



environmental affairs

Department:
Environmental Affairs
REPUBLIC OF SOUTH AFRICA

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Reference: PAIA191299

Enquiries: Mark Jardine

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The Centre for Environmental Rights

Springtime Studios

1 Scott Road

Observatory

7925

Telephone: (021) 447 1647

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Dear Mr Lloyd

RE: REQUEST FOR ACCESS TO RECORDS IN TERMS OF THE PROMOTION OF ACCESS TO INFORMATION ACT 2 OF 2000 BY THE CENTRE FOR ENVIRONMENTAL RIGHTS RELATING TO THE KENDAL COAL-FIRED POWER STATION (“RECORDS”)

1. Your application for access to information in terms of the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000) (“PAIA”), dated 3 February 2020, has reference.
2. You have requested access to the following information or records:

A. In an official media statement from the Department of Environment, Forestry and Fisheries (the “Department”), dated 21 December 2019, titled “Environment, Forestry and Fisheries on on [sic] compliance notice issued to Kendall [sic] Power Station management” (“the Media Statement”), it was reported that the Green Scorpions had issued a compliance notice to the management of Eskom’s Kendal power station requiring a maintenance plan to be submitted by 12 January 2020. It also states that the “timing of the implementation of this plan rests with the power utility”. We understand from subsequent communication with Eskom representatives, which has also been confirmed in the media, that it had applied to vary the compliance notice and that it had obtained an extension from the Department to submit the maintenance plan by 31 January 2020.

In the light of the above, the following documents are requested:

- I. A copy of the compliance notice issued by the Green Scorpions, in terms of section 31L of the National Environmental Management Act, 1998, to Eskom management at Kendal power station on or about 21 December 2019.*
- II. A copy of the maintenance plan which should have been submitted by Eskom management at Kendal power station by the extended deadline of 31 January 2020.*
- III. Objections to the compliance notice lodged by Eskom management at Kendal power station and the Department’s response to such objections.*

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IV. All other correspondence exchanged between Eskom management and the Department in relation to this compliance monitoring and enforcement action; including but not limited to the following:

- a. Eskom’s application to vary the compliance notice;
- b. the Department’s response to this application;
- c. any representations made by Eskom purporting to show good cause for an extension of time to submit the maintenance plan; and
- d. the Department’s response to this request for an extension of time.

3. In considering your request in terms of PAIA, I have considered the following provisions:

3.1 The Promotion of Administrative Justice Act 3 of 2000 (PAJA) defines a decision as any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision, *inter alia*, to impose a condition or restriction or make a declaration, demand or requirement.

3.2 Section 44(1)(a)(ii) of PAIA provides the Information Officer with the discretion to refuse a request for access to a record of a public body if the record contains an account of a consultation, discussion or deliberation that has occurred, including, but not limited to, minutes of a meeting, for the purpose of assisting to formulate a policy or take a decision in the exercise of a power or performance of a duty conferred or imposed by law.

3.3 Section 23(1)(b)(ii) of PAIA provides that if there are reasonable grounds for believing that the record does not exist the information officer of a public body must, by way of affidavit or affirmation, notify the requester that it is not possible to give access to that record. Such notice is to be regarded as a decision to refuse a request for access to the record.

3.4 After due consideration of your application, and the relevant provisions of PAIA and PAJA (as set out above), I have exercised my discretion and decided as follow:

| Requested information | Decision |
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| <i>A copy of the Compliance Notice issued by the Green Scorpions</i> | Access granted. The Department considers a Final Compliance Notice, which includes final instructions from the environmental authority to the recipient aimed at bringing them back into compliance, as falling within the ambit of the definition of ‘decision’ in terms of PAJA. |
| <i>A copy of the maintenance plan</i> | Access refused in terms of section 23(1)(b)(ii) – Record does not exist. |
| <i>Objections to the compliance notice</i> | Access refused in terms of section 44(1)(a)(ii) of PAIA. The application for objection contains an account of a consultation, discussion or deliberation that has occurred for the purpose of assisting to take a decision i.e. to grant the objection. |
| <i>The Department’s response to such objections</i> | Access refused in terms of section 23(1)(b)(ii) – Record does not exist. |
| <i>All other correspondence exchanged between Eskom management and the Department:</i> | Access refused in terms of section 44(1)(a)(ii) of PAIA. The application for variation contains an account of a consultation, discussion or deliberation that has occurred for the purpose of assisting to take a decision i.e. to grant the variation. |
| <ul style="list-style-type: none"> • <i>Eskom’s application to vary the compliance notice</i> • <i>the Department’s response</i> | Access granted. The Department considers the approval of the |

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| | |
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| <i>to this application</i> | variation, which includes final instructions from the environmental authority to the recipient aimed at bringing them back into compliance, as falling within the ambit of the definition of 'decision' in terms of PAJA. |
| <ul style="list-style-type: none"> • <i>any representations made by Eskom purporting to show good cause for an extension of time to submit the maintenance plan</i> | Access refused in terms of section 44(1)(a)(ii) of PAIA. Representations made to show good cause for an extension of time fall within the ambit of a consultation, discussion or deliberation that has occurred for the purpose of assisting to take a decision i.e. to grant the variation. |
| <ul style="list-style-type: none"> • <i>the Department's response to this request for an extension of time</i> | Access granted. The Department considers the approval of the variation, which includes final instructions from the environmental authority to the recipient aimed at bringing them back into compliance, as falling within the ambit of the definition of 'decision' in terms of PAJA. |

4. Should you wish to appeal this decision you are referred to sections 74 and 75 of PAIA which allows you to lodge an internal appeal in the prescribed form to the Information Officer of the Department within sixty (60) days. The subject and reasons for the internal appeal must be clearly indicated. In addition, copies of the above stated documents should be emailed to the Director: Appeals, Mr Mokete Rakgogo (email address: MRakgogo@environment.gov.za).

Yours faithfully

Not signed due to COVID-19 lockdown

**DEPUTY INFORMATION OFFICER
DEPUTY DIRECTOR-GENERAL: REGULATORY COMPLIANCE AND SECTOR MONITORING
DEPARTMENT OF FORESTRY, FISHERIES AND THE ENVIRONMENT
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DATE:**