

**Legal Aid**  
South Africa

**DD**

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**By Email**

**28 January 2011**

**Adv A Brink**

**25 Baker Road**

**Prestbury**

**Pietermaritzburg, 3201**

**Email: [arbrink@iafrica.com](mailto:arbrink@iafrica.com)**

Dear Adv. Anthony Brink,

**REQUEST FOR INFORMATION IN TERMS OF PROMOTION OF ACCESS  
TO INFORMATION ACT 2 OF 2000**

1. I acknowledge your letter of 15 December 2010 in which you request access to information in Legal Aid SA's possession in terms of the Promotion of Access to Information Act, Act 2 of 2000 ("PAIA"). I have also considered your recent letters dated 30 November 2010 sent to the Chairperson of the Board of Legal Aid SA, Judge President Dunstan Mlambo ("Mlambo JP") and to the Board of Directors ("Board") dated 24 January 2011.
2. Legal Aid SA promotes and complies with the constitutional precepts of accountability; openness; transparency and respect for human and related rights including your right to access information in its possession. This recognition should set the tone for the answer that follows herein below.

3. In your letter to Mlambo JP, you made serious and malicious accusations which can in effect be separated into two groups. Firstly, you accuse Mr Brian Nair ("Nair"), the Legal Aid SA's National Operations Executive ("NOE"), and me of unlawfully misrepresenting information (mainly financial management issues) to Parliament's Portfolio Committee on Justice and Constitutional Development and of concocting unlawful excuses and reasons, all with malicious intent to freezing a post of Senior Litigator, Pietermaritzburg ("PMB") for which you were singly selected and recommended for appointment subject to your final interview with Mlambo JP.
  
4. Secondly, you accuse Mr Nair and I or even the Legal Aid SA of singling you out for differential treatment which is, according to you, unlawful and unconstitutional, because of your race and of your conscience and belief. As a result of the foregoing conclusions, you grounded your application for access to information on section 46 of PAIA in seeking access to information from the Legal Aid SA. It is common cause that section 46 provides that:

*"Despite other provisions of this Chapter, the information officer of a public body must grant a request for access to record of the body contemplated in section 34 (1)... if –*

*The disclosure of the record would reveal evidence of –  
a substantial contravention of, failure to comply with, the  
law; or*

*...*

*the public interest in the disclosure of the record clearly  
outweighs the harm contemplated in the provision in  
question."*

5. At the outset, I wish to record my strongest rejection of your accusations which you levelled against me as the Chief Executive Officer of Legal Aid SA; members of the Executives (both individually and collectively) including but not limited to Mr Nair; Ms Amanda Clark ("Ms Clark") and the Board members including its chairperson, Mlambo JP; and its secretary Ms B Schoeman. Your views are unfounded; wrong and outright defamatory. My and my organisations' rights are strictly reserved to deal therewith at a later stage and/or an appropriate forum.
  
6. As I will show herein below, the premise you have chosen in seeking access to information you seek herein is baseless. This wrong assumption, which I will disprove herein below, led you to reject my answers to your request for access to our records. You continued with these malicious accusations to the Parliamentary Portfolio Committee on Justice and Constitutional Development; to the Ministry of Justice and Constitutional Development; to the Board; and to other institutions of your choice.
  
7. As I will demonstrate to you herein below, your assumptions in taking this route are far from the truth and are misinformed. I must however advise you, that the explanation furnished by me to you on 18 October 2010 remains valid and will be added to and clarified where possible as indicated herein below.
  
8. Despite the above accusations and assumptions, which I completely reject, I provide you with further information and reasons that led to the freezing of the Senior Litigator posts in Durban, Pietermaritzburg and Mthatha, in addition to the reasons furnished to you on 18 October 2010.

9. I provide you with the following documents to dispel the incorrect assumptions with which you ground your right to access information from the Legal Aid SA. In doing so, I wish to advise that the documents provided to you are provided on the basis that they are and should **remain private and confidential**. You are therefore requested not to distribute them any further.

<u>NATURE OF DOCUMENT</u>		<u>AIM OF THE DOCUMENT</u>
V1.	The Legal Aid SA Approval Framework as approved by the Board on 23 May 2009	To demonstrate to you that the COO and CEO in consultation with other national Executives incl. NOE, HRE, ROEs, JCEs and the Board took part in deciding on various cost-cutting mechanisms including freezing of posts. The Board agreed with the Executives. See the extract herein below. The freezing of posts is contemplated in clause 8.1.2 thereof without same being Strategic Planning as you contend. This clause should be read together with Note 31 which clarifies that the NOE is the responsible executive for positions related to functions reporting to him and that the concurrence of the COO is not required for these posts. The COO has a similar authority for posts related to functions reporting to him.

V2.	The Legal Aid SA policy on inter alia, Recruitment of new employees, approved by the Board on 29 November 2008	To demonstrate (i) that in selecting employees, Legal Aid SA is guided by the Constitution Act of 1996 and relevant legislation; and (ii) Legal Aid SA Executives are not precluded from formulating processes for recruitment.
V3.	Letter of 18 March 2010 by CEO to DG DoJ & CD	To demonstrate that the Legal Aid SA has always had financial difficulties as a result of failure by DoJ to advance funding in terms of OSD 2 <sup>nd</sup> phase as promised; and the consequences of such failure on Legal Aid SA mandate.
V4.	Letter of 13 April 2010 by CEO to DG DoJ & CD	To demonstrate that there was a need for further funding as a result of the failure to deliver on the promised funding; and the effect that such failure will have on service delivery.
V5.	Email from Brian Nair (NOE) dated 15 July 2010 to Executives	To demonstrate the need to budget for the shortfall; to show that not only the Senior Litigators' posts were identified for possible freezing; and to show other costs-cutting mechanisms resorted to stay in budget.
V6.	Email from Jerry Makokoane (COO) and attached Memo to Executives; ROEs and JCEs of Legal Aid SA	To demonstrate that; a process of cost-cutting processes were proceeding even after you received your regret letter; that even Cabinet required Legal Aid SA to engage in cost-cutting processes; an impending

	date 30 Sept 2010	shortfall in Legal Aid SA's budget; and the types of cost cutting measures proposed by cabinet. See the 1 <sup>st</sup> option proposed.
V7.	An edited/ blacked out recommendation of the 1 <sup>st</sup> round Panel recommending inter alia you "For Next Round Interviews" dated 6 November 2009	To demonstrate that the process for Senior Litigator was two-pronged; that there were 2 candidates recommended for next round of interviews; that you were not selected and recommended for appointment subject to Mlambo JP's satisfaction as you claim but subject to a second round interview process for which the interview panel included Mlambo JP and other National Office Executives; and that the 2 <sup>nd</sup> round was never approved by NOE thus was never proceeded with.
V8.	Extract of audio recording of my presentation to Portfolio Committee on Justice on 12 October 2010 (after your regret letter)	To demonstrate that even in Parliament, I mentioned challenges that may face Legal Aid SA should OSD funding not be fixed; that if funding does not come through "we would have to freeze posts" and further that "because that entails a change in baseline because if we don't have that we are still doing to go back to that problem"; that there is a further budget cut in 2012.

V9.	Confidential letter of regret dated 23 August 2010 sent to you by KZN ROE Mr Vela Mdaka.	To demonstrate that you were informed that the Legal Aid SA will not be proceeding with the filling of the posts of Senior Litigator's KZN's Durban and PMB.
V10.	Extract of Legal Aid SA's Board minutes of 31 July 2010 where a resolution on cost-cutting proposal were approved by the board.	To demonstrate that the issue of cost-cutting measures served on the Board of Directors for its resolution thereon and that it has approved these cost-cutting measures.
V11.	The Advertisement for the position of Senior Litigator, KZN (Durban and PMB)	To demonstrate that processes outlined in the Policy on Recruitment were followed by the relevant regional office in seeking to recruit candidates for the above posts.
V12.	Chain email dated 14; 22; and 30 April 2010 from Clark to you and other regional and national managers dealing, in general, with the Senior Litigators' post.	To demonstrate that you were informed that process was still on and you were asked to liaise with KZN regional execs in re the relevant post.

10. I trust that the above information addresses the complaint you have against the Legal Aid SA regarding the Senior Litigator posts. From your reading of the request for information specified in your **Annexure**

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**To Form A: Section D: Records Required** (as per your letter dated 26 August 2010 and repeated in your letter dated 15 December 2010) ,  
I am able to advise as follows:

**AS TO PART 'A' THEREOF (AND PART B WHERE NECESSARY)**

11. As to your requests 1 and 2: I wish to refer you to the Legal Aid SA's Policy Document read with the Approval Framework.
12. As regard your request number 3 and 4: Mr Nair relied on the Approval Framework especially at 8.2.2(c) where, you will note, he has to approve the appointment of senior staff. However, he was not the person in charge of or managing the process of recruiting a Senior Litigator. This process is managed by the relevant Regional Human Resources Manager if it is a regional post; and a HRE if it is a senior national appointment. Mr Nair is the line executive/manager responsible for the appointment of Senior Litigators.
13. Seeing that the posts of Senior Litigator's post was a senior post, second round interviews were to proceed to the national level with national executives and was to be coordinated and managed by the HRE. The relevant regional HR officer was responsible, at all times, together with the KZN ROE Mr Mdaka who managed and compiled the recommendation of the panel after the first round of interviews as attached in the above table.
14. I reject your allegations in your request number 5 and 6: I dispute your argumentative conclusion premised, of course on misguided facts and

false information. Since these allegations are unfounded no such document exists.

15. As to request 7: I refer you to the Approval Framework annexed hereto.
16. As to requests 8 and 9 : I refuse to grant you access to this information on the basis of section 44(1) and (2) as the information sought herein relate to the deliberative process of the Legal Aid SA with third parties. Such information was required by it before; during and/or after engaging, in interviews and candidates reference check. (Refer in this regard to the Legal Aid SA's Policy on Recruitment Checks.
17. As to request 10: No time limit was set to finalise the recruitment process.
18. As to requests 3 and 4 (both in Part A and B of the request document): there are no such communications that I am aware of. I am willing to provide you with an email from Ms Clark dated 30 April 2010 which you already have in your possession and which you have referred to in your letter to Mlambo JP on or about 30 November 2010. This was blind copied to the ROE of KZN Mr Mdaka and Brijal.
19. For your requests 11; 12; 13 (PART A); 13 (PART B); 14 (PART A); 14 (PART B); 15 (PART B): please refer to the correspondence on costs-cutting measures, read with the Legal Aid SA's Approval Framework.
20. As for your request 15: The disparity on the advertised salary between Mthatha and Durban/Pietermaritzburg Senior Litigator position, is as a result of cost of living expense which was effected on 23 October 2009. You would have noted that the difference between the two advertisements is a period of over nine months.

21. As for your request 16: I am not aware of any of the Executives discussing you and/or your candidacy for the above-mentioned post save the edited and blacked out recommendation for the next round of interviews. This is attached hereto as part of the bundle in the table above.
22. As to the regional panel members' individual assessment notes; scores; deliberations; submissions and assessment reports on you, I, having considered your request, refuse to grant you access thereto as these documents and information relating thereto were compiled from the Legal Aid SA's panel's deliberative process of decision-making in the assessment and interview of candidates, including you, for vacant posts in the Legal Aid SA. I am entitled to refuse to grant you this information in terms of section 44(1) and (2) of PAIA.
23. I have decided, notwithstanding the above position, and after I have exercised my discretion, to grant you access to an edited/blacked out version of the final recommendation of the panel to show you what its decision was.

#### **AS TO PART B "OTHER RECORDS"**

24. As for your requests 1; 2; 28; 29; 30; 31; and 32: Except for annexures "V7" and "V9" (attached), I have exercised my discretion against granting you access thereto. I refuse to grant you access thereto in terms of section 44(1) and (2) of PAIA. My reason therefore is that this information was generated and compiled as a result of the Legal Aid SA's panel's deliberative process of decision-making in the assessment and interview of candidates, including you, for the vacant posts in the Legal Aid SA.

25. As to requests 3; and 4: Please refer to above.
26. As for requests 5; 6; 7; 8; 9; and 10: I am able to inform you that there is no recorded explanation for what you refer to as 'the delay'. I reject that there were any delays in dealing with any post. As far as I can tell, there were no time frames within which these recruitment drives were to be conducted and completed. I however wish to state that the Legal Aid SA was, at the same time as it conducted the recruitment drives referred to herein above and as you would have noted from the above documents, in a parallel process of securing funding. It had in conducting these recruitment processes parallel with fund raising drive, acted under the impression that the DoJ &CD would honour its promise to extend OSD funding to it. Accordingly and naturally, the drive to secure funding took priority as you would have noted from the correspondence above that all those Executives that were engaged in the recruitment of the Senior Litigator posts were also engaged in costs-cutting discussions/processes including identifying the areas that could be sacrificed to keep Legal Aid SA in budget. Ms Clark's mail to you was to be and must be understood in this light.
27. Because Ms Clark would not have been involved in the Senior Litigator's recruitment process as the second round of interviews was not proceeded with (see her email of 14; 22 and 30 April 2010 which you already have in your possession), Baboo Brijal would have been provided with the same updates as included herein above regarding the costs-cutting mechanisms. Obviously by November 2010, after the Memorandum from the COO, it was evident that there would be no funding coming from the DoJ. In fact a shortfall was expected up to 2012. Brijal was to update you should anything change regarding the continuation or otherwise of the recruitment drive not anything more.

28. As for requests 11; and 12: Ms Clark, as a HRE, was involved with the cost-cutting processes and was not at liberty to inform you of the reasons why the posts were not being finalised. All she did and said to you is informed by the costs-cutting measures that appear in the above documents. She was privy thereto and she too, just like all of us, had to wait and see if the Department of Justice and Constitutional Development would allocate us budget to proceed with finalising the recruitment processes. It is on this basis that you should understand Ms Clark's communications to you regarding this process.
29. As to requests 13, 14 and 15: The decision to create or abolish a post is derived from the Approval Framework which is annexed herewith. All communication relating thereto is also attached. If for any reason, the e-mail or any form of communication is not attached, it would have been verbal, the authority of which derives from the aforementioned Approval Framework.
30. As to your requests 16; 19; 20; 21; 22; 23; 24; 26; and 27: I have exercised my discretion against granting you access to this information in terms of sections 43(1) as it relates to confidential correspondence with third parties.
31. I further refuse to grant you access on the same information and documents on the basis of section 44(1) and (2) as the information sought herein relate to the deliberative process of the Legal Aid SA with third parties. Such information was required by it before; during and/or after engaging, in interviews and candidates reference check. (Refer in this regard to the Legal Aid SA's Policy on Recruitment Checks). I also refuse to provide access to this record as it relates to research or information gathering by third parties on behalf of Legal Aid SA as contemplated in section 43(1) and (2). It seems apparent to me that you already have document(s) that you seek in this regard.

32. As for your requests 17 and 18: There is no such discussion other than the documents provided to you.
33. As for your request 25: As this information would relate to the internal deliberations; opinions and views intended for Legal Aid SA to take certain decisions as contemplated in section 44(1) and (2), I have exercised my discretion against granting you access thereto. I therefore refuse to grant you access to this information or document.
34. As for your requests 33; and 34: Your attention is referred to the costs-cutting measures correspondence in which Nair was instrumental in identifying posts that should be cut; frozen etc. This was part of the Executive's mandate around that time. See especially the email and memo from COO to all Executives; ROEs; JCEs and 'All Staff' herein above wherein Cabinet also propagated the same mechanisms as Legal Aid SA.
35. As for request 35: To the best of knowledge there are no other electronic records relating to you.

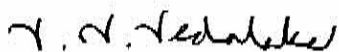
#### **IN CONCLUSION**

36. As you will note from the perusal of these documents, your request in terms of overriding provisions of section 46 of PAIA were in lieu of your misguided accusations against me; Nair; Mlambo JP; Clark and now the Board that either one or more of us were engaged in substantial contravention of the law. This I have rejected, out of hand, and I put you to the proof thereof.

37. In light of the above information given to you, it must further be apparent that your allegations of discrimination against you as an individual are baseless and misguided. Save for the documents and information delivered to you, I refuse to grant you access to the documents I have referred to.
38. Mlambo JP had an occasion to peruse and consider your long letter of 30 November 2010 wherein you seem relentless in your complaint and accusations against me; Nair and the Legal Aid SA and has essentially, after reviewing our processes regarding the cost-cutting measures including but not limited to the Senior Litigator posts, found no evidence to substantiate your claims. Of course you do not believe him and you ridicule his findings in your subsequent correspondence and your threatened court actions. I have, on my part, also tried, notwithstanding this answer from Mlambo JP, to answer your requests and avail certain documents to you, the contents of which, I wish to repeat, are private and confidential.
39. As indicated hereinabove, I have also had an occasion of reading your recent letter dated 24 January 2011 to Mlambo JP. I, and the Legal Aid SA under my watch, have never sought to make any decisions regarding the Senior Litigator posts on any ground other than the budget constraints which you have rejected.
40. You accuse us and persist with your baseless accusations of financial improprieties and misrepresentations to the Portfolio Committees etc. I challenge you to present your investigative results of Legal Aid SA's financial mismanagement; wasteful and fruitless expenditure to the Auditor General.

41. In conclusion, I note your threats of court actions cross examining me, officials of Legal Aid SA; now the Board members; and their secretary. Your threats of *mandamus* against the Legal Aid SA; of using independent judges; of probing our executives' affidavits; of your draft notice of motion and an accompanying founding affidavit, are unnecessary. Please refrain from your disparaging attacks on people's dignity on baseless assumptions.
42. Be advised that the Legal Aid SA will defend itself against any of the threats that you have made against its officials and Board members.
43. The Legal Aid SA's Board of Directors; its Executives and all of its staff country-wide are committed to complying with the laws and statutes of the country most importantly the Constitution of the country and its values of accountability and transparency. It is in that spirit, and despite your insulting and condescending tone of language to us, that I have responded fully to your requests for access to information regarding your non-appointment to the position of Senior Litigator, PMB.
44. We have exhausted our explanations to you and trust that this final letter to you shall put this matter to rest. Please be advised that no further correspondence on this matter will be responded to. Your cheque will be returned to you with the original of this letter.

**Yours faithfully,**



**Vidhu Vedalankar**

**CEO: Legal Aid South Africa**