

AFRICAN NATIONAL CONGRESS

SECRETARY GENERAL'S OFFICE



Chief Albert Luthuli House 54 Sauer Street Johannesburg 2001 PO Box 61884 Marshalltown 2107 RSA
Tel: 27.11.376.1000 Website: www.anc.org.za

Mr Simon Dickinson
Chief Executive Officer
Democratic Alliance
Theba Hosken House
16 Mill Street
Gardens
Cape Town

By email: headoffice@da.org.za

17 February 2021

Sir

RESPONSE TO PURPORTED APPLICATION BY DEMOCRATIC ALLIANCE IN TERMS OF THE PROMOTION OF ACCESS TO INFORMATION ACT, 2000

On Thursday last week we received a communique from Rapport journalist, Mr Dawie Boonzaaier, requesting a response from the ANC to the Democratic Alliance's request for information in terms of the Promotion of Access to Information Act.

According to the journalist, it appears that the Democratic Alliance (DA) has made application to access the records of every meeting of the ANC's Deployment Committee since 1 January 2013 and requires a list of all decisions taken and reasons for those decisions.

Apparently the request was made by DA MP, Mr Leon Schreiber, on 11th inst. We have no record of having received such a request. Kindly forward a copy to my email address krishn@mweb.co.za. This letter is written on the assumption that such a request for information was made by the DA. If the DA did not make such a request, kindly ignore this letter and accept the ANC's apology.

It is common cause that the African National Congress was the forerunner in spearheading the constitutional democracy and rights we enjoy under our Constitution which did not come cheaply. ANC members were hanged, exiled, imprisoned, maimed and bludgeoned to death to give us the freedoms we all enjoy today. For this reason, the organisation will not only uphold the rights in our Constitution but also defend those rights.

We are aware that section 32(2) of the Constitution paved the way for the enactment of the Promotion of Access to Information Act (PAIA) to enable any third party to access information of public and private bodies. As you are aware, the promulgation of PAIA marked a clean break from the secretive and undemocratic past of South

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Africa under apartheid rule.

Once again, the ANC was a cheer leader in the promulgation of PAIA in order to foster a culture of transparency and accountability in our country. Consequently, the ANC will be the first to accede to the request for information under PAIA from the DA or any other party.

Section 50 of the Act provides that the DA must be given access if the information is required for the exercise or protection of any rights. Accordingly, our law, as interpreted by our Courts, requires the DA to fulfil two distinct requirements before such information could be made available to it.

First, the DA must identify the right that it seeks to exercise or protect and show that *prima facie* it has established that it has such a right; and second, the DA must demonstrate how the information will assist in exercising or protecting the right.

In short, the DA must establish a connection between the information requested (in this case minutes and information of the ANC Deployment Committee) and the right sought to be exercised or protected and must lay a proper foundation for why that information is reasonably required for the exercise or protection of the right.

The required information will be made available once the DA has satisfied the legal requirements for its request as set out above. As an aside, when the National Chairperson, comrade Gwede Mantashe, made a presentation to the State Capture Commission in November 2018, he tabled the offer to make available the ANC's Deployment Policy.

Regards

KRISH NAIDOO
LEGAL ADVISER

Dear Mr Naidoo,

I refer to your letter dated 1 March 2021.

It is unclear to me whether your letter dated 1 March 2021 is a refusal of my request, dated 22 February 2021, in terms of the Promotion of Access to Information Act (PAIA).

If it is not a refusal, kindly let me know at your earliest convenience whether the ANC will accede to or refuse my request as it currently stands.

If your letter constitutes a refusal, kindly provide me with the details of the ANC's internal appeal process under PAIA.

Yours faithfully,

A handwritten signature in black ink, appearing to be 'L. Schreiber', written over a horizontal line.

Dr Leon Schreiber MP

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Dr Leon Schreiber
Member of Parliament
National Assembly
Cape Town

Per email: leon.schreiberei@gmail.com

1 March 2021

Sir

APPLICATION FOR INFORMATION IN TERMS OF PAIA

Your application for information dated 22nd ult., which we acknowledged receipt of, has reference.

It appears from your application that you seek privileged information of a private body which ordinarily you would not have access to save for the provisions of the Protection of Access to Information Act. Needless to say, such a request constitutes a drastic invasion of the privacy of the ANC which would not pass constitutional muster unless supported by cogent legal grounds.

Your application is based on the constitutional right to equality, the assumption that service delivery decline is attributable to the ANC and the untested allegations made by various witnesses to the State Capture Commission. These are open ended allegations which are inconclusive. You also seek to place some reliance on the Glenister judgement which has no relevance to support your right to access the specific information you seek.

The letter we addressed to the Democratic Alliance, put simply, requires a response to two fundamental issues arising from the Act – what right are you purporting to protect or advance and second, how is the information you seek relevant to the right you seek to protect or advance. We have wandered through your application and are unable to find relevant information to satisfy the two grounds raised in our letter.

Unless you provide a cogent response to our letter, the ANC is under no obligation to furnish you with the information sought in your request.

Yours faithfully

KRISH NAIDOO
LEGAL ADVISER



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Our Ref: DEM16/0769/ELZANNE JONKER/ks | **Your Ref:** | **Date:** 18 March 2021

ANC

PER EMAIL: krishn@mweb.co.za

Dear Mr Naidoo

REQUEST IN TERMS OF PAIA: CADRE DEPLOYMENT RECORDS

1. We act for Dr Leon Schreiber MP and the Democratic Alliance. Your letter of 14 March 2021 refers.
2. We deny that Dr Schreiber's request in terms of the Promotion of Access to Information Act 2 of 2000 ('PAIA' and 'the PAIA request') 'does not have the information required by law for it to be considered as an "application" in terms of PAIA', as you claim.
3. At Part G(1) of the PAIA request, it is clearly stated that Dr Schreiber relies upon the constitutional right to equality, the right of employees in the public service not to be discriminated against on the basis of party affiliation under section 197(3) of the Constitution, the right of access to information, and the rights to the rights to human dignity, freedom, security of the person, administrative justice and socio-economic rights, including the rights to education, housing, and health care.
4. At Part G(2) of the PAIA request, it is clearly described how the records requested are reasonably necessary to protect the rights set out in Part G(1). Without repeating the Part:
 - 4.1. Cadre deployment, by favouring members of the ANC, patently infringes the right of non-ANC government employees to equal treatment under sections 9 and 197(3) of the Constitution. The records relating to cadre deployment will assist those government employees to protect their rights to equal treatment.
 - 4.2. Cadre deployment can only result in the appointment of people to government positions that are less suitable than would be the case were government positions filled without consideration of party affiliation. This undermines service delivery, which prevents the realisation of socio-economic rights.

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5. The ANC cannot claim to be committed to transparency and good governance, and at the same time refuse to release records relating to a policy that appears to determine many of the persons appointed to important government positions. Every South African has the right to know how the people who govern them are selected.
6. If the ANC is of the opinion that the PAIA request does not sufficiently link the rights referred to with the records requested, or if it is of the opinion that a ground of refusal under Chapter 4 of Part 3 exists, the ANC must refuse the PAIA request and provide reasons. This is required by section 56(1)(a) read with section 56(3) of PAIA. What the ANC cannot do is pretend that the request is not a request and refuse to make a decision.
7. The PAIA request was transmitted on 22 February 2021. Under section 58 read with section 56(1) of PAIA, if the ANC fails to decide whether to grant or refuse the request within 30 days of the request (in other words, by Wednesday, 24 March 2021), the request will be deemed to be refused.
8. If the PAIA request is refused (whether as a result of the deeming provision or otherwise), all of Dr Schreiber's rights are reserved, including bringing an application to the High Court in terms of Chapter 2 of Part 4 of PAIA. Costs will, of course, be claimed from the ANC.

Yours faithfully

MINDE SCHAPIRO & SMITH INC.

per: 

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Dr Leon Schreiber MP
Per email

14 March 2021

Sir,

Your undated letter sent electronically to me on 11th inst. at 17h23 refers.

At the outset, we must point out that our letter of 1st inst. is not a refusal. Consequently, the lodgement of an appeal in terms of the Act, at this stage, would be premature.

One of our responsibilities in terms of the Act, as a private body, is to assist a requester (which is you in this case). The purpose of PAIA is to give effect to the *constitutional right* of access to information for the exercise or protection of any *rights*. For this reason, we requested in our letter of 1st inst. (to which you refer) the following information:-

1. What *right* (understood constitutionally because we operate in a constitutional democracy) are you purporting to protect or advance; and
2. How is the information you seek relevant to the *right* you seek to protect or advance.

Unless and until you provide the requested information and place the ANC in a position to give due consideration to your application, it would be premature to even talk about a refusal of your application. In short, your application does not have the information required by law for it to be considered as an "application" in terms of PAIA. It follows, that if an application does not meet the requirements as contemplated in the Act, there is no obligation to consider it. We hope this explanation will assist you.

We also informed you in our letter of 1st inst. that we went through your application and were unable to find relevant information to satisfy the two matters dealt with above. In short, you must give us more relevant information.

We await to hear from you.

Yours faithfully
Sgd. K. Naidoo

LEGAL ADVISER



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E: elzanne@mendes.co.za | www.mendes.co.za

Our Ref: DEM16/0769/ELZANNE JONKER/ks | Your Ref: | Date: 23 March 2021

ANC

PER EMAIL: krishn@mweb.co.za

Dear Mr Naidoo

REQUEST IN TERMS OF PAIA: CADRE DEPLOYMENT RECORDS

1. We act for Dr Leon Schreiber MP and the Democratic Alliance. Your letter of 19 March 2021 refers.
2. We do not intend to litigate by correspondence. Any failure to respond to any portion of your letter should not be interpreted as a concession or a waiver.
3. Your letter implies that Dr Schreiber requires a mandate from public-service employees to make a PAIA request in respect of rights held by public-service employees. This is incorrect:
 - 3.1. Section 23 of the interim constitution granted a right of access to information 'in so far as such information is required for the exercise or protection of any of his or her rights'. The interim constitution thus required a link between the information sought and the requestor's rights.
 - 3.2. Section 32 of the final Constitution, on the other hand, grants a right of access to information in private hands insofar as access 'is required for the exercise or protection of any rights'. The final Constitution thus requires a link between the information sought and any right – not only the requestor's rights.
4. Dr Schreiber does not have a mandate from public-service employees because he does not need one.
5. The ANC will not be receiving any further documents or clarification from Dr Schreiber. We urge the ANC to make a decision on Dr Schreiber's PAIA request by tomorrow. The ANC has everything it needs to make a decision. If it does not, the request will be

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deemed to be refused.

6. All of our clients' rights are reserved.

Yours faithfully

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per: 

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Attorneys Minde Schapiro and Smith
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Building Number 2
Cnr Wille van Schoor & Old Oaks Road
Bellville

Per email: elzanne@mindes.co.za

19 March 2021

Dear Elzanne

REQUEST IN TERMS OF PAIA: CADRE DEPLOYMENT RECORDS YOUR REFERENCE: DEM 16/07/69 ELZANNE JONKER/KS

Good to hear from you again and I trust you are keeping safe and in good health during this pandemic.

Your letter of 18th inst. is acknowledged and the contents are noted.

At the outset, I point out that the ANC has no record of having received a PAIA application from your client, the Democratic Alliance. With regard to your other client, Dr Leon Schreiber, we trust he has also furnished you with a copy of our letter dated 1st inst.

Apropos Dr Schreiber, his interest, which will ultimately determine his *locus standi* to bring a PAIA application, requires amplification. Can he advise whether he was adversely affected by any decision taken by the ANC or other public or private body or if any other person was favoured over him in such circumstance, resulting in him suffering discrimination. If so, full details are required.

Moreover, he purports to represent employees in the public service. I always understood the Public Service Commission to be tasked with evaluating the administration of the public service. In this regard, could your client furnish us with the appropriate mandate to confirm that he indeed represents public service employees.

With respect, your client's reliance on section 9 of the Constitution is without foundation. The decisions of the Constitutional Court on equality jurisprudence are well documented and a matter of public record.

Your client's understanding of the ANC deployment policy is equally misplaced. The ANC is a voluntary political organisation and is not the State. The ANC is not

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responsible for the employment of public servants.

I place on record that your client's PAIA application has not been refused. Additional relevant information is required in order for the ANC to apply its mind to the application.

Finally, I note your client's intention to approach a High Court for relief. Such action, if instituted, will be defended.

Yours faithfully

Sgd. K. Naidoo

KRISH NAIDOO
LEGAL ADVISER