

Annual report for 2015/16 by Legal Aid South Africa to the South African Human Rights Commission under section 32 of the Promotion of Access to Information Act 2 of 2000 ('PAIA')

REPORTING PERIOD FROM 1 APRIL 2015 TO 31 MARCH 2016			
NO	Items	Total number	Comments
1	a) the number of requests for access received;	<i>(Besides any other requests Legal Aid SA might have received from requesters other than Advocate Anthony Brink...)</i> 1	Under section 20 of PAIA, the Department of Justice and Correctional Services referred Brink's request for the records of Legal Aid SA's budget applications to Legal Aid to respond to. In the previous reporting period, 1 April 2014 to 31 March 2015, Brink made three requests: in November 2014 and a fourth one in March 2015. All these requests were finally decided in May 2015, in the current reporting period.
2	(b) the number of requests for access granted in full;	<i>(Besides any other requests Legal Aid SA might have granted in full...)</i> 1	Legal Aid SA granted in full Brink's request referred to it by the Department. None of Brink's requests for access made in the previous reporting period and decided in the current 2015/16 reporting period were granted in full.
3	(c) the number of requests for access granted in terms of section 46;	<i>(Besides any other requests Legal Aid SA might have granted in terms of section 46...)</i> 0	
4	(d) the number of requests for access refused in full and refused partially and the number of times each provision of this Act was relied on to refuse access in full or partial[y];	<i>(Besides any other requests Legal SA might have refused in full and refused partially...)</i> Re: 'the number of requests for access refused in full and refused partially' 3 requests were refused in full. 1 was refused partially. Re: 'the number of times each provision of this Act was relied on to refuse	In May 2015, claiming to have been 'delegated' by information officer Vidhu Vedalankar to do so (in fact he was only delegated as a deputy information officer eight months later on 11 January 2016), Legal Aid SA Corporate Services Executive Thembile Mtati responded to Brink's (i) request addressed to Vedalankar in March 2015 for access to eight records/sets of records (two of which Brink requested by letter supplementing his original PAIA request)



access in full or partial[ly]:

Without expressly stipulating them, Mtati unambiguously alluded to the provisions of sections 7 and 45 to justify totally refusing all Av Anthony Brink's requests for access to the 83 records requested from Hundermark and Makokoane. (Mtati and deputy information officers Bambiso and Msweli had expressly stipulated these same two sections together in November 2014 when refusing Brink's three PAIA requests made the month before.)

Section 36 was relied on to justify refusing Brink's request for four records/sets of records relating to Legal Aid SA's liability insurance with Carmague concerning its maintenance of Legal Aid SA's defence to Brink's labour claim.

and (ii) plea to her in his evenly dated covering letter that she exercise her powers and ultimate responsibility under section 17 for compliance with PAIA by her deputy information officers, and to see to (alleged) deputy information officers Patrick Hundermark's and Jerry Makokoane's compliance with Brink's requests for access to records addressed to them in November 2014 (two requests to Hundermark, one to Makokoane), in respect of which requests, instead of notifying their grant or refusal of them within the prescribed time (an extended 60 days) as required, they had demanded payment for time spent variously on reading the requests, on background reading, and on being briefed about them before deciding his requests. (In fact, contrary to the false information in Legal Aid SA's PAIA manual, Hundermark and Makokoane were not duly delegated DIOs at the time.)

There is no provision in the Act for such reading and briefing fees. And section 22 prescribes that search fees may only be levied in respect of records to which access has been granted. As will appear below, these unlawful money demands were later abandoned at court.

Mtati responded by:

- (i) totally refusing all Brink's requests for access addressed to Hundermark (all 27, comprising 23 plus 4 records/sets of records);
- (ii) totally refusing all Brink's requests for access addressed to Makokoane (all 56 records/sets of records);

(iii) persisting with the unlawful money demands, even after Brink had shown with reference to the Act in his letter to Vedalankar that they were unlawful; and, (iv) granting access to one record requested from Vedalankar; stating that one record did not exist; and refusing all the rest (6 of 8 records/sets of records).

However, section 7 on which Mtati relied is not a provision included in sections 34–45 in Part 2 of Chapter 4, 'GROUNDS FOR REFUSAL OF ACCESS TO RECORDS', and could therefore not lawfully be relied upon to refuse a request for access, and it consequently had no application to Brink's requests. As will appear below, Mtati's spurious reliance on section 7 was later abandoned at court.

Section 45 bars frivolous and vexatious requests; but in light of Legal Aid SA's repeated acknowledgement of Brink's serious stated purpose in requesting access to the specified documents, namely to use them in criminal, civil and disciplinary proceedings against Legal Aid SA's national management executives, the section had no application to Brink's requests. As will appear below, Mtati's spurious reliance on section 45 was later abandoned at court.

Section 36 on which Mtati relied to justify refusing Brink's request for four records/sets of records relating to Legal Aid SA's liability insurance had no application to the request for these records. As will appear below, Mtati's spurious reliance on section 36 was later abandoned at court.

			<p>Since Mtati was only designated by information officer Vedalankar as a deputy information officer on 11 January 2016, he had no authority under the Act to refuse most of Brink's requests for access in May 2015 (and also in November 2014) when he do so. For this reason, over and above the unlawfulness of the grounds he advanced, Mtati's refusal of nearly all Brink's record requests was ultra vires and unlawful. Mtati's repeated claims under oath to have been a deputy information officer when he refused Brink's requests for access – claims made in his answering affidavits in Brink's applications to compel Legal Aid SA's compliance with PAIA – were false and perjurious.</p>
5	<p>(e) the number of cases in which the periods stipulated in section 25(1) were extended in terms of section 26(1);</p>	<p><i>(Besides any other requests in respect of which the periods stipulated in section 25(1) were extended ...)</i> 1</p>	<p>The first reason advanced for the extension (notified by Mtati on 28 April 2015, concerning Brink's request addressed to Vedalankar in March 2015), namely that information officer Vedalankar was on leave, was not competent under section 26(1), not being among the permissible reasons for an extension contemplated by the subsection.</p> <p>The given reason was also untrue, in that Mtati later confirmed that Vedalankar 'has not read' the request and was not dealing with it; instead he was.</p> <p>And section 26(1)(c) on which Mtati relied as a further reason for extending the 30-day time limit had no application; it allows an extension if 'consultations among divisions of the public body or with another public body is necessary or desirable to decide the requests that cannot reasonably be completed within the original</p>

				period.' No such consultations were embarked on, and the implication that they were was untrue. Nonetheless, Brink did not object to the extra 30-day extension, even though both reasons advanced to him for seeking it were false.
6	(f) the number of internal appeals lodged with the relevant authority and the number of cases in which, as a result of an internal appeal, access was given to a record;	N/A	N/A	Since Legal Aid SA is a category-(b) public body, as defined by section 1 of PAIA, it has no internal appeal procedure available to aggrieved record requesters.
7	(g) the number of internal appeals which were lodged on the ground that a request for access was regarded as having been refused in terms of section 27;	N/A	N/A	Ditto.
8.	(h) the number of applications to a court which were lodged on the ground that an internal appeal was regarded as having been dismissed in terms of section 77 (7); and	N/A	N/A	Ditto.
9.	(i) such other matters as may be prescribed.	<u>PART A</u> <i>(Besides any other 'complaints lodged with the Public Protector in respect of a right conferred or duty imposed by this Act and</i>	<u>RE: PART A</u> Section 84(x) requires the SAHRC to report "the number of complaints lodged with the Public Protector in respect of a right conferred or duty imposed by this Act and the nature and	

the nature and outcome thereof ...)

One such complaint to the Public Protector was lodged by Brink on 2 April 2015, appealing for the Public Protector's intervention and mediation in Legal Aid SA's repeated refusal to comply with his requests for access to its records.

Re: **'the outcome thereof'**: The KwaZulu-Natal office declined to mediate.

PART B

(Besides any other applications to court...)

Re: **'the number of applications made to every court'**

Two applications against Legal Aid SA information- and deputy information officers were made to the Eshowe Magistrate's Court in the reporting period (cases 1005/15 and 1432/15), in which Brink sought orders compelling their compliance with his requests for access to records that had been illegally refused: in August 2015 Brink sued national deputy information officer Brian Nair and in November 2015 information officer Vidhu Vedalankar.

In February 2015 (in the previous reporting period), Nair had totally refused Brink's request made in November 2014 for four records/sets of records.

outcome thereof'. Since the National Assembly is concerned to know about all complaints to the Public Protector regarding public body failures to comply with their constitutional information transparency obligations, Legal Aid SA is providing this information under this general head: 'such other matters as may be prescribed'.

Misdirecting himself with several basic factual misconceptions, which he stated and proceeded from, KwaZulu-Natal office investigator Sipho Ciske declined to intervene. Brink identified his basic errors and the National Office undertook to review Ciske's decision. The matter is still pending.

RE: PART B

Since LASA is a 'b'-type public body under the definition of 'public body' in section 1 of PAIA, there is no internal appeal procedure at LASA, and under PAIA an aggrieved record requester's remedy is to apply directly to court. However, sections 84(b)(viii) and (ix) require the South African Human Rights Commission to report to the National Assembly annually:

(viii) the number of applications made to every court and the outcome thereof and the number of decisions of every court appealed against and the outcome thereof; (emphasis added)

(ix) the number of applications to every court which were lodged on the ground that an internal appeal was regarded as having been dismissed in terms of section 77 (7);

Since the National Assembly is concerned to

In May 2015, Corporate Service Executive Thembile Mtati, claiming to have been 'delegated' by Vedalankar to do so:

- (i) totally refused all Brink's requests for access addressed to Hundermark (27, comprising 23 plus 4 records/sets of records sought in his first and second requests);
- (ii) totally refused all Brink's requests for access addressed to Makokoane (56 records/sets of records); and,
- (iii) granted access to one record requested of Vedalankar (namely an earlier section 32 report), stated one did not exist, and refused the rest (6 out of 8 records/sets of records).

Re: 'the outcome thereof'

The above-mentioned two applications to court against Vedalankar and Nair were set down for hearing on 11 February 2016, together with three earlier applications Brink brought against Vedalankar and provincial deputy information officers Bambiso and Msweli in 2014 (cases 257, 258 and 259/14), also arising from their illegal refusals to allow access to duly requested documents. The five applications before court for trial were BRINK versus:

1. HOPE BAMBISO N.O., DEPUTY INFORMATION OFFICER, EASTERN CAPE REGION, LEGAL AID SA: Case257/14;
2. VIDHU VEDALANKAR N.O., INFORMATION OFFICER, LEGAL AID

know about all applications to court against both category-(a) and category-(b) public bodies, brought to compel their compliance with their constitutional information transparency obligations, Legal Aid SA is providing this information about the applications to court Brink brought against it, under this general head: 'such other matters as may be prescribed'.

	<p>SA : Case 258/14;</p> <p>3. ZANELE MSWELI N.O., DEPUTY INFORMATION OFFICER, FREE STATE AND NORTH WEST REGION, LEGAL AID SA : Case 259/14;</p> <p>4. BRIAN NAIR N.O., DEPUTY INFORMATION OFFICER, LEGAL AID SA : Case 1005/15; and,</p> <p>5. VIDHU VEDALANKAR N.O., INFORMATION OFFICER, LEGAL AID SA : Case 1432/15</p> <p>At court on 11 February 2016 – following Mtati's receipt ten days earlier of Brink's agenda for the pre-trial conference called by the magistrate, which agenda addressed and refuted all Legal Aid SA's defences in light of relevant provisions of the Act – and before Brink could move his applications:</p> <ul style="list-style-type: none"> o the said information- and deputy information officers, via Mtati, reversed their decisions to refuse Brink's record requests; o abandoned their money demands; o abandoned their defences to Brink's applications to court; and, o agreed to surrender to Brink all the records he had requested, or to certify on oath any that do not exist. <p>In fine, 'the outcome' of all five of Brink's applications to court in 2014 and 2015, to oppose which Legal Aid SA flew in two privately briefed counsel from Johannesburg to oppose him at court, at immense fruitless and wasted expense,</p>	
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was that Legal Aid SA's said information- and deputy information officers unreservedly conceded Brink's entitlement to all the records he had duly requested under PAIA since October 2013, and undertook to surrender them within two months, or certify on oath any that do not exist.

PART C

On 25 January 2016, the SAHRC recommended to Legal Aid SA that it amend its PAIA manual by making several changes to cure deficiencies and grave mistakes in it.

These remedial recommendations were to:

- Include mention of an aggrieved record requester's right to sue for relief out of a Magistrate's Court in which he/she is 'ordinarily resident', having regard to the definition of 'court' in section 1 of the Act. (In legal proceedings against it, Legal Aid SA had incorrectly disputed this right of jurisdiction.)
- Remove the spurious distinction between 'deputy information officer' and so-called 'designated deputy information officer' in Legal Aid SA's PAIA manual, having regard to the fact that the Act makes no such distinction.
- Include mention of Legal Aid SA's information officer's ultimate responsibility for compliance with PAIA by her deputy information officers. (In legal proceedings against it, Legal Aid SA had incorrectly disputed this, and ignorantly and incorrectly

RE: PART C

The SAHRC acted under its power vested in it by section 83(3)(d) to 'recommend a public ... body ... make such changes in the manner in which it administers this Act as the Commission considers advisable'.

The many errors in Legal Aid SA's revised PAIA manual, which Brink brought to the SAHRC's attention, were the result of amendments made to LASA's originally perfect PAIA manual by CSE Mtati (so he said in his answering affidavits), who fancied he could improve it – without bothering to read the Act before he did so. Every one of Mtati's changes to, which is to say corruptions of, the original PAIA manual was wrong, including his misleading inclusion of himself, COO Makokoane and CLE Hundermark in it as alleged deputy information officers, without having been delegated in writing by information officer Vedalankar as required by section 17(6)(a).

		<p>alleged she was responsible for deciding appeals.)</p> <ul style="list-style-type: none"> ● Include mention that a deposit on search fees may only be claimed in respect of a request for access to records that has been granted. (Legal Aid SA had unlawfully demanded payment of such deposits before granting three requests by Brink, persisted with such demands even after refusing the requests, and further persisted with them in litigation for inter alia an order declaring the demands to be unlawful. The demands were ultimately abandoned at court before argument.) ● Remove all provision in Legal Aid SA's PAIA manual for an internal appeal against the refusal of a request for access to records. (In legal proceedings against it, Legal Aid SA took the wrong point, later abandoned at court, that the applicant was barred because he had not first made an internal appeal before suing. In fact, as conceded, in the case of category-(b) public bodies such as Legal Aid SA, PAIA provides for an application directly to court.) 	
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