, and may make any recommendation to the Regulator necessary or incidental to any action that should be taken against a responsible party, information officer or head of a private body, as the case may be.

5.3 The Enforcement Committee does not review the preliminary findings and recommendations in the investigation report, and is not empowered to do so.

6. Having considered the report of the Enforcement Committee the Regulator has made the following findings: -

- 6.1 The complainant (Hardwick Trading (Pty) Ltd) complied with the procedural requirements of PAIA and insofar as it did not do so, condonation was correctly granted.
- 6.2 Access to the records was not refused in terms of any grounds for refusal contemplated in Chapter 4 of Part 3 of PAIA.
- 6.3 The refusal by the head of the private body (Risa Audio Visual Licensing NPC) to grant access to records held by the private body on the basis that there is no valid assignment of rights from Bula Records to Chieftain Family Trust, is not sustained.
- 6.4 The complainant is the holder of the copyright and intellectual property rights that originally vested in Bula Records (Pty) Ltd.
- 6.5 The records requested by the complainant and held by the private body are reasonably required for the exercise or protection of the licensing and copyright rights that were assigned to the complainant by the Chieftain Family Trust on 26 February 2015.
- 6.6 The complainant is entitled to be granted access to the requested records.

7. Based on the above-mentioned findings, the Regulator decides as follows:

- 7.1 The decision of head of the private body to refuse access to the records for the reason that the complainant failed to provide a valid assignment of rights from Bula Records to the Chieftain Family Trust, is hereby set aside;
- 7.2 The head of the private body is directed, in terms of s 77J(1)(a) and (b) of PAIA, to:-
 - 7.2.1 Grant access to the complainant to the complete and accurate records of payment distributions made to any third party in respect of license fees or copyright royalties received by the private body from broadcasters and other users for the public broadcast of music videos created by Bula Records (Pty) Ltd, in respect of the broadcast usage reports for the periods October 2009 to October 2014 or any prior periods in respect of which distribution payments were made from 2014 to the date of submission of the PAIA request.

8. COMPLIANCE PERIOD

The head of the private body is hereby directed to comply with this Enforcement Notice within thirty-one (31) days from the date of receipt of this Notice.

9. REVIEW OF THE DECISION OF THE INFORMATION REGULATOR

9.1 Please be advised that a head of a private body has the right to apply to a court with jurisdiction for appropriate relief, in terms of section 82 of PAIA, should he or she be aggrieved by a decision of the Regulator in this Notice.

9.2 The application, in terms of section 82 of PAIA, must be brought to a court having jurisdiction for appropriate relief within a period of one hundred and eighty (180) days from date of receipt of this Notice.

10. CONSEQUENCES FOR NON-COMPLIANCE WITH AN ENFORCEMENT NOTICE

Please note that the head of a private body who fails to comply with this Enforcement Notice is guilty of an offence and liable upon conviction to a fine or to imprisonment for a period not exceeding three (3) years or to both such a fine and imprisonment.

DATED at JOHANNESBURG on this the 04th day of April 2023



ADV. PANSY TLAKULA

CHAIRPERSON OF THE INFORMATION REGULATOR