

1 Boast Street
Eshowe
KwaZulu-Natal
2 April 2015

Adv Mlandeli Nkosi
Provincial Representative, Public Protector
Suite 2114, 22nd Floor
Commercial City Building
40 Dr A B Xuma Street
Durban

Dear Adv Nkosi

LASA'S REFUSAL TO COMPLY WITH PAIA
A REQUEST FOR MEDIATION

1. According to the Public Protector's website,

The mandate of the Public Protector is to strengthen constitutional democracy by [inter alia] resolving disputes relating to the operation of the Promotion of Access to Information Act of 2000.

2. I write to request your office's mediation and assistance in achieving Legal Aid South Africa's compliance with several PAIA requests I filed in November 2014, all of which have been illegally obstructed or refused by LASA's national office deputy information officers Patrick Hundermark, Jerry Makokoane and Brian Nair to whom they were addressed.
3. I enclose my requests and the unlawful responses they elicited, together with my recent letter about this to LASA information officer Vidhu Vedalankar, asking that she intervene in the matter under her power reserved to her by sections 17(2) and (6)(b) of the Act, and covering a further request addressed to her arising from recently discovered information.
4. However, in view of her repeated illegal refusals to comply with my PAIA requests addressed to her in August and December 2010 and November 2013, I'm not expecting her cooperation.

5. You'll appreciate from my letter to her that the reason for this is that she's deeply involved as CEO in the exceptionally serious malfeasance that my PAIA requests are directed at exposing.
6. That is, Vedalankar has abused her power as LASA information officer to suppress documentary evidence of her and her colleagues' capital professional misconduct.
7. This feature of the case sets it apart from the ordinary sort of routine difficulties that requesters notoriously encounter in obtaining access to public body records, and makes it extraordinarily grave.
8. Currently pending perjury criminal prosecutions and strike-off applications against former Acting National Director of Public Prosecutions and two other top national and provincial prosecutors are a pointer what's coming in this matter.
9. Hundermark's and Makokoane's demands for money before notifying me of their decisions as to whether to grant my requests or not are illegal, as I show with reference to the relevant provisions of PAIA quoted in my letter to Vedalankar. In sum, under section 22, (i) an access fee isn't payable before notification by an information officer of his decision to grant a request; (ii) an access fee is only payable in respect of a record to which access has been granted; and (iii) the Act doesn't permit an information officer to raise a fee against a requester for reading anything or consulting anyone (as Hundermark and Makokoane have incompetently and unlawfully done).
10. Nair has justified his blanket refusal of my entire request addressed to him on various obviously legally incompetent grounds, rebutted in the appendix hereto.
11. Will your office assist me under the Public Protector's declared mandate to 'strengthen constitutional democracy by ... resolving disputes relating to the operation of the Promotion of Access to Information Act of 2000'?
12. (My repeated appeals to your national and Gauteng provincial offices to help me disgorge illegally withheld records from LASA, and my repeated complaints about LASA's false reporting under section 32 in 2011 and 2012 to conceal from the SAHRC, and from Parliament in turn, its refusal to comply with its constitutional freedom of information obligations came to nothing, and turned out to be a complete waste of a lot of my time and energy, hence this new tack in hopefully approaching your local provincial office instead.)

13. If I can't get LASA to comply with my PAIA requests through mediation, and it persists in illegally withholding records from me, or where they don't exist certifying this on oath, I'll be approaching the High Court with an application to compel, in which event I'll put this letter up with the papers to show my attempts to engage the Public Protector's assistance in resolving the dispute out of court.

14. An early answer by email to arbrink@iafrica.com would be appreciated.

Yours sincerely

A handwritten signature in black ink, appearing to be 'ADV ANTHONY BRINK', written in a cursive, somewhat scribbled style.

ADV ANTHONY BRINK

APPENDIX

Note: My records request addressed to Nair comprised fourteen items, and these are treated in the following centrally numbered parts. Section '(a)' of each part identifies the records to which I requested access, or Nair's sworn confirmation under section 23 in any case the records don't exist. Section '(b)' records Nair's various justifications for refusing me access to them, which for clarity I've set in italics. Section '(c)' rebuts Nair's justifications, and demonstrates the unlawfulness of Nair's refusals and the irrelevance of the sections of PAIA he relies on, as well as his other justifications not referenced to the Act.

1.

- (a) **Request:** The minutes kept by HRE Amanda Clark¹ of the 'second round interviews' held 'for some Regional Operations Executive posts',² as alleged by LASA's single witness NOE Brian Nair at the trial of case LC D529/11.
- (b) **Refusal:** *This request cannot be acceded to in terms of section 7 as it relates to the evidence in the matter pending before Court.*
- (c) **Rebuttal:** Section 11(1) provides:

11 Right of access to records of public bodies

(1) A requester must be given access to a record of a public body if –

(a) that requester complies with all the procedural requirements in this Act relating to a request for access to that record; and

(b) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part.

'CHAPTER 4 GROUNDS FOR REFUSAL OF ACCESS TO RECORDS (ss 33-46)' does include section 7, and Nair's justification based on section 7 for refusing these records is accordingly incompetent and unlawful.

Section 7 doesn't afford an information officer a ground for refusing a record. It ordinarily bars a litigant from adducing in evidence a record obtained via PAIA after the commencement of the case, but the rule is not absolute and section 7(2) gives the trial court a discretion to admit such a record.

¹ Record, page 372, line 23 to page 373, line 2. '[HRE Clark] would assist in the writing up of whatever recommendations flow out of the ['second round interview'] panel'.

² Record, page 338, lines 8–9.

Not being founded on any grounds allowed by Chapter 4, the fact that a request in some manner 'relates to the evidence in the matter pending before Court' is no valid justification for refusing a request.

Judgment had been delivered when I made the request, so the case was already over, and no longer 'pending'.

2.

- (a) **Request:** The recommendations made by the selection panels of candidates (i) for the Bloemfontein, Cape Town, Johannesburg, Mahikeng, Port Elizabeth, and Pretoria Senior Litigator posts, (ii) for the Pietermaritzburg Senior Litigator post when it was first advertised, and (iii) for the Kimberly Senior Litigator post – if a recommendation was made – showing inter alia the names of (a) the shortlisted and interviewed candidates, (b) the recommended candidates, and (c) the members of the selection panels.
- (b) **Refusal:** *This request cannot be acceded to in terms of section 7 as it relates to the evidence in the matter pending before Court.*
- (c) **Rebuttal:** This repeated incompetent and unlawful justification is rebutted above.

3.

- (a) **Request:** In respect of the Bloemfontein, Cape Town, Johannesburg, Mahikeng, Port Elizabeth, and Pretoria Senior Litigator posts, the emails sent by the ROEs to Nair³ (or by the RHRMs to Clark, forwarded to Nair) covering the selection panels' recommendations and the CVs of the recommended candidates, as well as the CVs of the other candidates who were shortlisted and interviewed by the selection panels but not recommended by them – in compliance with the 'specific requirement of the second [round interview] panel'⁴ to send all CVs, and not only those of the recommended candidates, since it was 'The practice of the ... second round panellists to ... consider if there was anyone else they would be interested to interview.'⁵

³ Record, page 407, lines 11–14. '[I] would then have found that email again because it would have been in my box'.

⁴ Record, page 349, lines 7–15. 'In fact, a specific requirement of the second panel was that all candidates who were interviewed or shortlisted for the first round, their CVs had to be sent ... so that the second round panellists could consider if there was anyone else [besides the recommended candidate] they would be interested to interview.'

⁵ Record, page 349, lines 10–17.

(b) **Refusal:** *This information relates to third parties and falls within the ambit of section 37 read with section 47 and 48 of the Act.*

(c) **Rebuttal:** Subsection 1(b) of section 37 in Chapter 4, 'Mandatory protection of certain confidential information, and protection of certain other confidential information, of third party' allows that 'the information officer of a public body- ...

(b) may refuse a request for access to a record of the body if the record consists of information that was supplied in confidence by a third party –

(i) the disclosure of which could reasonably be expected to prejudice the future supply of similar information, or information from the same source; and

(ii) if it is in the public interest that similar information, or information from the same source, should continue to be supplied.

Nair doesn't have any facts to state to support requirements (i) and (ii).

Section 37 manifestly has no application to the records requested under this item, and Nair has obviously grabbed at the wrong section.

If he possibly meant to grab at subsection 1 of section 34 instead, 'Mandatory protection of privacy of third party who is natural person', which stipulates that 'the information officer of a public body must refuse a request for access to a record of the body if its disclosure would involve the unreasonable disclosure of personal information about a third party', he's failed to show that the mere covering emails in question contain any 'personal information about a third party'.

Nair purports to fortify his refusal under section 37 by suggesting that it be 'read with section 47 and 48 of the Act'.

Section 47, 'Notice to third parties', imposes a duty on an information officer to notify an affected third party contemplated in sections 34 and 37. Section 48, 'Representations and consent by third parties', affords such parties an opportunity to oppose or agree to the release of a record containing their 'personal information' or 'confidential information'. Since section 37 is irrelevant (and section 34 too), sections 47 and 48 are equally so.

The fact that a request 'relates to third parties' doesn't ipso facto not bring it within the ambit of section 34 – not unless the record contains 'personal information'. Not having any interest in such, I headed my annexure with the notice that it 'may be blacked out'.

(I referred to ‘confidential information’, meaning ‘personal information’; section 34 that I mentioned concerns ‘personal information’.)

4.

- (a) **Request:** The email that KwaZulu-Natal ROE Vela Mdaka sent to Nair (or RHRM Baboo Brijlal sent to Clark, forwarded to Nair) covering the selection panel’s recommendation of LASA attorney Ashok Kaloo for the Pietermaritzburg Senior Litigator post⁶ and his CV, as well as the CVs of the other candidates who were shortlisted and interviewed by the selection panel for the post but not recommended by it, when it was first advertised.
- (b) **Refusal:** *This record was requested during the discovery process in the trial court for which the matter is still pending. Therefore it is excluded in terms of section 7 of the Act.*
- (c) **Rebuttal:** Contrary to Nair’s lie about this, in truth and in fact the email record in question was not ‘requested during the discovery process in the trial court’. It was not among the records I specified for discovery in my agenda for the pre-trial conference in October 2011; in my application to compel discovery in January 2012; in my agenda for the first pre-trial conference at court under judicial supervision in January 2013 to compel LASA to discover; and in my agenda for the second pre-trial conference at court under judicial supervision in June 2013 to the same end. (All this extraordinary trouble I was put to was occasioned by LASA’s resolutely determined refusal to discover documents I needed for trial, with the corrupt intention of hindering me in proving my claim, which is to say with the intention of obstructing and defeating the ends of justice. In the result this criminal object was achieved by Nair’s rampant perjury at trial.)

Not being a ground provided for by Chapter 4, the fact that a record was ‘requested during the discovery process’, but was not furnished therein, is anyway not a ground for refusing a request for it later made again under PAIA.

When I made the request, the trial was already over, and was no longer ‘pending’.

5.

- (a) **Request:** The email the Free State and North West ROE sent to Nair (or its RHRM sent to Clark, forwarded to Nair) covering the selection panel’s recommendation of a candidate for the Kimberly Senior Litigator post – if a recommendation was made –

⁶ Record, page 410, lines 15–21.

and his/her CV, as well as the CVs of the other candidates who were shortlisted and interviewed by the selection panel for the post but not recommended by it.

- (b) **Refusal:** *This request relates to the evidence and the records already before court, which matter is still pending. Therefore it is excluded in terms of section 7 of the Act.*
- (c) **Rebuttal:** The fact that a record requested under PAIA ‘relates to the evidence and the records already before court’ is not one of the grounds for refusing it provided by Chapter 4.

As said, the case was already over with judgment delivered when I requested the record; and section 7 doesn’t afford an information officer a ground for refusing a record request. This incompetent, unlawful justification is rebutted above.

6.

- (a) **Request:** In respect of the Bloemfontein, Cape Town, Johannesburg, Mahikeng, Port Elizabeth, and Pretoria Senior Litigator posts, Nair’s emails to the five⁷ members of the ‘second round’ panel, forwarding the selection panels’ Senior Litigator candidate recommendations in each case and the CVs of all candidates who were shortlisted and interviewed by the selection panels, including the CVs of those candidates who were not recommended,⁸ in which emails Nair asked the five members of the

⁷ Record, page 409, line 11.

⁸ Record, page 407, lines 13–17. ‘I would have sent it [the email with recommendation and CVs attached] to the panellists to advise who they would like to see (indistinct) the recommended candidate. Therefore, all four [CVs] would have been sent to the panellists and everyone would have the opportunity to see who they would have liked to have (indistinct).’

Record, page 409, lines 24–5 to page 410, lines 1–2. ‘...we do not only interview the recommended candidates.’

Record, page 408, line 25 to page 409, lines 1–2. ‘The panellists can look at all people who were interviewed at the first round and they can say, “we would also like to see X, Y and Z”.’

Page 409, lines 10–11. ‘I would send it to the five panellists and say, “Please advise who you would like to see.”

Record page 409, lines 16–20. ‘By email, Ja --- Yes. [Through] correspondence --- Yes. Okay, so by email that is done --- Yes.’

Record, page 349, lines 21–3. ‘... in deciding who will be in [the] interview for the second round, we look at all four [‘candidates interviewed for the first level’] again and not only the person that the first round panellist[s] interviewed or recommended.’

Record, page 450, lines 7–10. ‘... the second panel does have sight of ... all CVs and it can also select others in addition to whoever is recommended.’

Record, page 350, lines 10–11. ‘[The second round interview panel] is free to make the decision it wants to make and to interview whoever it wants to interview.’

‘second round’ panel to advise him as to who they ‘would like to see’⁹ and ‘interview’.¹⁰

- (b) **Refusal:** *The request relates to the evidence in a matter pending before Court and is excluded in terms of section 7 of the Act and secondly the information relates to third parties and falls within the ambit of the provisions of section 37, 47 and 48 of the Act.*
- (c) **Rebuttal:** These incompetent, unlawful justifications are rebutted above.

7.

- (a) **Request:** In respect of the Pietermaritzburg Senior Litigator post when it was first advertised, Nair’s emails to the five members of the ‘second round’ panel, forwarding the selection panel’s recommendation of attorney Kaloo, his CV, and the CVs of those candidates who were not recommended, in which emails Nair asked the five members of the ‘second round’ panel to advise him as to who they ‘would like to see’ and interview.
- (b) **Refusal:** *This is part of the records for the matter still pending before Courts and is excluded in terms of section 7 of the Act.*
- (c) **Rebuttal:** This incompetent, unlawful justification is rebutted above.

8.

- (a) **Request:** In respect of the Kimberly Senior Litigator post, Nair’s emails to the five members of the ‘second round’ panel, forwarding the selection panel’s recommendation – if one was made – of the recommended candidate and his CV, and the CVs of those candidates who were not recommended, in which emails Nair asked the five members of the ‘second round’ panel to advise him as to who they ‘would like to see’ and interview.
- (b) **Refusal:** *This is part of the records for the matter still pending before Courts and is excluded in terms of section 7 of the Act.*
- (c) **Rebuttal:** This incompetent, unlawful justification is rebutted above.

⁹ Record, page 409, lines 10–11. ‘I would send it to the five panellists and say, “Please advise who you would like to see.”’

¹⁰ Record, page 349, lines 7–15. ‘In fact, a specific requirement of the second panel was that all candidates who were interviewed or shortlisted for the first round, their CVs had to be sent ... so that the second round panellists could consider if there was anyone else [besides the recommended candidate] they would be interested to interview.’

9.

- (a) **Request:** In respect of the Bloemfontein, Cape Town, Johannesburg, Mahikeng, Port Elizabeth, and Pretoria Senior Litigator posts, the records of the 'second round' panel members' responses to Nair's enquiries as to which Senior Litigator candidate(s) they wished to see and interview, notifying him as to whom they wished to see and interview, including candidates who had been shortlisted and interviewed by selection panels but not recommended by them.¹¹
- (b) **Refusal:** *The request relates to the evidence in a matter pending before Court and is excluded in terms of section 7 of the Act and secondly the information relates to third parties and falls within the ambit of the provisions of section 37, 47 and 48 of the Act.*
- (c) **Rebuttal:** These incompetent, unlawful justifications are rebutted above.

10.

- (a) **Request:** In respect of the Pietermaritzburg Senior Litigator post when it was first advertised, the records of the 'second round' panel members' responses to Nair's enquiries as to which Senior Litigator candidate(s) they 'would like to see' and interview besides attorney Kaloo, notifying him as to whom they 'would like to see' and 'interview', including candidates who had been shortlisted and interviewed by the selection panel but not recommended by it.
- (b) **Refusal:** *This requests forms part of the discovery notice at the trial court and accordingly is excluded in terms of section 7 of the Act.*
- (c) **Rebuttal:** Contrary to Nair's lie about this, in truth and in fact I didn't seek these records by way of pre-trial discovery procedure. And the reason for this is that contradicting LASA's repeatedly pleaded and sworn case (in the interlocutory affidavits), it was only in his oral evidence that Nair made the novel allegation that after a Senior Litigator selection panel had 'identified the most suitable candidate for appointment' (per LASA's Recruitment code), in the process eliminating the other shortlisted, interviewed candidates, he would email his so-called 'second round' interview panel members to enquire as to which of the shortlisted, interviewed Senior Litigator candidate(s) they 'would like to see' and interview and to notify him as to whom they 'would like to see' and 'interview' – including candidates who had been shortlisted and interviewed by the selection panel but not

¹¹ Record, page 410, lines 10–12. '... the panel does not confine itself to only the person that is recommended. The [second round interview] panel, has in the past, requested to see other candidates who were interviewed.'

recommended by it, and thereby 'eliminated'* from consideration for appointment.
(*LASA's word in the pleadings)

Nair's justification for refusing me access to these records, or certifying on oath under section 23 that they don't exist (thereby proving his perjury for his prosecution on the point), is incompetent and unlawful for the reasons stated in the rebuttals above.

11.

- (a) **Request:** In respect of the Kimberly Senior Litigator post when it was first advertised, the records of the 'second round' panel members' responses to Nair's enquiries as to which Senior Litigator candidate(s) they 'would like to see' and 'interview' besides the recommended candidate – if a recommendation was made – notifying him as to whom they 'would like to see' and 'interview', including candidates who had been shortlisted and interviewed by the selection panel but not recommended by it.
- (b) **Refusal:** *This information relates to third parties and accordingly the provisions of sections 37, 47 and 48 are applicable.*
- (c) **Rebuttal:** This incompetent, unlawful justification is rebutted above.

12.

- (a) **Request:** In respect of the Bloemfontein, Cape Town, Johannesburg, Mahikeng, Port Elizabeth, and Pretoria Senior Litigator posts; the Kimberly Senior Litigator post – if a recommendation was made; and the Pietermaritzburg Senior Litigator post when it was first advertised, the records of the invitations to attend 'second round' interviews sent to Senior Litigator candidates recommended by the selection panels, and the invitations to attend 'second round' interviews also sent to any candidates who had been shortlisted and interviewed by the selection panels but not recommended by them, on the basis that the 'second round' interview panel had indicated to Nair that it 'would like to see' and 'interview' them too.
- (b) **Refusal:** *This information relates to third parties and accordingly the provisions of sections 37, 47 and 48 are applicable.*
- (c) **Rebuttal:** This incompetent, unlawful justification is rebutted above.

13.

- (a) **Request:** The minutes¹² of the meetings of the ‘second interview panel’ on the ‘three separate occasions’ on which it has ‘sat ... to select prospective candidates ... for [appointment as] senior litigators’,¹³ at which (i) the current six incumbent Senior Litigators at Bloemfontein, Cape Town, Johannesburg, Mahikeng, Port Elizabeth, and Pretoria were chosen; (ii) LASA attorney Ashok Kaloo was rejected, and (iii) ‘one other person [besides Kaloo] that was recommended as possible, as possibly appointable’ was also rejected because ‘we did not like’¹⁴ him/her.
- (b) **Refusal:** *This information relates to third parties and accordingly the provisions of sections 37, 47 and 48 are applicable.*
- (c) **Rebuttal:** This incompetent, unlawful justification is rebutted above.

14.

- (a) **Request:** The record of Mlambo JP’s communication to executive management of his ‘brain-child’ of a ‘second round of interviews’ referred to in LASA’s original response to the original statement of claim in case LC D529/11.¹⁵
- (b) **Refusal:** *The request relates to evidence in a matter pending before Court and is excluded in terms of section 7 of the Act.*
- (c) **Rebuttal:** This incompetent, unlawful justification is rebutted above.

¹² Record, page 372, line 23 to page 373, line 2: ‘[HRE Clark] would assist in the writing up of whatever recommendations flow out of the [second round interview] panel’.

¹³ Record, page 366, lines 14–21.

¹⁴ Record, page 410, lines 21–4.

¹⁵ Pleadings bundle, page 143, paragraph 8: ‘The second round of interviews is, in fact, the brain-child of the Chairperson together with the executive management after it was realised that most of the senior practitioners who were recruited without having undergone a second interview were lacking experience in vital areas like High Court litigation skills and also given the seniority of the position involved herein.’