

OUR INDUSTRY IS CHANGING. ARE WE?

*“Rights and obligations in an evolving Retirement Funds environment”*

**PENSION LAWYERS**



**A S S O C I A T I O N**

THE 2006 PENSION LAWYERS ASSOCIATION CONFERENCE

5 - 7 MARCH 2006

SPIER, STELLENBOSCH, CAPE TOWN

- **Constitution of the Republic of South Africa, 1996**

Section 32: provides every citizen the right to access of information held by the State or any person

- **Promotion of Access to Information Act, 2000 (“PAIA”)**

Requester of any record must be given access to the record if-

- the record is required for the exercise or protection of any rights;
- the requester complies with the procedural requirements for a request;
- access to the record is not refused on any of the permissible grounds provided for in Chapter 4 of Part 3 of PAIA.

- **Pension Funds Act, 1956**

Trustees have a duty to -

“(c) ensure that adequate and appropriate information is communicated to the members of the fund informing them of their rights, benefits and duties in terms of the rules of the fund.” [Section 7D(c)];

“(a) take all reasonable steps to ensure that the interests of members in terms of the rules of the fund and the provisions of the Act are protected at all times,[7C(2)(a)];

“(b) act with due care, diligence and good faith.” [Section 7C(2)(b)]”.

- **Mbambo v MPF [2000] 12 BPLR 1392 (PFA):**  
“good practice and the applicable standard to evaluate fund conduct.”.
  
- **PF Circular 86**
  - New Members: Explanatory pamphlet within 3 months of date of entry.
  - Existing Members:
    - Annual benefit statement within 6 months of fund year end.
    - Withdrawal from service:
      - Options in terms of the rules;
      - Benefits that may be forfeited if cash is taken.
    - Retirement:
      - Options in terms of the rules;
      - Annuity: State requirement for certificate of existence;
      - Lump sum: State that benefit is full and final payment.
    - Death:
      - Beneficiaries must each receive a letter notifying them of trustee decision and setting out all options available.

■ **PF Circular 86 (continued)**

- Notification of specific events:
  - Voluntary fund termination (section 28);
  - Withdrawal of employer;
  - Conversion from DB to DC: Personal benefit statement illustrating effect of conversion, stressing the difference in benefit structure and transfer of investment risk;
  - Reduction or increase in contributions or benefits;
  - Transfer of benefits to another fund: Statement should include note of transfer value.
  
- Fund restructuring: 60 days' notice.

- ***Complainant is under a duty to ensure he understands the implications of his decisions - Adams v Guarantee Trust Group Pension Fund & Another [2004] 5 BPLR 5655 (PFA)***
  
- ***Trustees must actively communicate to members – Holmes v Morris Crane Aid Pension Fund [2005] 4 BPLR 309 (PFA)***
  
- ***Misstatement – Unlawful conduct – Padayachee v Telkom Pension Fund & Another [2004] 4 BPR 5630 (PFA)***
  - Unlawfulness:
    - Context within which the benefit statements were furnished;
    - Nature of the statements;
    - Purpose of the statements;
    - Relationship between the parties;
    - Considerations of public policy.

- ***Information to former spouse- Smith v Smith en 'n Ander [2004] 2 BPLR 5431 (T)***
- ***Claims by Disappointed Beneficiaries of Death Benefits - Aucamp and Others v University of Stellenbosch [2002] 6 BPLR 3497 (C)***

Court concluded that it is clear from South African and common law authorities that disappointed beneficiaries have a claim in delict against a person who has wrongfully and negligently caused them loss or damage, despite there being no privity of contract or any other direct legal relationship between them.

- ***Communication with Former Members [Section 15B(3) and (4)]***
  - Communicate proposals to former members and funds to which former members had been transferred;
  - Convey proposals to the board received from former members and funds to which they had been transferred;
  - May be excluded after reasonable steps to trace them are evident, including-
    - Advertising on a national basis and in the area where former members used to work.

- ***Communication with Employer, Members, Former Members [Section 15B(9)]***
  - Inform in a manner that is clear and understandable to the members and former members;
  - Provide details of the scheme;
  - Independent actuary might be required to report on adequacy of communication;
  - Communication must be explicit about procedures for complaint;

Effect of non-compliance: Surplus scheme of no force or effect.

## ■ GROUNDS FOR REFUSAL TO PROVIDE INFORMATION

- ***Section 7D(c):***
  - “adequate”
  - “appropriate”
  - to inform members of their rights, duties and benefits in terms of the fund rules
  
- ***PAIA: Chapter 4 of Part 3***
  - Mandatory protection of privacy of third person [Section 63(1)]:  
Prohibits disclosure of a record that would involve the unreasonable disclosure of personal information about a third party (natural person),

- ***PAIA: Chapter 4 of Part 3***

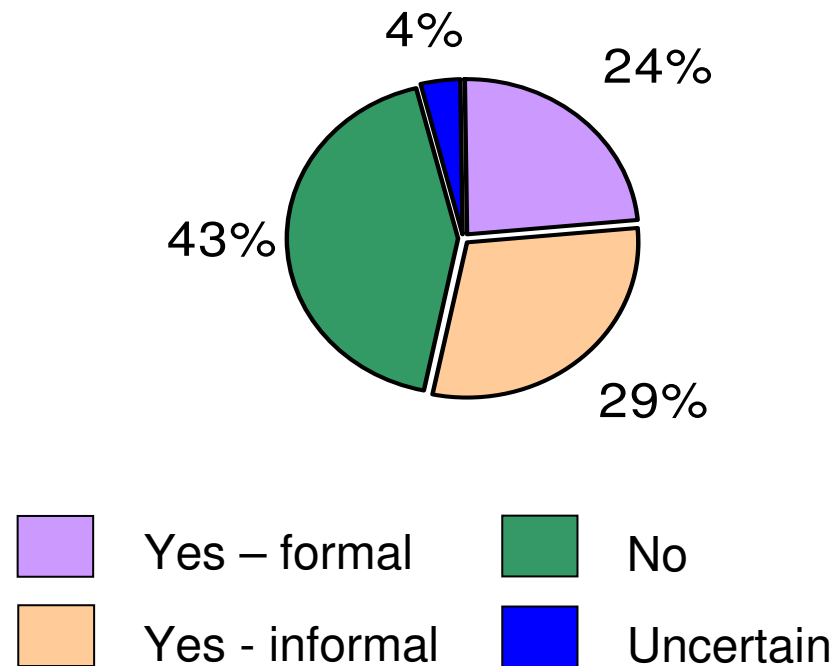
Mandatory protection of commercial information of third party (Section 64):

Prohibits disclosure of information if the record contains-

- Trade secrets
- Financial, commercial, scientific or technical information, the disclosure of which could cause harm to the commercial or financial interests of the third party;
- Information supplied in confidence and that could put the third party at a disadvantage in contractual or other negotiations or in commercial competition,

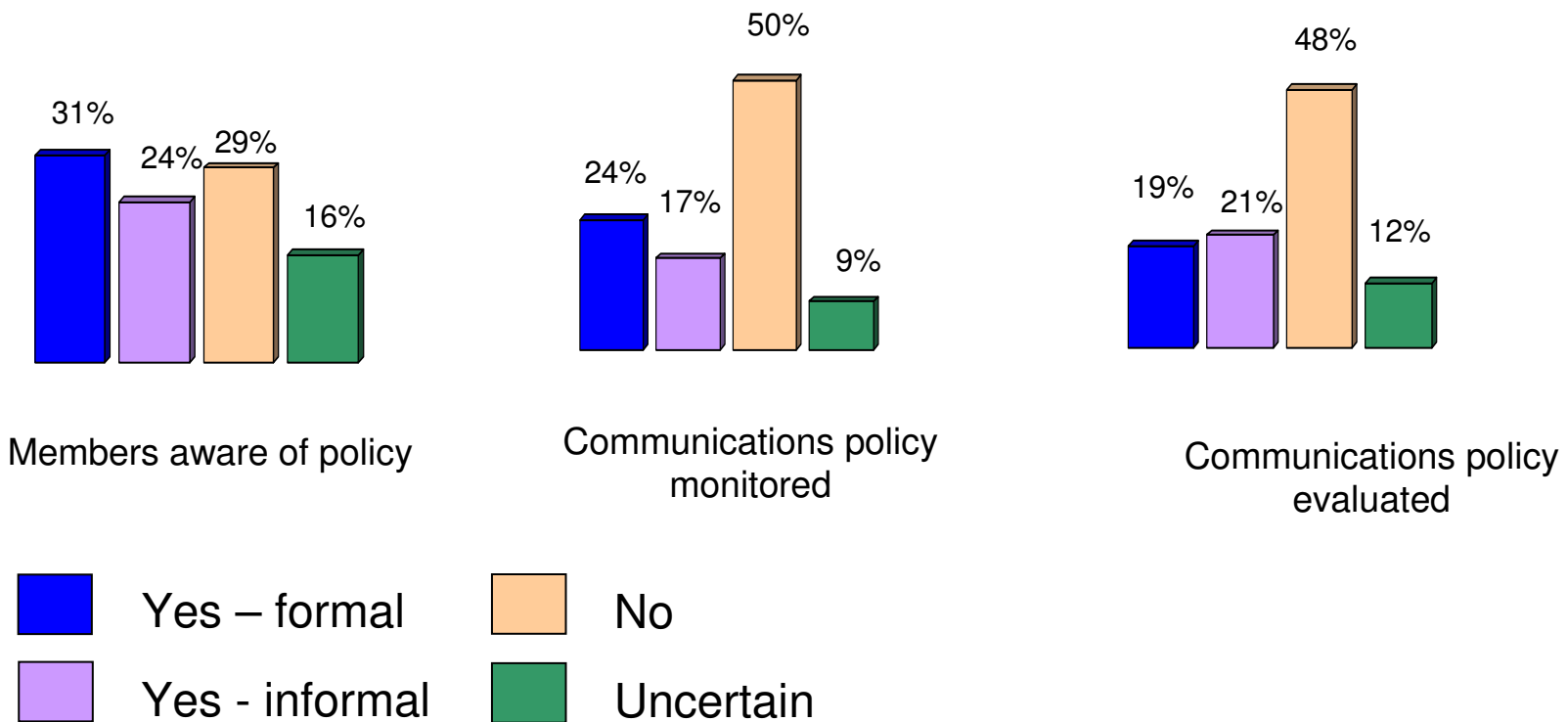
## DELOITTE'S SURVEY ON RETIREMENT FUND GOVERNANCE IN SOUTH AFRICA 2005:

***“A formalized, professionally developed, yet easy to understand, communications policy is important for effective governance and can assist trustees in complying with PF Circular 86...and PF Circular 90.”***



# DELOITTE'S SURVEY ON RETIREMENT FUND GOVERNANCE IN SOUTH AFRICA 2005:

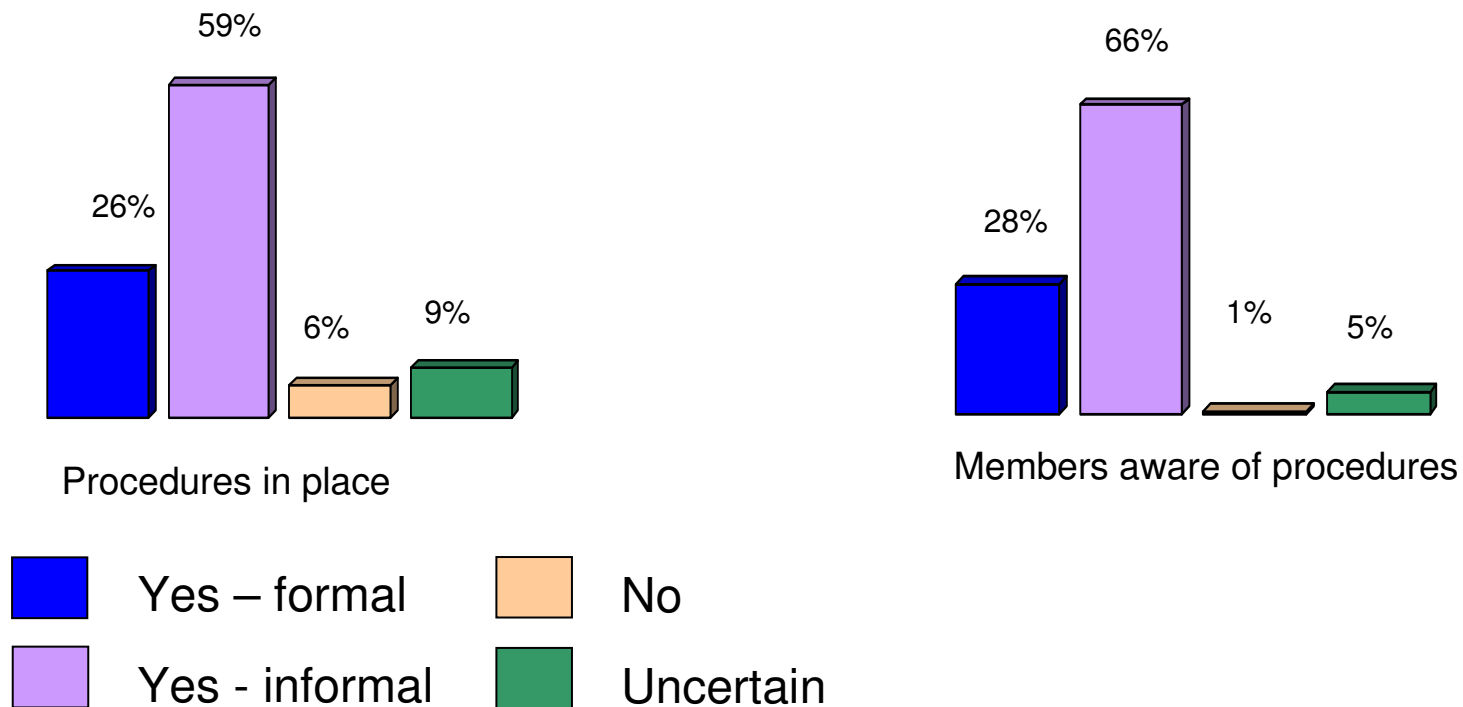
***Monitoring adherence to the fund's communications policy and evaluating its effectiveness on a regular basis.***



# DELOITTE'S SURVEY ON RETIREMENT FUND GOVERNANCE IN SOUTH AFRICA 2005:

*Member initiated communication with trustees and the administrator is equally important as it allows individual members to obtain additional information on those matters that are important to them;*

## Member communication with trustees

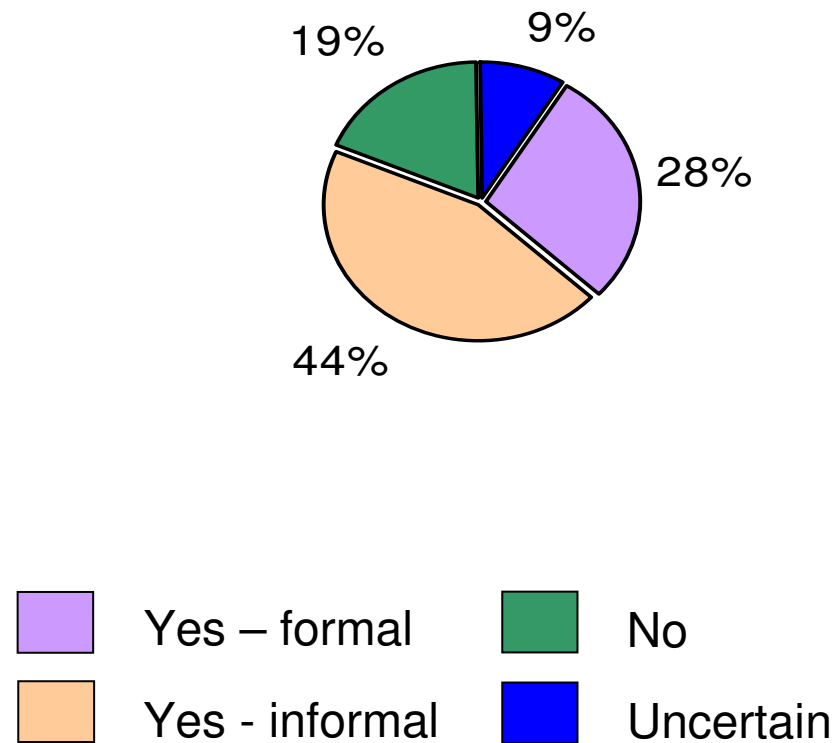


## DELOITTE'S SURVEY ON RETIREMENT FUND GOVERNANCE IN SOUTH AFRICA 2005:

- *The increased use of technology (emails, help-lines and the internet) by fund boards is encouraging, but trustees should be careful to ensure that this does not discriminate against members that do not have access to electronic resources.*
- *Although transparent communication with stakeholders must be encouraged, trustees must appreciate that they are custodians of sensitive information that should not be shared with other parties without prior authorization.*
- *In a self-regulatory ethical environment, attestations are often obtained from office bearers confirming compliance with the entity's ethical standards and the relevant laws and regulations.*

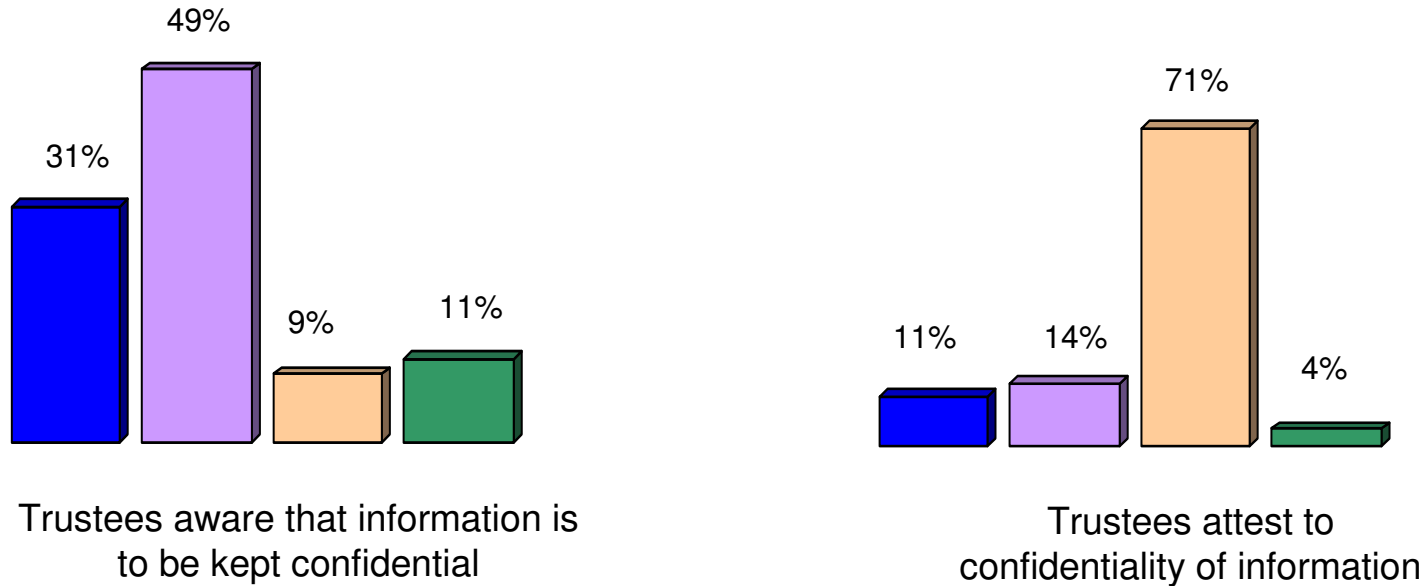
# DELOITTE'S SURVEY ON RETIREMENT FUND GOVERNANCE IN SOUTH AFRICA 2005:

## Guidelines on dissemination of sensitive information



# DELOITTE'S SURVEY ON RETIREMENT FUND GOVERNANCE IN SOUTH AFRICA 2005:

## Confidentiality of fund information



Yes – formal      No  
Yes - informal      Uncertain