ACCESS REQUIRED IN TERMS OF COMPANIES ACT

S176 OF COMPANIES ACT, 71 OF 2008

The Companies and Intellectual Property Commission OR Takeover Regulation Panel

May issue a summons to any person

to appear before the Commission or Panel — OR — to deliver or produce documents for purposes of an investigation/ inspection carried out by them.

S417 OF COMPANIES ACT, 61 OF 1973

Section 417 of the Companies Act, 1973, has remained in force after the Companies Act, 2008, came into effect; and this will be until the Minister determines, by notice in the Gazette, that the section will cease to have effect.

In any winding-up of a company unable to pay its debts,

the Master of the Court… may,

at any time after a winding-up order has been made,

summon…any director or officer of the company or person

known or suspected to have in his possession any property of the company or believed to be indebted to the company,

or any person whom the Master or the court deems capable of giving information concerning the trade, dealings, affairs or property of the company.

Any person summoned under subsection 417(1) may be represented, and should consider obtaining representation, by an attorney, with or without counsel, at his attendance before the Master or the Court.

THE MASTER MAY

Examine any person summoned under subsection (1) on oath or affirmation concerning any matter referred to in that subsection, either orally or on written interrogatories

Reduce his answers to writing and require him to sign them

THE AUDITOR HAS THE RIGHT TO
Legal Representation

THE AUDITOR MUST
Answer any question put to him at the examination, notwithstanding that the answer could incriminate him…

If he refuses to answer, answer if so obliged by the Master or the Court, after the Master or the Court has consulted with the Director of Public Prosecutions

(Read more page 25 of IRBA guide…Many requirements and stipulations…)

ACCESS REQUIRED IN TERMS OF PROMOTION OF ACCESS TO INFORMATION ACT, 2 OF 2000

PURPOSE: Give effect to CONSTITUTIONAL RIGHT OF ACCESS
to any information held by the State/ any person which is required
for the exercise or protection of any rights.

Manner in which access should be treated (Chapter 3 PAIA)

Right to access is not automatic.

Seek Legal Advice.

Mandatory grounds for refusal of access (Chapter 4)

A person must be given access to any record of a private body (Chapter 50) if:

- record is required for the exercise or protection of any of the person's constitutional rights
- person complies with the procedural requirements laid down in the Act relating to a request for access to that record
- Request for information does not fall within any of the grounds laid down in the PAIA upon which access to information may be refused

ACCESS REQUIRED BY SARS

Customs & Excise Act (separate but similar to TAA)

S59 & 63 of TAA
SARS MAY

Conduct search and seizure

Enter premises unannounced (if relevant material is being kept at such premises)

With or Without Warrant

With Warrant (S59 of TAA)

OBTAINING THE WARRANT

Authorised by Senior SARS Official

SARS applies to magistrate for said warrant

Magistrate or judge issues warrant when satisfied REASONABLE GROUNDS to believe that a person failed to comply with any tax obligation/ committed a tax offence

AND

Relevant material likely to be found on premises may provide evidence

SARS MAY

May enter and search premises and any person present on premises

May seize relevant material and related storage (e.g. computer/ device)

Make extracts/ copies of relevant material

May require a reasonable explanation of relevant material from a person

SARS MUST

Produce the warrant to owner of premises

If owner not present - affix a copy of warrant to premises in a prominent and visible place

THE AUDITOR SHOULD

Be aware that failure to produce the warrant as required entitles a person to refuse access to the premises.

When presented with warrant, determine whether warrant is valid before granting access to the premises

Inform relevant client of the search and seizure

Take necessary steps to limit access solely to relevant material, which must be described with reasonable specificity in warrant

Without Warrant (S63 of TAA)

ONLY IF

Owner of premises consents in writing to senior SARS official

OR

Senior SARS Official, on reasonable grounds is satisfied that:

Risk of imminent removal or destruction of relevant material likely to be found on premises

AND

If SARS had applied for warrant it would be issued

AND

Delay in obtaining warrant would defeat the objective of the search and seizure

SARS MUST

Inform the owner or person in control of the premises what the legislative basis is for the search and alleged failure to comply with an obligation under a tax Act or tax offence that is the basis for the search

AUDITOR SHOULD

Inform relevant client of search and seizure

Take necessary steps to limit access solely to the relevant material being seized.

S46 of TAA

SARS GUIDE
IRBA GUIDE
NB guides are not legally binding

A request for access to audit working papers forms part of SARS's right in terms of the Tax Administration Act, 28 of 2011 to request RELEVANT MATERIAL

Example of circumstances

- Verify if tax return, declaration or document is correct
- Auditing a person's tax affairs
- Establishing a person's correct liability or refund
- Collecting a tax debt
- Investigating and collecting evidence on whether or not a person has committed a tax offence

If in doubt SEEK LEGAL ADVICE (on a case by case basis)

SARS has right to request → RELEVANT MATERIAL (including Audit WP) → I.t.o. Section 46(3) of TAA

But NOT unfettered discretion → Auditor Duty to ensure that SARS observes the LIMITED SCOPE and APPLICATION of S46

Ties in with CPC Professional behaviour Due Care

Don't take unreasonably long → Could be seen as obstructing the process (lead to extension of prescription period)

Auditor to ensure he understands and provides only RELEVANT MATERIAL (Definitions of relevant material/ audit documentation etc)

Before granting access within the period indicated by SARS, Auditor should

- Inform client of request
- Put safeguards in place to limit access solely to specific information requested
- Determine if authorisation letter meets the requirements of S41 of TAA (if field audit)

- No general restriction on SARS requiring information contained in audit file
- SARS states in guide access will only be requested where it is considered necessary for purposes of administration of a tax Act.
- SARS respects the unique relationship between auditor & taxpayer and therefore will not undertake to call for audit files as a matter of routine
- Will obtain approval from a senior SARS official
- Any concerns with request to be referred to senior management to SARS per SARS internal policies and procedures as communicate in SARS guide

ACCESS REQUIRED BY SAPS

SEARCH and SEIZURE

NO LEGAL PRIVILEGE between auditor and client
An auditor MAY NOT lawfully refuse to hand over documents of relevance when called upon to do so by the SAPS, provided SAPS have shown that they are acting within the ambit of their powers

With Warrant (S21 Criminal Procedure Act, 51 of 1977)

Warrant will be issued by magistrate or judge IF reasonably believe…in possession, required as evidence

SAPS MAY

Seize article

Search any person identified in warrant

Enter and search any premises identified in warrant

Search any person found on or at premises

Execute by day (unless written authorisation to execute by night

Use warrant until executed or cancelled

SAPS MUST

Upon demand of any person whose rights have been effected in terms of search and seizure, hand to him a copy of the warrant.

THE AUDITOR SHOULD

Determine whether the warrant is valid before granting access to the auditor's premises

Inform the relevant client of the search and seizure

Take the necessary steps to limit access solely to the specific information covered by the warrant

Without Warrant

ONLY IF

Person consents — OR — Police official believes a search warrant would be issued if he applied for one AND the delay in obtaining one would defeat the objective of the search.

THE AUDITOR SHOULD

Request a search warrant as envisaged in Section 21 of the Criminal Procedure Act to be produced.

Not consent to a search or seizure without this written search warrant being produced.

HOWEVER, if police official maintains that he would be issued with a search warrant if it were applied for and that the delay in obtaining such a warrant would defeat the objective of the search, the auditor may not lawfully refuse to allow the police official to search and seize documents and should therefore allow the search and seizure.

Be aware of auditor's obligations and rights in terms fo different laws that grant search and seizure rights and obligations (refer IRBA Guide P 26 for list).

WHAT

AUDIT DOCUMENTATION (ISA 230)

CLEAR DISTINCTION WORKING PAPERS — PERM FILES:
- Tax - where files
- Compliance files

RELEVANT MATERIAL (TAA)

ANY — Information / Document / Thing — that (in SARS's) opinion — foreseeably relevant for the administration of a tax Act

The property solely of the firm

WORKING PAPERS (IRBA GUIDE)

MATERIAL — prepared by / received by / retained by — Auditor — to ASSIST the auditor — conclusion / report / opinion

PRIMARY RECORDS — RECORD — prioritised / work performed / conclusions reached / discussions held and documented / conclusions reached

Links to other records stored on:
- Paper files
- Electronic Media
- Video Media
- Hand-held information analog Media

WHO IS RESPONSIBLE?

Auditor responsible for the engagement

OR

Assigned by policies and procedures

OR

AGSA work - only AGSA (Section 50 of PAA)

RISKS when granting access

The auditor should consider REASON:
- consider RISKS (examples of risks p 16 of IRBA guide
- engage Consultations
- seek Legal Advice

Policies and Procedures

ISQC1 - A firms shall establish POLICIES AND PROCEDURES designed to maintain the confidentiality, safe custody, integrity, accessibility and reliability of documentation.

ESTABLISHING POLICIES AND PROCEDURES REGARDING ACCESS TO WORKING PAPERS

The Protection of Personal Information Act, 4 of 2013 (POPI) seeks to ensure that personal information is processed responsibly.

When auditors provide access to working papers, they should:

Always comply with the requirements of POPI

Ensure POPI is sufficiently addressed in engagement letter.

Establish and maintain the appropriate security measures referred to in s19 of POPI when releasing working papers.

Step 1 = Risk Identification; Step 2 = Implement Policies & Procedures to lower risk to acceptable level

EXAMPLES OF POLICIES AND PROCEDURES

Assign responsibility to "Risk Management Partner" or "Engagement Partner"

Stipulate procedures to be followed in various circumstances when access is required

Stipulate terms to be met before access is granted

Stipulate circumstances under which the firm can elect to grant or deny access to working papers

Prescribe templates for obtaining authorisation and acknowledgement letters when access is granted

Stipulate whom letters will be provided to

Stipulate timing of when letters will be obtained

Stipulate types of working papers that access will be granted to (for example those that contain factual and relevant information)

Prescribe a reviewer to review working papers to ensure they are in a condition suitable for review by a third party

Determine the format in which working papers will be provided (should not put confidentiality of firm's methodologies or information of other clients at risk

Prescribe how photocopies will be provided (for example cover audit comments, legends, tickmarks, etc before copying)

Prescribe discussions to be had between predecessor and successor auditor to arrive at an agreement of what is reasonable to copy

Restrict the duration of the period for which access will be granted to a reasonable duration.

Restrict location at which access is to be provided (usually auditor's premises, but be mindful of confidentiality of other clients' information.

Reasonable cost recovery stipulations (for example copying of documents, time spent on retrieving and extracting information)

Stipulate applicable legal and professional requirements to consider & set out procedures that will achieve compliance

INTRO & WHEN

Working papers — prepared by / Registered Auditor — planning and performing engagement / responses and review work / record evidence to support opinion/ report/ conclusion

It may therefore not be appropriate for third parties, whose objectives and requirements might be different from those of the auditor, to have access to the working papers of the auditor that they might consider necessary.

This is where Legal Advice is required

Third parties who wish to obtain information should request from client directly

Circumstances may arise where information cannot be obtained from the client

Could be required — may be issued from the auditor

Applies

- client
- auditor
- third parties

- PAIA protected (i.t. s36(3) & 36(4) PAIA STATUTORY OBJECTION TO SHARE HELD)
- ITA (i.t.o. s4 ITA Inspectors, investigations and disciplinary hearings)
- SARS (i.t.o. Section 46 of the Tax Administration Act, 28 of 2011 (TAA), Section 4 of the Value-Added Tax Act, 89 of 1991 (VAT Act) and Section 4(4)(a) of the Excise Act, 91 of 1964 (Customs Act)
- By Law
- By SAICA / SAIEA/ CPC/ Other Auditing Pronouncements
- By Contractual Obligation

- Group auditor
- SAAE 3000
- Successor auditor
- Client auditor
- Audited party
- Other

CONFIDENTIALITY OF CLIENT INFORMATION

The issue that existing papers contain CLIENT INFORMATION obtained by the AUDITOR from the client in the ORDINARY COURSE of performing the auditor's professional functions.

AUDITOR may only disclose CONFIDENTIAL INFORMATION where the disclosure is COMPELLED or ALLOWED by LAW:
Section 142 CPC (…shall not disclose without proper and specific AUTHORITY, unless there is a LEGAL or PROFESSIONAL RIGHT or DUTY to disclose.
Section 213 of the Companies Act, 71 of 2008 PROHIBITS the auditor from DISCLOSING the client's confidential information.

Auditor should regard this as a HIGH RISK ACTIVITY.

EXAMPLE
AUDITOR A CLIENT CHANGES AUDITORS

Successor Auditor
Required to ascertain whether there are any PROFESSIONAL REASONS not to accept the engagement.
Inquire from prospective client if prior auditor has permission to provide information.
Obtain written permission from client to communicate with predecessor.
If client refuses/ fails to grant permission DECLINE the appointment.
Unless EXCEPTIONAL CIRCUMSTANCES (information obtained by other means).
It entails the engagements
Decide if audit staff is going to be utilised to share SUPPORT SERVICES/ RESOURCES/ FACILITIES/ TECHNOLOGY/ METHODOLOGIES/ POLICIES.
NO REQUEST ACCESS TO WORKING PAPERS FOR THIS PURPOSE

Predecessor Auditor
Extent to which the auditor can discuss the client's affairs (DEFEND on the client's permission and legal duty to disclose)
DO NOT volunteer information about client's affairs without SPECIFIC INSTRUCTION from the client
Even if client refuses/ fails to grant permission UNLESS prohibited by law or regulation
Ascertains from proposed successor whether client granted permission to communicate with existing auditor and further considers:
Whether any parties interests could be harmed by disclosure (incl third parties)
Whether relevant informations sought is known and substantiated (as far as predecessor auditor is aware) or involves unsubstantiated facts, incomplete info, unsubstantiated conclusions, professional judgements to be used in determining type of disclosure
Type of communication
Appropriate Recipients
Take care that no more information than is necessary is made available (and provide information "honestly and unambiguously")

WHEN REQUIRED BY LAW

General Requirements when access is requested

Legal requirements to permit requesting information will vary depending on circumstances ITA s 46; VAT s 50(4); LEGAL ADVICE

Inform the client as soon as possible, unless prohibited by LAW

Auditors always consider the following general principles BEFORE divulging any information:
- Is disclosure legally permissible?
- Is disclosure allowed in terms of contract?
- Is the information subject to legal privilege?

MORE EXAMPLES:
- Inspections by the Public Company Accounting Oversight Board (PCAOB) (Read more p27 IRBA guide/ S104 Sarbanes-Oxley Act of 2002 of the USA)
- Inspections by Regulators in Other Foreign Jurisdictions (Read more p27 IRBA guide/ Foreign legislation as applicable)

IRBA Rules of improper conduct: Auditors shall be guilty of improper conduct if they contravene/ fail to comply with a requirement of the Auditing Profession Act, 26 of 2005 (APA) UNDERLINED/BOLD/BIRD REQUEST OF REGULATORY BOARD WITHIN REASONABLE TIME

CLEAR: Reports give management letters to non-access to RELEVANT third-party Public Interest Entities (PIE) Significant Deficiencies in internal control identified during the audit

Third Parties' rights reasonable

Assurance engagements other than audits or reviews of historical financial information

Auditors' requirements for the engagement partners to have access to the working papers of another auditor in order to determine whether the work performed is adequate for the auditor's purposes.

Considerations where access is at the DISCRETION OF THE AUDITOR

- Confidentiality of client information (get written permission of client) - bit of requirements p14 of IRBA guide
- Duty of care to third parties (make it clear that it would be inappropriate for them to rely on the working papers for purposes other than those for which they were created.
- Limitation on reliance by third parties (hold harmless letter & disclaimer letter) bit of requirements on p15 of IRBA guide

Auditors SHOULD NOT provide access to working papers unless they are LEGALLY required to do so.

ACCESS REQUIRED BY IRBA

INSPECTIONS

s47 of Auditing Profession Act 26 of 2005 (APA)

IRBA MAY

Inspect/ Review the practice of an auditor at any time

Inspect/ make copies of any information, including working papers, statements, documents, records, other documents, in possession or under control of an auditor.

IRBA MUST

Inspect every 3 years inspect/ review the practice of an auditor that audits a public company, as defined in Companies Act, 71 of 2008

THE AUDITOR MAY NOT

Refuse to produce any information, including working papers, on the basis that it is subject to the Promotion of Access to Information Act 2 of 2000, or on the basis that the practice of auditor is of the opinion that the information contains confidential information about a client

THE AUDITOR WILL NOT

be held liable civilly or criminally for producing information in good faith requested by IRBA.

INVESTIGATIONS

s48 of APA

When investigating a charge of improper conduct the Investigating Committee may, in respect of any matter to which the charge relates to produce information including working papers…

DISCIPLINARY HEARINGS

s50 of APA

The Disciplinary Committee may, for the purposes of a hearing, subpoena any person who might be able to give material information concerning the subject of the hearing.…

WHEN PROVIDED WITH SUBPOENA

Perform procedures to ensure that subpoena is valid
- Must be issued by a court or an authority entitled to issue subpoenas (for example IRBA)
- Ensure that stamp of issuing of authority and date of issue appear on subpoena
- Ensure subpoena is address to correct person
- Determine type of legal reason for subpoena to perform additional procedures

Civil or Criminal Proceedings

Check that subpoena is specific regarding information required

Seek legal advice as to whether the categories of documents required may be challenged on the ground of relevance or admissibility

If challenge subpoena, must do so before the date of hearing.

If served by third party, immediately inform client

- to record subpoena
- intention to comply
- intention to ask subpoena to be set aside (tell the auditor's duty)

An auditor will be in contempt of court if, without good reason, the auditor fails to attend the hearing after being subpoenaed.

Public sector proceedings

PAIA s18(3)

Refrain from granting access

Inform engagement manager (ie SQM requirement)

Appendix 3 of IRBA guide

Public sector criminal proceedings

OR

Subpoena, instruction or request by a magistrate

PAIA s 7(1) DOES NOT APPLY

Inform engagement manager (ie SQM requirement) immediately

Comply with Subpoena UNLESS client in contempt of court

Subpoena one of two forms

To Produce

To Give auditor to attend hearing and bring certain specified documents

Either require auditor to attend hearing in person to give oral evidence

Client may consider if appropriate to authorise auditor to give information available in advance of the hearing, as this would reduce the inconvenience to the auditor and would not otherwise prejudice the client's interests.