



Title	Directions under the Protection from Harassment Act
Last updated	June 2013
Applies to	All licensees and licence exempt persons
Source	Protection from Harassment Act 17 of 2011 and related Regulations and Directions
Summary	ISPA members may receive directions from a Magistrate's Court requiring them to provide information under the Protection from Harassment Act. This Advisory sets out the procedure to follow and provides the relevant forms. There are potential criminal sanctions for failing to comply with this Act.

Contents

Very short version 1
 What is the PFHA about? 1
 Who has to comply?..... 2
 Procedure 2
 Obligation to notify the respondent 3
 Failure to respond a criminal offence 3
 Process to follow when sending / forwarding a response / form / document..... 4
 Obligation to keep your details updated..... 4
 Compensation 4
 Practical limitations..... 4
 Version history 4

Very short version

If you receive a document mentioning the Protection from Harassment Act (PFHA) you must pay attention and respond within the time periods specified as there are potential criminal sanctions for not doing so. If following the procedure below is too challenging, get legal advice immediately.

What is the PFHA about?

The intention of the PFHA is to provide victims of harassment with an inexpensive and effective remedy against the person harassing them (think phone calls from private numbers or anonymous emails). Harassment is very widely defined and can include causing harm or a reasonable anticipation of harm through electronic communications such as email.

The PFHA is relevant to ISPA members because it creates a procedure under which a magistrates' court can issue a direction to an electronic communications service provider (ECSP) to provide it with information about the sender of harassing communications and the harassing communications themselves.

Who has to comply?

All "electronic communications service providers" (ECSPs) are required to respond to directions received under the PFHA.

An ECSP is anyone who provides an electronic communications service, whether or not they are licensed or exempt from being licensed under the ECA. This does not really result in clarity: in practice the Department of Justice & Constitutional Development (DOJCD) – which oversees the PFHA – has circulated to the courts ICASA's spreadsheet of licensees, so members with licences may be contacted by the courts under the PFHA¹.

In practise, if you receive a notice under the PFHA you will generally be required to respond. If you are not certain whether you are required to, seek legal advice (try regulatory@ispa.org.za).

Procedure

A court which has decided to issue a protection order where a complainant is being harassed by means of electronic communications over an electronic communications system of an ECSP may issue a direction to an ECSP to provide the following information:

- the electronic communications identity number² from where the harassing electronic communications or electronic mail originated;
- the name, surname, identity number and address of the respondent to whom the electronic communications identity number has been assigned;
- any information which indicates that electronic communications or electronic mail were or were not sent from the electronic communications identity number of the respondent to the electronic communications identity number of the complainant; and,
- any other information that is available to an ECSP which may be of assistance to the court to identify the respondent or the ECSP which provides a service to the respondent.

The direction will generally be served on you by fax. The direction must be responded to within 5 working days from the time that it is served (see below for your options on how to respond and also on the specific process to follow when responding).

The response must be provided in the form of an affidavit, i.e. it must be completed before a commissioner of oaths.

¹ Obviously this is less than optimal: (1) licence exempt resellers are not listed (2) broadcasting licensees are listed & (3) the accuracy of ICASA's information leaves something to be desired

² "electronic communications identity number" means a technical identification label which represents the origin or destination of electronic communications traffic, as a rule clearly identified by a logical or virtual identity number or address assigned to a customer of an electronic communications service provider (such as a telephone number, cellular phone number, e-mail address with or without a corresponding IP address, web address with or without a corresponding IP address or other subscriber number);

If you have relevant information, you must respond using Form 6 (provided).

An ECSP which receives a direction may, instead of providing the information required, make an application on Form 7 for:

- an extension of 5 working days on the grounds that the information cannot be provided timeously; or,
- the cancellation of the direction on the grounds that it does not provide an electronic communications service to either the respondent or complainant or related person or that the requested information is not available in the records of the electronic communications service provider.

Once the court has received a response from the ECSP it

- may request additional evidence which the ECSP must respond to using Form 9 within 5 working days; or
- must give a decision on any application for an extension or cancellation and communicate this to the ECSP.

Obligation to notify the respondent

Important: If an ECSP has information to provide to the court in response to a request under the PFHA then it is obliged to inform the respondent (i.e. the person to be identified as the sender of the communications specified in the request) of:

- the information that the ECSP will be providing to the court;
- the reference number of the direction; and,
- the name and address of the court.

This must be done at least 48 hours before you send a response to the request from the court³. This means that you will need to have your response to the request prepared within 3 working days of receiving the request. There is no prescribed format for this response and it appears that it can be done by email.

Failure to respond a criminal offence

Under the PFHA, an ECSP or an employee of an ECSP will be guilty of an offence if it, her or she:

- fails to furnish the required information within five working days or extended period allowed by the Court;
- makes a materially false statement in an affidavit when providing a response under the PFHA; or,
- fails to notify the respondent as set out in the previous paragraph.

If convicted the ECSP can be fined up to R10 000 while an employee convicted of an offence may be sentenced to “a fine or to imprisonment for a period not exceeding 6 months”.

³ ISPA lobbied strongly against the inclusion of this provision on the grounds that it seems completely counter-intuitive to alert the respondent to the complaint.

Process to follow when sending / forwarding a response / form / document

When you respond to a direction or otherwise send a document required under the PFHA, this must be done by fax and the following procedure must be followed (unless a Court orders differently):

- you must get a transmission successful confirmation and keep this together with the actual document sent as proof of your response;
- you must phone the recipient in order to “enquire whether the fax was received by him or her”; and,
- you must complete Form 26 and keep this with the transmission confirmation and document sent.

Obligation to keep your details updated

The PFHA requires that a list of ECSPs be compiled and maintained and made available to courts so that they can contact an ECSP where required. The list contains:

- name and physical address of the ECSP
- email address, telephone and fax number of a contact person at the ECSP
- names of persons who are responsible for providing information in response to requests

ECSPs are required to notify the Director-General of the Department of Justice and Constitutional Development of any change in these particulars.

Use ckok@justice.gov.za cc srobbertse@justice.gov.za.

It is in the best interests of ECSPs (and the unfortunate individuals listed) to ensure that their contact details are in fact correct. ISPA members should make the effort to see if they are on the list and ensure that the individual listed is the one who will actually respond to requests.

Compensation

Compensation is payable to an ECSP responding to a request from a court under the PFHA. Currently this is set at R80 ex VAT per request.

There is currently, however, no worthwhile way to do this. If you want to claim the compensation you have to bill the complainant directly. The Department of Justice is considering regulations to make this process practically feasible.

Practical limitations

The provisions of the PFHA and its Regulations dealing with ECSPs require a degree of knowledge on the part of Court officials which is not always present and there is evidence of a fairly random distribution of directions. There is also a need to educate officials on advising complainants who are being harassed through services like Facebook and chat sites which are provided from outside South Africa.

Version history

Date	Version	Revisions
June 2013	1.0	