

FORM A

REQUEST FOR ACCESS TO RECORD OF PUBLIC BODY

(Section 18(1) of the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000))

[Regulation 2]

FOR DEPARTMENTAL USE

Reference number:

Request received by (state rank, name and surname of information officer/deputy information officer) on (date) at (place).

Request fee (if any): R

Deposit (if any): R

Access fee: R

SIGNATURE OF INFORMATION OFFICER/DEPUTY INFORMATION OFFICER

A. Particulars of public body

Legal Aid South Africa

29 De Beer Street

Braamfontein

Johannesburg

B. Particulars of person requesting access to the record

(a) *The particulars of the person who requests access to the record must be recorded below.*
 (b) *Furnish an address and/or fax number in the Republic to which information must be sent.*

Full names and surname : Anthony Robin Brink
 Identity number : 5902255116081
 Postal address : 36 Pearson Street, Eshowe 3815, KwaZulu-Natal
 Fax number : N/A
 Telephone number : 083 779 4174
 E-mail address : anthonybrink.sa@gmail.com

C. Particulars of person on whose behalf request is made:

N/A

D. Particulars of record

(a) Provide full particulars of the record to which access is requested, including the reference number if that is known to you, to enable the record to be located.

PART ONE

CONTEXTUAL NOTE:

On 15 March 2019, upon application made to the High Court at Pietermaritzburg, Legal Aid SA ('LASA') was granted an order postponing three opposed applications brought by the requester under section 78 of the Promotion of Access to Information Act 2 of 2000 ('PAIA') under case numbers 11187/16P; 14224/17P and 5239/18P to compel compliance with his requests for access to certain of LASA's public records, duly set down for argument on that day.

RECORDS REQUESTED:

- 1. All LASA's counsels' fee-notes for their services in drawing or settling the said postponement application papers, and for arguing the application.**
- 2. All travel expense and subsistence vouchers reflecting what LASA disbursed on travel and subsistence expenses for LASA's junior advocate and two in-house attorneys to attend the said postponement application.**

PART TWO

RECORDS REQUESTED:

- 3. LASA's annual reports made under section 32 of PAIA to the South African Human Rights Commission for:**
 - 3.1. 2016/17;**
 - 3.2. 2017/18;**
 - 3.3. 2018/19.**

PART THREE

CONTEXTUAL NOTE:

On 9 October 2012, at a meeting with the National Assembly's Portfolio Committee on Justice and Constitutional Development (since renamed '-and Correctional Services'; hereafter 'the Committee'), LASA CEO Vidhu Vedalankar presented LASA's annual performance report for 2011/12.

The Committee had called the meeting in the exercise of its oversight responsibility over LASA imposed by section 55(2)(b)(ii) of the Constitution.

The Parliamentary Monitoring Group ('PMG') kept a minute of the meeting, a material excerpt of which follows:

Ms Vedalankar said that she could not comment on helping with Chapter 9 organisations because she would have to discuss it with her staff first. In terms of the discrepancy with the posts and employees, it was very clear in the report. They had allocated a certain amount of funds but they knew that those positions could not be filled so they adjusted the budget.

Mr Jeffrey said that the expenditure could not be 99% with the figures that they had.

Ms Vedalankar said she would send the information to the Committee.

The PMG's minute records that Committee member Hon John Jeffery MP (now Justice Deputy Minister) had queried 'the discrepancy with the posts and employees', i.e. the discrepancy between reported budget expenditure and reported post occupancy, to which Vedalankar responded that 'it was very clear in the report. They [LASA's management executives] had allocated a certain amount of funds but they knew that those positions could not be filled so they adjusted the budget.'

The minute reflects that Hon Jeffery didn't believe and accept this information given by Vedalankar to the Committee. To the contrary, 'Mr Jeffrey said that the expenditure could not be 99% with the [post occupancy] figures that they had.'

The minute further records that 'Ms Vedalankar said she would send the information to the Committee' – in addition to the 'very clear' information alleged to have been contained 'in the report' – to persuade Hon Jeffery, and to overcome his incredulity as to the truth of Vedalankar's information to the Committee that 'They had allocated a certain amount of funds but they knew that those positions could not be filled so they adjusted the budget.'

RECORDS REQUESTED:

4. **Any record identifying what vacant ‘positions could not be filled’ at LASA that ‘they [Vedalankar and other LASA officers] knew’ about.**
5. **Any record reflecting the reason these vacant ‘positions could not be filled’ that ‘they knew’.**
6. **The record of executive management’s decision to ‘adjust.. the budget’ because ‘they knew that those positions could not be filled’.**
7. **The Board’s resolution to approve the ‘adjust[ment of] the budget’ because the vacant ‘positions could not be filled’, if, per LASA’s Approval Framework, this entailed a ‘Reallocation of budget in excess of 8% between cost centres’.**
8. **‘[T]he information’ about LASA’s ‘adjust[ment of] the budget’ (because ‘they knew that those positions could not be filled’) that Vedalankar sent the Committee after the meeting, as undertaken to Hon Jeffery; and its covering letter.**

CONTEXTUAL NOTE CONTINUED:

The reason Hon Jeffery clearly didn’t believe the said information Vedalankar gave the Committee may be because, inter alia, in truth and in fact ‘the report’ said nothing at all about LASA having ‘adjusted the budget’ – either for the reason Vedalankar alleged, namely that ‘they knew that those [unspecified vacant] positions could not be filled’ or for any other.

That is, Vedalankar’s statement to the Committee that ‘it was very clear in the report’ why there was a ‘discrepancy with the posts and employees’ was absolutely false.

Vedalankar didn’t specify to the Committee ‘those positions’ that ‘they knew ... could not be filled’.

Certainly she didn’t have in mind any of LASA’s public defender ‘positions’ serving the lower criminal courts, recruitment to which had briefly and temporarily been frozen by executive management with Board approval on 30 July 2010 for a couple of months until provision was made in the national mid-term budget in October 2010 for the payment of legal staff salary increases under the OSD scheme, because by October 2012 when

Vedalankar appeared before the Committee and claimed to it, 'They had allocated a certain amount of funds but they knew that those positions could not be filled so they adjusted the budget', the hiccup over the delayed transfer of LASA's OSD budget for 2010/11 and the transient freeze on lower criminal public defender recruitment was distant history.

It seems likely that 'those positions' to which Vedalankar was alluding and implicitly claiming to the Committee 'could not be filled' (for some unstated reason 'they knew') were LASA's three remaining, very long vacant Senior Litigator posts at Pietermaritzburg, Durban and Mthatha at the top of its legal professional staff establishment, to which the requester had called both Hon Jeffery's and the Committee chairperson's attention.

Indeed, like Vedalankar's information to the Committee that 'those positions could not be filled so they adjusted the budget', LASA's annual report to the South African Human Rights Commission ('the Commission') under section 32 of PAIA for 2010/11 told a similar lie: 'the decision to freeze the [Pietermaritzburg Senior Litigator] post due to change in business needs budget.'

In truth and in fact, as LASA National Operations Executive and deputy information officer Brian Nair repeatedly confirmed on affidavit in April 2011 and again in evidence in court in mid-2013, no record whatsoever exists of any such 'decision to freeze the post', as falsely and dishonestly alleged to the Commission for the intended misinformation of the Committee in turn.

And LASA's financial records show that there's been no 'change in business needs budget' concerning the Pietermaritzburg Senior Litigator post and those at Durban and Mthatha. Quite the contrary, since their creation by Board resolution in November 2006, LASA has applied and continues applying to the Justice Department every year, and has received and continues receiving millions of rands in salary funding for all nine of its Senior Litigator posts, including its three now very long vacant Pietermaritzburg, Durban and Mthatha posts.

And whereas in her total refusals in October 2010 and January 2011 of the requester's PAIA requests in August and December 2010 interrogating the reason the substantially complete recruitments to the said three posts had been aborted (off the record), Vedalankar repeatedly falsely alleged *insufficient budget* received from the Justice

Department as the reason for not proceeding to appoint the three candidates recommended by selection panels for LASA's three remaining vacant Senior Litigator posts and for freezing recruitment to them – which story she confirmed on affidavit under penalty of perjury in April 2011, as did Nair and Human Resources Executive Amanda Clark – Nair totally changed the alibi in his 'Report to Board' in November 2011 to account for why LASA's three remaining top professional posts had not been filled, after the *budgetary insufficiency* excuse had been completely discredited, and now falsely alleged '*recruitment challenges*', even as three eminently suitably qualified and experienced candidates had been selected and recommended for the posts – consistent with Vedalankar's absolutely false and untruthful claim to the Committee that 'they knew that those positions could not be filled'.

Hon Jeffery was pertinently aware of LASA's unlawful failure to finalize its successful, substantially complete recruitments to its Pietermaritzburg, Durban and Mthatha Senior Litigator posts under cover of a bogus financial insufficiency excuse eventually fed to the requester, and Vedalankar appreciated that Hon Jeffery was aware of this, because at her presentation on 11 October 2011 of LASA's annual report for 2010/11 the year before, Hon Jeffery pointedly raised the fact, reported to him by the requester, that LASA wasn't 'spending its money allocated to impact litigation'.

Which fact Chief Legal Executive Hundermark (then called 'Legal Development Executive'), also present at the meeting, conceded to the Committee, mentioning 'our senior litigators' performing this 'impact litigation', without disclosing to the Committee (i.e. concealing from it) that three Senior Litigator appointments had been illegally aborted and the three posts practically permanently frozen: wholly off the record in criminal contravention of section 55(1)(a) read with section 86(2) of the Public Finance Management Act 1 of 1999 ('PFMA') (quoted below); unlawfully without Board authority under the Approval Framework (quoted below); and unlawfully under section 53(4) of the PFMA (quoted below) – as the Constitutional Court confirmed in *Zungu v Premier of the Province of KwaZulu-Natal and Others* (CCT136/17) [2018] ZACC 1 (22 January 2018): in the case of public entities, 'leaving' a budgeted and funded 'position' 'vacant' is a 'breach of the provisions of the Public Finance Management Act (PFMA)'.

Section 55(1)(a) of the PFMA requires that 'The accounting authority for a public entity ... must keep full and proper records of the financial affairs of the public entity'. Not to do so is a serious crime under section 86(2): 'An accounting authority is guilty of an

offence and liable on conviction to a fine, or to imprisonment for a period not exceeding five years, if that accounting authority wilfully or in a grossly negligent way fails to comply with a provision of section ... 55.'

So if Vedalankar told the Committee the truth when responding to Hon Jeffery's query about 'the discrepancy with the posts and employees', by stating that she and her management colleagues 'had allocated a certain amount of funds but they knew that those positions could not be filled so they adjusted the budget', records will exist to vouch that they had indeed 'adjusted' LASA's salary 'budget' sought from the National Treasury, voted by the National Assembly, and paid over via the Justice Department's Third Party Funds Division during or before the 2011/12 financial year (because 'they knew that those positions could not be filled').

And records will exist to show that that 'they adjusted the budget' by reallocating to other cost centres the salary 'budget' applied for and received for 'those positions' that 'they knew ... could not be filled'.

Certainly LASA's 'budget' has never been 'adjusted' downwards in regard to its three Senior Litigator 'positions' that 'they' allegedly 'knew ... could not be filled', because LASA's annual budget records reveal that it has always budgeted for and has always received salary budget from the Treasury via the Justice Department for all nine of its Senior Litigator posts, including its three now very long vacant posts at Durban, Pietermaritzburg and Mthatha. And it continues to do so.

Section 2.3 of LASA's Approval Framework governing 'Reallocation of budget – Operational expenditure' prescribes different levels of executive approval required for the reallocation of different amounts of LASA's budget, and it requires Board approval for any 'Reallocation of budget in excess of 8% between cost centres'.

So if Vedalankar and her fellow management executives 'adjusted' LASA's salary 'budget', not by lowering it (because they never did) but by reallocating part of it, and this entailed a 'Reallocation of budget in excess of 8% between cost centres', a record will exist to vouch that the Board approved this – unless she and they 'adjusted' LASA's salary 'budget' in regard to 'those positions' that 'they knew ... could not be filled' by reallocating 33.3% of it (one third of the salary budget for the nine Senior Litigator posts – three vacant) without Board approval in an unlawful contravention of section 2.3 of LASA's Approval Framework.

Section 53(4) of the PFMA prescribes: ‘The accounting authority for such a public entity is responsible for ensuring that expenditure of that public entity is in accordance with the approved budget.’

By definition under section 1, the Board is LASA’s ‘accounting authority’; and as authorised to do so by section 56(1)(a), the Board has delegated its powers as such to Vedalankar.

Under section 56(2)(c), the Board retains ultimate ‘responsibility concerning the exercise of the delegated power or the performance of the assigned duty’ as ‘accounting authority’, of which ‘responsibility’ its delegation to Vedalankar doesn’t ‘divest’ it.

Consistently with section 56(1)(a) of the PFMA, section 16 of the Legal Aid South Africa Act 39 of 2014 stipulates under the heading ‘Functions of chief executive officer’ in subsection (2): ‘Subject to the provisions of section 56 of the Public Finance Management Act, the chief executive officer has such powers and duties as may, in writing, be delegated or assigned to him or her by the Board.’

At the trial of case DLC 529/11 in mid-2013, a copy of the Board’s delegation to Vedalankar of its ‘powers and duties’ as ‘accounting authority’ was handed into court by LASA’s counsel.

If the requested records specified in this Part don’t exist, section 23 of PAIA requires that this be certified on affidavit – categorically and unambiguously: Section 23(1)(b) draws a clear and crucial distinction between a record that ‘(i) is in the public body’s possession but cannot be found’ and one that ‘(ii) does not exist’.

The two categories are distinguished by ‘or’, so an affidavit complying with section 23 may not conflate non-existent records with extant but lost records.

Subsection (2) prescribes: ‘The affidavit or affirmation referred to in subsection (1) must give a full account of all steps taken to find the record in question or to determine whether the record exists, as the case may be, including all communications with every person who conducted the search on behalf of the information officer.’

Albeit irrelevant under section 11(3) of PAIA to the decision of the request, the requester records that his reason for requesting the records specified in this Part is to establish whether Vedalankar told the Committee the truth in responding to Hon Jeffery’s query about ‘the discrepancy with the posts and employees’ when she stated, ‘They had

allocated a certain amount of funds but they knew that those positions could not be filled so they adjusted the budget’ (certainly untruthfully false was her statement that ‘In terms of the discrepancy with the posts and employees, it was very clear in the report’), or whether, as Hon Jeffery suggested, she lied to the Committee in making this statement – in furtherance of a cover-up of top-level recruitment corruption entailing multiple criminal and other illegal contraventions of the PFMA (illustrating the adage coined after Watergate: ‘The cover-up is always worse than the crime’) to defeat the Committee’s constitutional oversight mandate over LASA and to evade detection and being held to account – in criminal contravention of section 17(2)(e) of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004.

Which provides: ‘A person who ... wilfully furnishes a House or committee with information, or makes a statement before it, which is false or misleading ... commits an offence and is liable to a fine or to imprisonment for a period not exceeding two years or to both the fine and imprisonment.’ In which case, the requester intends referring the matter to the Committee and to the National Director of Public Prosecutions.

E. Fees

*(a) A request for access to a record, other than a record containing personal information about yourself, will be processed only after a **request fee** has been paid. (b) You will be notified of the amount required to be paid as the request fee. (c) The **fee payable for access** to a record depends on the form in which access is required and the reasonable time required to search for and prepare a record.*

The R35 request fee prescribed by section 22 of PAIA was paid into Legal Aid SA’s bank account on even date under reference number: PAIA_Brink_2019.

F. Form of access to record

Mark the appropriate box with an "X".
(a) Your indication as to the required form of access depends on the form in which the record is available.
(b) Access in the form requested may be refused in certain circumstances. In such a case you will be informed if access will be granted in another form.
(c) The fee payable for access to the record, if any, will be determined partly by the form in which access is requested.

1. If the record is in written or printed form -

X	copies of records		inspection of record
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2. If record consists of visual images - N/A			
3. If record consists of recorded words or information which can be reproduced in sound - N/A			
4. If record is held on computer or in an electronic form -			
<input type="checkbox"/>	printed copy of record	<input type="checkbox"/>	printed copy of information derived from the record*
<input type="checkbox"/>		<input checked="" type="checkbox"/>	X copies in computer readable form – to be emailed as file attachments.

G. Notice of decision regarding request for access

You will be notified in writing whether your request has been approved/denied. If you wish to be informed thereof in another manner, please specify the manner and provide the necessary particulars to enable compliance with your request.

How would you prefer to be informed of the decision regarding your request for access to the record?

By email.

Signed at Eshowe on 12 April 2019



SIGNATURE OF REQUESTER