



Legal Aid
South Africa

MMM

18 October 2010.

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Dear Advocate Brink,

**Re: Promotion of Access to Information Act: Request for Records: Senior Litigator
Position, Pietermaritzburg**

I acknowledge receipt of your letters addressed to the CEO and COO dated 26 August and 1st September respectively. Whilst not responding to each and every allegation contained therein, an omission to address any aspect should not be construed as an admission of the correctness on our part, and we reserve our rights to respond to any such allegation should the need arise.

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The test to be applied to a request for information in terms of the PAIA, as laid down by the court in the case of *National Teachers Union v Superintendent General: Department of Education & Culture, Kwazulu-Natal and Another (D38/08) [2008] ZALC 18*, is as follows:

- a) *In dealing with a request in terms of the Act, the question is not whether the requester is entitled to information but about whether the information is relevant for the purpose of enabling the requester to exercise a right that maybe breached, rendered unenforceable or weakened by the non disclosure.*

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In considering your request for information we were guided by this principle, together with Section 32 of the Constitution and the relevant provisions of the PAIA.

Section 32 of the constitution grants access to information in the following terms:

“(1) *Everyone has the right of access to:-*

- (a) *Any information held by the State; and*
 - (b) *Any information that is held by another person and that is required for the exercise or protection of any rights.*
- (2) *National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state”.*

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The national legislation enacted for this purpose is the Promotion of Access to Information Act which you have sought to use in this matter. In terms of Chapter 4 of the Act, specifically sections 62 to 70, the information officer of a public body must refuse access to information falling into the following categories, save in circumstances provided for in the Act:

- a) *Mandatory protection of the privacy of a third party who is a natural person.*
- b) *Mandatory protection of certain confidential information of a third party.*
- c) *Mandatory protection of records privileged from production in legal proceedings.*
- d) *Mandatory protection of research information of a third party.*

The refusal of information falling into the above categories is however not without qualifications. In this regard section 46 provides as follows:

“Despite any other provision of this Chapter, the information officer of a public body must grant a request for access to a record of the body contemplated in section 34 (1), 36 (1), 37 (1) (a) or (b), 38 (a) or (b), 39 (1) (a) or (b), 40, 41 (1) (a) or (b), 42 (1) or (3), 43 (1) or (2), 44 (1) or (2) or 45, if—

- (a) *the disclosure of the record would reveal evidence of—*
 - a substantial contravention of, or failure to comply with, the law; or*
 - an imminent and serious public safety or environmental risk; and*
- (b) *the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question.”*

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Your request for information was considered against this background and it was in terms whereof that it was decided that (i) your request for information goes beyond your individual

circumstances and extends to information on other third parties, (ii) the information on third parties does not fall within the section 46 category above.

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Noting the above and without waiver of any of our rights, the following explanation is provided in so far as it relates to the senior litigator positions within Legal Aid SA:

- 6.1 A defined number of Senior Litigator positions were created linking to particular High Courts.
- 6.2 Noting the seniority of these positions, it was decided to implement a two stage interview process in the appointment to these posts.
- 6.3 The first stage takes place at Regional Office level where an Interview Panel will make a recommendation for candidates to proceed to the second stage of interviews.
- 6.4 The second stage comprises an interview process by a national office panel, including the Chairperson of the Board, National Operations Executive (NOE), Legal Development Executive, Human Resource Executive and the Chief Operations Officer. This panel does not have to recommend for appointment any of the recommended candidates from the first phase interviews conducted by the region.
- 6.5 The recommendation of the second stage of interviews are finalised by the responsible executive in terms of section 8.2.2 (b) of the Legal Aid SA Approval Framework. As per this Approval Framework, the relevant Regional Operations Executive (ROE), in the case of the Durban and Pietermaritzburg positions the ROE for KwaZulu-Natal together with the NOE and CEO approve the final appointment. The Approval Framework is approved by the Board of Legal Aid SA from time to time, and was last approved on 27 February 2010. The relevant extract of the approval framework is hereby made available and attached for ease of reference.
- 6.6 The NOE, as the executive responsible for operations may also motivate a change in the organisational structure, including the freezing of positions, for discussion and finalisation with the CEO (refer S.8.1.2 (b) of the Legal Aid SA Approval Framework).
- 6.7 Due to the effects of the recession, anticipated funding for the 2010/11 financial year did not materialise. This had the effect of cutting our baseline funding by a significant amount. It was accepted that this required a reduction to our staff establishment in the 2010/11 financial year in order to meet this shortfall. Since early this year, management has had to identify positions which could be frozen. In July 2010 the NOE and CEO took the decision that all senior litigator posts that were vacant would be immediately frozen.

Noting the above and without waiver of any of our rights, the following explanation is provided in so far as it relates to your individual application for the senior litigator position and the circumstances that followed.

- 7.1 You were interviewed together with other candidates in the first round of interviews.
- 7.2 You were recommended together with other candidates, for the second round of interviews. As explained above that however was not a guarantee that you would get the position. We have instances in the past when our nationally constituted panel has not recommended for appointment any of the recommended candidates from the first phase interviews conducted by the region.
- 7.3 The NOE and CEO took the decision that all senior litigator posts that were vacant would be frozen. Therefore, the three vacant Senior Litigator positions for Durban, Pietermaritzburg and Mthatha have been frozen.
- 7.4 You were sent a final letter of regret from our Regional Operations Executive dated 23 August 2010 indicating that Legal Aid SA will not be proceeding with the filling of the Senior Litigator post. A copy of the aforementioned letter is also attached for your reference.
- 7.5 Should we decide to unfreeze these positions in the future, the positions will be duly advertised and you will be at liberty to submit your application for any of the positions.

The above information is provided to clarify the position and to definitively address your suspicion that your right to a fair administrative process is threatened, breached or may be rendered unenforceable. Accordingly your request for the detailed information requested in your letter, other than the information and explanation provided above, is declined as it is not relevant to you exercising any right you may have in law.

Yours faithfully,

N. N. Vedalankar

Ms Vidhu Vedalankar

CEO & Information Officer