



SOUTH AFRICAN HUMAN RIGHTS COMMISSION

Ref No: GP/2012/0677

LUBBE VILJOEN

Complainant

and

UNIVERSITY OF PRETORIA

Respondent

REPORT

1. INTRODUCTION

1.1. The South African Human Rights Commission (the Commission) is an institution established in terms of Section 181 of the Constitution of the Republic of South Africa, 1996 (the Constitution).¹

1.2. The Commission is specifically mandated to:

¹ Section 181 Constitution of the Republic of South Africa, 1996

- 1.2.1. Promote respect for human rights;
 - 1.2.2. Promote the protection, development and attainment of human rights; and
 - 1.2.3. Monitor and assess the observance of human rights in the Republic.
- 1.3. Section 184(2) of the Constitution empowers the Commission to investigate and report on the observance of human rights in the Republic and to take steps to secure appropriate redress where human rights have been violated.
- 1.4. The Human Rights Commission Act, of 2013 (the Act) provides the enabling framework for the exercise of the Commission's powers and imposes a mandatory duty on both public bodies and private individuals to cooperate with the Commission.
- 1.5. Section 9(6) of the Act specifies the procedure to be followed by the Commission when conducting an investigation into an alleged violation of or threat to a fundamental right.
- 1.6. Article 3(b) of the Commission's Complaints Handling Procedures (CHP) provides that the Commission has the jurisdiction to conduct or cause to be conducted any investigation on its own accord or upon receipt of a complaint.

2. **THE PARTIES**

- 2.1. The Complainant, Lubbe Viljoen (the Complainant), is an adult male currently residing in Pretoria, Gauteng.
- 2.2. The Respondent, the University of Pretoria, is a public university with its main campus situated in Lynwood Pretoria, Gauteng.

3. **THE COMPLAINT**

3.1. The complaint relates to the following allegations raised by the Complainant against the Respondent:

3.1.1. The Complainant enrolled for a Bachelor of Commerce in Accounting Science (BCom) with the Respondent from 2007 to 2010 in which he alleges to have obtained an overall average of 69% (sixty-nine percent);

3.1.2. In 2011, the Complainant enrolled at the Respondent for an Honours degree in Accounting Science which, upon passing, would permit him to write the South African Institute of Chartered Accountants (SAICA) qualifying examinations;

3.1.3. The Complainant submits that he has a rare genetic metabolic disease since 2006, diagnosed in 2007 as Mitochondrial Cytopathy, which is categorized as a medical disability. The muscle biopsy procedure which led to the confirmation of the diagnoses was overseen by Prof Izelle Smuts, a Neurologist and researcher on human mitochondrial disorders at the Respondent's Faculty of Health Sciences;

3.1.4. Mitochondrial Cytopathy results in the mitochondrial cells becoming fatigued, requiring recovery periods in order to become functional again. Symptoms of the disease include but are not limited to fatigue, temporary visual impairments such as double vision and loss of focus, severe migraines, cramping and muscle pains, weakness of the nerves and kidney dysfunction. It is not unusual for all cells in

the body to be affected and symptoms manifest when an organ or muscle becomes exhausted;

3.1.5. The disease has had a direct and negative impact on the Complainant's eyesight. Two eye-muscle operations were performed in 2006 and 2008 in an attempt to relieve the strain on his eye muscles caused by the demands of his studies, in particular the reading work;

3.1.6. Complainant's condition has been monitored by an Ophthalmologist, Dr Gideon du Plessis. Dr du Plessis made recommendations to the Respondent about how the Complainant's condition could be accommodated, which included the Complainant being provided with adequate rest in between work sessions to recover and perform normally;

3.1.7. The Complainant is of the view that considering his medical condition, he was not reasonably accommodated during his postgraduate studies at the Respondent and that as a result thereof, his academic career was negatively impacted.

4. **STEPS TAKEN BY THE COMMISSION**

4.1. Numerous correspondence was exchanged between the Commission and the Respondent regarding the abovementioned allegations. Having assessed all responses provided by both the Complainant and the Respondent, the Commission advised the Complainant as follows during April 2013:

- 4.1.1. That the Commission would continue to investigate the Complainant's allegations regarding the Respondent's lack of a disability policy and the alleged impact thereof on him;
- 4.1.2. That the Complainant's request for advice regarding the applications submitted to the Respondent (and other tertiary institutions) in terms of the Promotion of Access to Information Act, 2 of 2000 (PAIA) would be assessed and responded to by the Commission's PAIA specialists; and
- 4.1.3. In respect of the Complainant's on-going academic issues with the Respondent, the Commission noted that he had already lodged complaints with the following institutions:

- 4.1.3.1. Department of Higher Education and Training (DHET);

- 4.1.3.2. Council for Higher Education (CHE);

- 4.1.3.3. The Public Protector of South Africa (PPSA).

- 4.1.4. In respect of paragraph 4.1.3, above, the Commission highlighted the following provisions of Chapter 4 of its CHP:

"12 (9) If the Provincial Manager makes a finding that the complaint does not fall within the jurisdiction of the Commission, or could be dealt with more effectively or expeditiously by another organisation, institution, statutory body or institution created by the Constitution or any applicable legislation, the complainant ... must be notified thereof, in writing; be provided with the contact details of the said organisation, institution or body in order to pursue the alternative option himself or herself..." (own emphasis).

- 4.1.5. Based on the aforesaid, the Commission advised the Complainant that it did not have the power to order retrospective relief, such as

ordering the remark of past examination papers, and that any such relief would more appropriately fall within the mandate of the relevant educational authorities, including the DHET and CHE. The Commission further recommended that in the event that the Complainant was dissatisfied with the service received and / or was still receiving from the Respondent, or any institutions and / or department, the Complainant should internally escalate such matters to the respective appropriate senior officials within such institutions / departments.

4.1.6. The Commission thus confined its investigation to allegations regarding the lack of a disability policy at the time that the Complainant was a student at the Respondent and allegations relating to alleged violations of the right to access information.

4.2. Having completed a provisional report in January 2015, the Commission issued the provisional report findings and recommendations to the parties on 15 January 2015 for comment.

4.3. On 27 January 2015, the Commission received comments from the Complainant.

4.4. On 13 February 2015, the Commission received comments from the Respondent.

4.5. Having duly considered submissions by the parties, the Commission hereby provides its final findings and recommendations in this matter.

5. **DISABILITY POLICY**

In response to allegations put to it in November 2012 regarding its disability policy, the Respondent advised the Commission as follows:

5.1. Response received from Respondent (dated 21 November 2012)

5.1.1. Respondent acknowledged that it does not have a formally approved Student Disability Policy. However, it stated that certain **general guidelines and procedures pertaining to students with special needs had been followed by the Respondent for a number of years**. These guidelines and procedures have been incorporated into a formal draft policy that was in the process of being finalised. The Respondent has a dedicated unit to assist students with physical and learning disabilities (Disability Unit). It was submitted that this unit assisted the Complainant in obtaining additional time for tests and examinations. Additional concessions, such as extra time to rest between sessions, were also discussed and decided upon by the Complainant and the programme coordinator.

5.2. Response received from Respondent (dated 2 May 2013)

5.2.1. The Respondent confirmed that it had **decided to review its overall policies and guidelines pertaining to persons with disabilities**. Owing to the extent of the project, this was estimated to take a number of weeks to finalise;

5.2.2. The Respondent advised that although the process had not yet been finalised, it did not mean that the Respondent did not have active measures for dealing with students with disabilities. In this respect, the Respondent confirmed that special provision is made for students with disabilities as a special needs group during the orientation. In instances where students contact the Respondent before

registration, a focused process is launched to assist the prospective student even before he / she commences studies through the Respondent.

5.3. Response received from Respondent (dated 8 October 2013)

5.3.1. The Respondent forwarded the Commission its Policy on Students with Disabilities as approved by the Respondent's Executive Management on 1 October 2013;

5.3.2. The Commission noted that additional information was required with respect to the newly formulated policy. Further correspondence was therefore sent to the Respondent requesting information on specific aspects such as: the level of consultation; the methods employed to communicate the new policy to relevant stakeholders; the methods of communication employed to ensure that the new policy was accessible to all students and reached the wider student and personnel bodies, and affected individuals, including parents of students; and details regarding training of employees which had taken place regarding the new policy and the implementation thereof.

5.4. Response received from Respondent (dated 11 November 2013)

5.4.1. With regards to the level of consultation in drafting the policy:

5.4.1.1. Initial consultation was driven by the Director of Student Affairs and the Disability Unit, primarily involving internal stakeholders. During this stage, there was a strong focus on those students who made use of the Disability Unit;

5.4.1.2. A working group was also appointed to assist in drafting the policy. Participation in the working group was determined from a wide range of stakeholders, including:

- Department of Occupational Therapy in the Faculty of Health Sciences;
- Academic Administration Staff in the faculties; Department of Security Services, responsible for inter alia, safety and access issues;
- Department of Facilities Management;
- Department of Residence Affairs and Accommodation;
- Department of Information Technology Services;
- Senior staff in the Department of Student Affairs;
- Law Faculty; and
- Staff members with disabilities.

- 5.4.2. Issues discussed by the working group arose from first hand interaction with students with disabilities who were assisted by the Disability Unit;
- 5.4.3. The Respondent subsequently contracted the services of Disability Management Services Inc. which played a key role in assisting the Respondent in the formulation of its disability policy;
- 5.4.4. Once the policy and related documents had been drafted, they were submitted to the Head of Staff of the Respondent's Centre for Alternative and Augmentative Communication (CAAC) for input;
- 5.4.5. A final draft of the policy was sent to the Faculty of Law for review and vetting before same was submitted to the Respondent's Executive Management for final approval.

5.5. With regards to the methods employed to communicate the new policy to students and staff members:

5.5.1. The policy and related documents were posted on the Respondent's website under the Section relating to the Department of Student Affairs. In addition, the policy and related documents are made available in various accessible formats from the Disability Unit;

5.5.2. The Vice Principal for Student Affairs and Residences communicated the policy to the Student Representative Council (SRC) and the Deans of the various faculties. The Deans were in turn requested to distribute the documentation to all academic departments falling under their control;

5.5.3. The Respondent also intended to post a special message on the Respondent's electronic notice board and SRC homepage at the start of the new academic year to alert students to the policy as well as the various services offered by the Disability Unit.

5.6. With regards to the methods of communication employed to ensure the new policy was accessible to and reached the wider university community and especially affected individuals, including parents of students:

5.6.1. Media was used as part of the broader communication strategy, including email, ClickUP (an electronic communication system accessed by all students), the web, intranet and a Student newspaper. The Respondent additionally advised that face to face communication platforms would be used during early 2014 orientation programmes;

5.6.2. Information and documentation would be available and provided to secondary schools upon request;

- 5.6.3. The policy and additional documentation are accessible at the Disability Unit in printed form as well as various other appropriate electronic formats for use by students according to the nature and level of their abilities, including Braille;
- 5.6.4. In respect of the training of relevant employees regarding the provisions and implementation of the new policy, the Respondent confirmed that because the policy was only recently approved, special training sessions had not yet been presented. However, it advised that the unofficial practices and guidelines that informed the final policy and that were in place for several years meant that informal training had been provided on an on-going basis;
- 5.6.5. In addition, the Respondent confirmed that it is a member of the Higher and Further Education Disability Services Association, which meets once a year and undertakes regular benchmarking.
- 5.7. Based on the above, the Commission notes the following:
- 5.7.1. That **at the time of the Complainant's enrolment as a student, the Respondent did not have a formal Student Disability Policy in place.** The Respondent does however submit that various informal guidelines were applied as and when required;
- 5.7.2. In addition, the Respondent has a Unit for Students with Special Needs that assists students with physical and learning disabilities. The Respondent confirms that according to the information in its possession, the Complainant first visited the Unit in October 2011, requesting extra writing time for tests and examinations and that the Complainant was assisted by the Faculty in that his exams were divided up and he was allowed rest periods;
- 5.7.3. Notwithstanding the above, since the Commission communicated with the Respondent, it has taken steps to ensure that a formal

student disability policy was put in place. In doing so, the Respondent took a number of steps to ensure that the policy was drafted in consultation and had been widely communicated to all relevant stakeholders through various forms that are also accessible to students with disabilities.

The Respondent therefore submits that it did attempt to assist the Complainant as far as possible to obtain his degree, but that the Complainant was unable to successfully complete two of the required modules on two different occasions. In this regard, the Respondent emphasises that students must comply with the relevant degree requirements in order to be awarded a particular degree, which was not done in the present circumstances.

6. Promotion of Access to Information² [PAIA]

Allegations around the application of specific provisions of PAIA are raised in the context of the broader constitutional right to access information. The deviations from formal compliance with PAIA are alleged to have violated the Complainants right to access information. The facts giving rise to these contentions are provided below:

6.1. On 12 March 2013, the Complainant advised the Commission that he had submitted a number of requests for information to the Respondent in terms of the PAIA.

6.2. As mentioned above, on 19 April 2013, the Commission forwarded correspondence to the Complainant confirming that PAIA related aspects of his

² Act 2 of 2000.

complaint would be attended to by the PAIA specialists within the Commission for further assessment and where possible, investigation.

6.3. On 7 October 2013, correspondence was forwarded to the Complainant setting out the preliminary findings of the Commission in respect of the PAIA related aspects of his matter. After further engagement with the Complainant regarding those preliminary findings, additional relevant information was forwarded to the Commission by the Complainant on 17 November 2013. A summary of the salient excerpts of the correspondence exchanged between the various parties and relating to this aspect of the complaint are set out below.

6.4. With regards to the complaint relating to the Respondent's Section 14 manual:³

6.4.1. The Complainant alleged that the Respondent's manual contravened Section 14(1)(e) of PAIA on the basis that it did not contain a list of categories of records held by the Respondent which are automatically available;

6.4.2. The Complainant also alleged that he was forced to make use of PAIA to request access to examination regulations and examination scripts, which in his view ought to have been automatically available;

6.4.3. In response to correspondence from the Commission advising of the Complainant's allegation that the Section 14 manual posted on the Respondent's website did not provide for a list of records that were automatically available, Ms Gardiner from the Respondent confirmed that "Form D – Automatically available records and access to such

³ Section 14 of the PAIA states that within six months after the coming into existence of a public body, the information officer of the public body concerned must compile a manual containing a description of its structure and functions; the contact details of its duly appointed information officer and deputy information officers, a description of a guide to the referred to PAIA, adequate information to facilitate requests for information, categories of records held and the most up to date notice regarding the categories of records available without having to submit a formal request in terms of PAIA. The Section 14 manual is commonly referred to as a road map of information holders designed facilitate easy access to information.

records” was part of the Respondent’s PAIA manual for a number of years, that the documents appeared on the website and that the Complainant’s submission was therefore incorrect. In this regard, the Commission notes that a list of automatically available documents appears at the end of the Section 14 manual as opposed to being contained in the body of the manual;

6.4.3.1. In this respect, the Respondent stated that it regards examination scripts as personal information and that automatic availability of such records would violate the need to protect personal information. On this basis, examination scripts are requested through the Respondent’s applicable regulations. The Complainant was however dissatisfied with this response on the basis that a similar restriction was not imposed in respect of copies of other test results and assessments nor, according to the Complainant, was a similar practice employed in other tertiary institutions;

6.4.3.2. The Respondent stated that its list of automatically available information in its Section 14 manual does not preclude students’ access to their examination scripts. In this regard, the Respondent advised the Commission in November 2012 that all students have the right to peruse their answer scripts after a test / examination and that students are aware of this perusal opportunity. Where formal perusal opportunities are not arranged, students may approach relevant lecturers with their requests to peruse (which the Respondent alleges the Complainant did not do). No fee must be paid in such instances. Further, in terms of Respondent’s policy, examination

scripts are the property of the Respondent and are never given to students (but are retained for a period of one year after the examination to facilitate the resolution of any queries that may subsequently arise). The Respondent therefore alleges that the Complainant was never denied permission to peruse his special examination answer scripts (the Complainant however submits that this perusal opportunity was not evident from the examination papers);

6.4.3.3. With regard to the Complainant's request to receive copies of his examination papers, answer scripts and memorandums, the Respondent advised the Commission that the Complainant was invited by the programme coordinator and the Registrar to view the relevant documents at the office of the programme coordinator and to bring along any expert who could perform an evaluation, as requested by the Complainant. The Respondent also indicated that it would have the Complainant's scripts re-marked by an external party at no additional cost to him. Although the Respondent advised that this offer was conveyed to the Complainant's father but was not accepted, the Complainant refutes this submission. In this regard, the Complainant advised that he did respond to the invitation but had received no further correspondence from the Respondent thereafter;

6.4.3.4. The Complainant viewed his request for copies of the examination scripts (and other related documents) as fair for a number of reasons, including that he had relocated to the Western Cape and that to appoint a specialist to sit in the office of the programme coordinator to review the

examinations scripts and related documents was in his opinion both impractical and unprofessional.

6.4.4. The Commission advised the Complainant that although the Respondent's Section 14 manual did not make provision for automatically available documents in the body of the manual, such exclusion could not be interpreted to mean that the Respondent limited access to such scripts through the requirement that formal requests in terms of PAIA would be the only means of access to the record. Nor was there any indication that PAIA was required to access personal information, such as examination scripts.

4.1. With regards to the complaint relating to Respondent's refusal to grant Complainant access to the student disability policy:

4.1.1. The Complainant alleges that he submitted a PAIA request for the Respondent's student disability policy. The Respondent stated that no such policy existed but that it was in the process of developing same. Complainant advised that in the event a record is requested that does not exist, the information holder in terms of Section 23 of PAIA is required to provide an affidavit stating that the requested record does not exist, which the Complainant alleged the Respondent failed to do;

4.1.2. During 30 October 2013, the compliance officer from the Commission's PAIA Unit advised the Respondent that it had received a complaint from the Complainant regarding his request for the Respondent's student disability policy. The Commission requested Ms Gardiner of the Respondent to complete an affidavit in terms of Section 23 that "the record does not exist" should this be the case, and to inform the Commission of the progress on the draft policy. On

31 January 2014, Ms Gardiner furnished the Commission with the requested affidavit and confirmed that the Complainant had been informed that no formally approved student disability policy was in place. The required affidavit was therefore provided to the Commission pursuant to a request being submitted for same.

5. CONTEXTUAL BACKGROUND

A brief summary of the version of events as put forth by the parties is provided below. The contextual information provided pertains to those matters within the jurisdiction of Commission relating to the lack of a formal disability policy and the right to access information appears below.

5.1. COMPLAINANT'S VERSION

- 5.1.1. During his postgraduate studies in accounting sciences, the Complainant obtained final marks below 45% in two subjects and was therefore not eligible to write re-examinations. In response to the Complainant's requests for re-examinations as an accommodation of his disability (and his inability to sit in the 2011 mid-term test due to illness), the Respondent indicated that it would allow the Complainant to write special examinations in his remaining two subjects in January 2012;
- 5.1.2. Due to a discrepancy in the results of his special examinations, the Complainant requested copies of his examination papers, memorandums and answer scripts to determine possible reasons for the discrepancy. All such requests relating to his November 2011 normal examinations and the January 2012 normal and special

- examinations are alleged to have been initially denied by the Registrar and the relevant course coordinator;
- 5.1.3. In light of such refusal, the Complainant submitted formal applications in terms PAIA, after which he received the required copies on 8 May 2012;
- 5.1.4. After perusing the examination material made available to him through the PAIA process, the Complainant discovered the following:
- 5.1.4.1. Neither of the examination papers had been externally moderated;⁴
 - 5.1.4.2. Neither of the examination papers made provision for perusals;⁵
 - 5.1.4.3. There appeared to be certain errors on the memorandum; and
 - 5.1.4.4. Mark allocations appeared to be inconsistent.
- 5.1.5. Based on the Complainant's belief that the Respondent had contravened its own external moderation policy, the Complainant recommended that the Registrar of an independent university attend to the external moderation;
- 5.1.6. The Complainant confirms that the concessions previously provided to him by the Respondent assisted him to a certain extent during his undergraduate studies. However, tests / examinations for his undergraduate studies were notably shorter in duration than those for his postgraduate studies and additional concessions should therefore have been provided to reasonably accommodate his medical disability during the longer postgraduate tests/examinations;

⁴ Eksamens en Verwante Aangeleenthere" - 2.2 and 3.2 and Bylaag 1, Bylaag 2

⁵ Eksamens en Verwante Angeleenthere" - 3.2 and 7.8 and Bylaag 2

- 5.1.7. In respect of the requested concessions, the Complainant's medical specialists determined that additional or extended writing time would not prove adequate for examinations exceeding three hours. Examinations which were longer in duration negatively impacted the Complainant to such an extent that he was rendered temporarily unable to use his eyes due to increasingly severe double vision and an inability to focus his eyes. It was therefore recommended that he be allowed other means of reasonable accommodation, such as adequate rest periods;
- 5.1.8. During May 2011, the Complainant's parents approached the Faculty Administrator and the Dean of the Faculty to request that the Complainant be provided adequate and reasonable accommodation as tests and examination sessions in the Honours course could reach eight (8) hours in length and, in some instances, run for two (2) subsequent days. However, no feedback was allegedly received from the Respondent;
- 5.1.9. The Complainant alleges that he was negatively impacted due to his medical condition as the Respondent failed to reasonably accommodate him, thereby denying him an opportunity to be fairly assessed. In this regard, the Complainant in particular alleges that:
- 5.1.9.1. The Respondent's lack of a formal disability policy and / or student support policy seriously prejudiced the Complainant, particularly in his Honours year.
- 5.1.9.2. The Complainant alleges that at the early onset of his Honours year, very little effort was made by the Respondent to fully understand his medical condition and its complications with a view to properly accommodating him. This, he alleges, was notwithstanding the fact that the Respondent had the knowledge resources, opportunities, etc. to assist him in determining the impact of his medical condition

on his studies and to reasonably accommodate him to assist him to successfully meet the academic requirements of the course (especially as the Respondent had a unit conducting research on mitochondrial disorders as described above).

- 5.1.9.3. As a result of the above, the Complainant alleges that he has experienced severe disadvantages, including being threatened with legal action by his bursary provider. In this respect, the Complainant's bursary agreement and three year training / employment programme were terminated by his bursary provider in January 2013 and he is now being held liable for repayment of all bursary monies disbursed since 2007, amounting to approximately R300 000. The Complainant is also unable to obtain relevant employment causing potential loss of income. Issues such as these have exposed the Complainant to severe physiological stress and trauma, which are proven to worsen and accelerate the degenerative effect on the mitochondria.

5.2. **RESPONDENT'S VERSION**

- 5.2.1. The Complainant registered for and was awarded the BCom: Accounting Sciences degree programme at the Respondent in 2007 and 2010 respectively. He thereafter registered for the BCom (Hons) degree programme in Accounting Sciences in 2011. Students must successfully complete all four prescribed modules to be awarded the Honours degree.
- 5.2.2. In order to be admitted to Part 1 of the qualifying examination of The South African Institute of Chartered Accountants (SAICA), a student must obtain a Certificate in the Theory of Accountancy (CTA) at a SAICA-accredited university, which is only awarded to graduate

students who have passed certain modules at the same examination session⁶ in their final year;

- 5.2.3. The Complainant was awarded a supplementary examination in two subjects and during the supplementary examinations, obtained a final mark of 50% for both. Unfortunately, he was unable to pass FRK 700 and ODT 700 during the November main examination (and obtained final marks of 42% (FRK 700) and 43% (ODT 700));
- 5.2.4. In view of the Complainant's medical condition, a special concession was made in that the Complainant was given the opportunity to write a special examination in both the said modules to enable him to comply with degree requirements. However, the Complainant and his parents were duly informed by the programme coordinator that it would not be possible to award him the CTA, even if he successfully completed the two special examinations, as the required modules had to be passed during the same examination session. For this reason, the Complainant was requested to consider whether he would be registering for the 2012 academic year to repeat the outstanding modules in order to qualify for the CTA in 2012. The Respondent advises that the Complainant was fully aware of the fact that he would not be able to receive the CTA in 2011 and that he would have to register again for the four modules in 2012 in order to be awarded the CTA at the end of 2012 (should he pass all four of the prescribed modules in the same examination session);
- 5.2.5. The Complainant wrote the special examinations but based on his results, did not comply with the degree requirements and could

⁶ Defined as the main examination session or the supplementary examination session that immediately follows upon the main examination session and special examinations written in January therefore do not qualify. Students who do not pass all four 700 modules or who eventually comply with degree requirements based on a special examination(s), have to repeat all four modules in order to obtain the CTA in the following year and to qualify to write the SAICA professional exam in January the year thereafter

therefore not be awarded either the BCom (Hons): Accounting Sciences degree or the CTA in respect of 2011;

5.2.6. With regard to the discrepancy in the results provided to the Complainant in respect of his two special examinations, the Respondent alleges that the Complainant did not follow the correct administrative procedure with regard to the special examinations in that he did not formally apply for the said examinations at the faculty administration. This resulted in the incorrect marks being reflected on the system. However, the Respondent alleges that notwithstanding this administrative issue, the Complainant was not able to successfully complete either of the said modules;

5.2.7. Students may also apply for the re-marking of their examination scripts after perusal of their scripts. In this instance, a fee is payable for the remarking. It is alleged that the Complainant was provided with an opportunity to have his two special examination scripts re-marked by an external examiner at no cost, an opportunity he elected not to make use of. In this respect, the Respondent advised PPSA in November 2012 that the offer would remain available to the Complainant and that he would be required to urgently engage with the Respondent should he wish to take advantage of the opportunity;

5.2.8. The Respondent alleges that the Complainant's examination scripts were re-marked by both the University of South Africa (UNISA) and the University of the Free State (UFS). The Respondent alleges that such re-mark was undertaken notwithstanding the Complainant's failure to respond to a request regarding whether or not he required such a re-mark and was done at no cost to the Complainant. In this regard, the Respondent submits that through the re-mark process, the Complainant again failed the subjects. The Commission notes that the Complainant has raised concerns regarding the validity of

the alleged re-marks and the roles of the UFS and UNISA in respect thereof;

- 5.2.9. General Regulation G.12.5 was cited as being applicable to cases where students are prevented from preparing for or sitting for an examination owing to unforeseen circumstances or illnesses. Per G.12.5, BCom (Honours) Accounting Sciences students who are unable to sit for an examination owing to unforeseen circumstances or illness are eligible to write the supplementary examination as a 'sick examination' if the required procedures are followed. Due to the demands caused by the syllabus in Complainant's specific course, missed tests were not replaced with additional assessments but were instead removed from the calculation of the student's final year mark. This latter approach was adopted in the Complainant's case as he was unable to write an examination due to medical reasons; and
- 5.2.10. The Respondent confirmed it had also advised the Public Protector South Africa that the Complainant was entitled to register for the following year to complete his degree and that it would assist him in obtaining a bursary, although it could not guarantee the outcome of such attempts. The Respondent however confirmed that the Complainant did not re-enrol for 2012 or any other year thereafter.
- 5.6. The Commission notes that there are a number of factual disputes in the submissions of the Complainant and Respondent. In considering the versions of each party, the Commission has been unable to make determinations on factual discrepancies. For this reason, as will be seen in the analysis below, the Commission confines its findings to instances where the facts are clear / admitted or issues are undisputed and relate to the matters within its jurisdiction for determination.

6. **RIGHTS ALLEGEDLY VIOLATED**

6.1. From its preliminary assessment of the complaint, the Commission identified a *prima facie* violation of the following human rights as enshrined in the Bill of Rights of the Constitution:

6.1.1. Section 9 (equality);

6.1.2. Section 10 (dignity) and

6.1.3. Section 32 (access to information).

7. **LEGAL FRAMEWORK**

7.1. The vulnerability of people with disabilities is recognised internationally, regionally and nationally. This international and regional recognition provides South Africa a broad normative framework within which to develop national legislation and policies aimed at protecting the rights of persons with disabilities.

7.2. International Law

7.2.1. The primary purpose of the **United Nation Convention on the Rights of Persons with Disabilities (2006) (UNCRPD)**,⁷ is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities. It therefore creates a normative standard for state parties to translate for the protection of the rights of persons with disabilities at domestic level⁸. By ratifying the **UNCRPD** in November 2007, South Africa accepted its legal obligations under the treaty to enact domestic legislation to ensure that the rights of persons with

⁷ *Convention on the Rights of Persons with Disabilities*, UN General Assembly, 13 December 2006, A/RES/61/106.

⁸ *Ibid.* at Article 2.

disabilities as enshrined in the **UNCRPD** are protected within the country.

While the **UNCRPD** has not been extensively incorporated into our legal framework in separate distinct legislation relating to people with disabilities, protection for the rights of persons with disabilities resides at a normative level firstly within the framework created by the Constitution and secondly through the equality legislation.

Relevant to the present matter are **Articles 24(1) and (5) of the UNCRPD** which state that in respect of an Adequate Standard of Living and Social Protection:

"States Parties shall:

(1) Ensure an inclusive education system at all levels and lifelong learning...

(5) Ensure that persons with disabilities are able to access general tertiary education, vocational training, adult education and living learning without discrimination and on an equal basis with others..."

The UNCRPD takes into account what is known as the "social model" which sees disability as "a social construct where barriers relating to physical access, attitudes and mindsets, rather than the actual medical condition of the person, disable the person... whereby barriers are recognised and must be addressed in a positive manner".⁹

⁹ Foundation of Tertiary Institutions of the Northern Metropolis "Disability in Higher Education – Project Report" 2009 – 2011, pg 21 - 22

7.2.2. **Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR),¹⁰** reaffirms the provisions of Article 24 of UNCRPD:

"The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace..."(own emphasis).

7.2.3. **The Committee on Social, Economic and Cultural Rights General Comment on the Right to Education 13 (21st Session, 1999)** has stated the following:

"Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalised adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children, promoting human rights."

7.2.4. As a member country of the United Nations (UN), South Africa must promote the **UN Standard Rules on the Equalisation of**

¹⁰ General Assembly Resolution 2200A (XXI), 16 December 1966.

Opportunities for People with Disabilities (1993) (the Rules).¹¹

The Rules recognise the difficulties faced by people with disabilities and calls for concerted efforts to ensure equality in all spheres for disabled persons. They also serve as an instrument for policy-making and as a basis for technical and economic cooperation:

*"The purpose of the Rules is to ensure that girls, boys, women and men with disabilities, as members of their societies, may exercise the same rights and obligations as others. In all societies... there are still obstacles preventing persons with disabilities from exercising their rights and freedoms and making it difficult for them to participate fully in the activities of their societies. It is the responsibility of States to take appropriate action to remove such obstacles... The equalisation of opportunities for persons with disabilities is an essential contribution in the general and worldwide effort to mobilise human resources..."*¹² (own emphasis).

- 7.2.5. A major outcome of the International Year of Disabled Persons held in 1981 was the formulation of the **World Programme of Action concerning Disabled Persons (WPA)**, which programme was adopted by the UN General Assembly on 3 December 1982 (resolution 37/52).¹³ The WPA is a global strategy aimed at enhancing disability prevention, rehabilitation and equalization of opportunities and the full participation of persons with disabilities in

¹¹ The political and moral foundations of the Rules lie in human rights instruments such as the Universal Declaration of Human Rights (1948), the International Covenant of Economic, Social and Cultural Rights (1966), the International Covenant on Civil and Political Rights (1966) and the World Programme of Action Concerning Disabled Persons, amongst others.

¹² *UN Standard Rules on the Equalisation of Opportunities for People with Disabilities (20 December 1993)*, adopted by the United Nations General Assembly, forty-eighth session, Resolution 48/96, can be accessed at <http://www.un.org/esa/socdev/enable/dissre00.htm>.¹²

¹³ Information about the initiative can be accessed at <http://www.un.org/disabilities/default.asp?id=23>.

social life and national development. The WPA also emphasizes the need to approach disability from a human rights perspective.¹⁴

7.2.6. The WPA, which was in part built off the **Declaration on the Rights of Disabled Persons** adopted seven years earlier in 1972, states:

"6. Disabled persons have the right to...education, vocational training and rehabilitation, aid, counselling, placement services and other services which will enable them to develop their capabilities and skills to the maximum..."¹⁵ (own emphasis).

7.2.7. Several other disability-specific non-binding instruments¹⁶ have been adopted at the international level, such as the **UNESCO Education for All (2000)**¹⁷ and Provision 57 of the **Sundberg Declaration on Actions and Strategies for Education, Prevention and Integration**,¹⁸ which provides as follows:

"Persons with disabilities should be given special attention in the design and implementation of adult and continuing education programmes. Persons with disabilities should be given priority access to such programmes. Special courses

¹⁴ *Ibid.*

¹⁵ General Assembly Resolution 3447 (XXX), adopted 9 December 1975, can be accessed at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RightsOfDisabledPersons.aspx>.

¹⁶ In August 2002, a UN ad hoc committee met for the first time to discuss the United Nations Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, which initiative is supported by the South African government.

¹⁷ A/RES/37/52 3 December 1998.

¹⁸ Adopted by the UNESCO World Conference on Actions and Strategies for Education, Prevention and Integration, Malaga (Spain), 2 - 7 November 1981, can be accessed at http://www.unesco.org/education/nfsunesco/pdf/SUNDBE_E.PDF.

should also be designed to suit the needs and conditions of different groups of adults with disabilities."

- 7.2.8. Instruments such as these represent a strong moral and political commitment of many governments to take action to attain substantive equalization of opportunities for persons with disabilities.

7.3. Regional Law

- 7.3.1. The **African Charter on Human and Peoples' Rights** adopted in 1981, confirms that:

*"[e]very individual shall be entitled to the enjoyment of the rights and freedoms without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status."*¹⁹

The specification of "*or other status*" clearly encompasses reference to every individual and creates the opening premise for application of the article to all individuals. Although the article provides examples of grounds of distinction which are prohibited and does expressly cite disability, the open ended status clearly provides for the broadest prohibition against distinction and for the equal enjoyment of rights. (Article 18 also makes specific reference to "...*the disabled shall have the right to special measures of protection in keeping with their physical or moral needs*."²⁰ This may arguably encompass education,

¹⁹ African [Banjul] Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Article 2 (emphasis added).

²⁰ *Ibid*, Article 18.

especially as Article 17 notes that "*every individual shall have the right to education*"²¹ (own emphasis).

7.3.2. The **Africa Decade of Disabled People (ADDP)**²² was an initiative of the non-governmental community of Africa, in cooperation with member states and governments of the Organisation of African Unity (OAU) (currently known as the African Union (AU)). The ADDP was an initiative aimed at furtherance of the equalization of opportunities for persons with disabilities. The **Continental Plan of Action (CPA)** that flowed from that initiative is aimed at implementing priority activities relating to disability. Some of the objectives of the CPA include the formulation and implementation of national policies, the creation of programmes and legislation to promote the full and equal participation of persons with disabilities, enhancing support services for disabled persons and the promotion and protection of disability rights as human rights.²³

7.4. From its commitments to international and regional frameworks, it is clear that South Africa is obliged to respect the obligations imposed by those frameworks in the interests of persons with disabilities in the country. These protections are relevant in that the Constitution expressly recognises international law in the interpretation of the bill of rights and in fact entrenches specific protections for particular rights in its own provisions.

7.5. Domestic Law

²¹ *Ibid*, Article 17.

²² The goal of the African Decade of Persons with Disabilities was the full participation, equality and empowerment of people with disabilities in Africa. Information on the Africa Decade of Disabled People can be accessed at <http://www.un.org/esa/socdev/enable/disafricadecade.htm>.

²³ *Continental Plan of Action for the African Decade of Persons with Disabilities 2010 – 2019*, African Union Commission Department of Social Affairs, can be accessed at <http://sa.au.int/en/sites/default/files/CPoA%20Handbook%20%20AUDP%20English%20-%20Copy.pdf>.

7.5.1. The **Constitution**²⁴ is the benchmark for all legislation in South Africa. Its provisions are applicable to all persons, including juristic persons.²⁵ The democratic values of equality, human dignity and freedom form the basis of any constitutional analysis of the human rights protected in the Bill of Rights.²⁶ South African domestic laws therefore find form through the primary law as contained in the Constitution of the Republic.

7.5.2. The relevant Sections are as follows:

Section 39 (Interpretation of Bill of Rights):

"(1) When interpreting the Bill of Rights, a court, tribunal or forum -

...

(b) must consider international law; and

(c) may consider foreign law..."

Section 9 (Equality):

"(1) Everyone is equal before the law and the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. [our emphasis]

²⁴ Note 1 above

²⁵Section 8 of the Constitution.

²⁶Section 7 of the Constitution.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including ...disability...

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in subSection (3)...²⁷

Section 10 (Human Dignity):

"(1) Everyone has inherent dignity and the right to have their dignity respected and protected."

Section 32 (Access to Information):

"(1) Everyone has the right of access to – ...

(b) Any information that is held by another person and that is required for the exercise or protection of any rights."

7.5.3. The **Promotion of Equality and Prevention of Unfair Discrimination Act (2000)** (PEPUDA) is the national legislation enacted to prevent or prohibit unfair discrimination and to promote the achievement of equality. Provisions of PEPUDA also apply to people with disabilities. PEPUDA not only contains negative provisions prohibiting discriminatory conduct, **but also positive measures aimed at eradicating systemic discrimination and promoting equality with regard to disability.**

Chapter 5 of PEPUDA deals with the promotion of equality by the state and other actors, including those in the public and private spheres.

²⁷ *"9(3): The state may not unfairly discriminate, directly or indirectly against anyone on one or more grounds, including...disability..."*

Section 9 of PEPUDA specifically deals with the prohibition of unfair discrimination on the ground of disability. Section 9(a)(c) specifically states the following in respect of the reasonable accommodation of persons with disabilities:

"...no person may unfairly discriminate against any person on the ground of disability, including ...

(b) Failing to eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities or failing to take steps to reasonably accommodate the needs of such persons."

Section 28 of PEPUDA states the following in respect of "special measures to promote equality with regard to race, gender and disability":

"(b) in carrying out the duties and responsibilities... institutions performing public functions and, where appropriate and relevant, juristic and non-juristic entities, must –

(i) Audit laws, policies and practices with a view to eliminating all discriminatory aspects thereof;

(ii) Enact appropriate laws, develop progressive policies and initiate codes of practice in order to eliminate discrimination on the grounds of...disability;

(iii) Adopt viable action plans for the promotion and achievement of equality in respect of... disability; and

(iv) Give priority to the elimination of unfair discrimination and the promotion of equality in respect of...disability."

The "Illustrative List of Unfair Practices in Certain Sectors", a Schedule to PEPUDA, states that with respect to education specifically, the "*failure to reasonably and practicably accommodate diversity in education*" confirms that failure to reasonably accommodate a person with disabilities may constitute a discriminatory practice which needs to be addressed.

- 7.6. **PAIA** gives effect to the constitutional right of access to any information held by the state; or that is held by another person, and that is required for the exercise or protection of any rights and to provide for matters connected therewith.
- 7.7. Section 4(a)(i) of the **National Education Policy Act 27 of 1996**, as amended, confirms that policy shall be drafted which is directed at the advancement and protection of the fundamental Constitutional rights of every person (and those rights contained in international conventions and ratified by government). In this respect, particular reference is made to the right of every person to be protected against unfair discrimination within or by an education department or education institution on any ground whatsoever.
- 7.8. **The National Plan for Higher Education (the Plan)**²⁸ aims to meet the learning needs and aspirations of individuals through the development of their intellectual ability and aptitude throughout their lives. The plan aims to increase and broaden participation and to increase access for black, women, disabled and mature students.
- 7.9. Various provisions of the **Disability Rights Charter of South Africa**²⁹ are applicable to the present matter as well. Of particular relevance is Article 4(a)

²⁸ The National Plan for Higher Education can be accessed at http://www.thepresidency.gov.za/docs/reports/15year_review/gdyc/disability/chapte4.pdf.

²⁹ http://www.vut.ac.za/drop/disability/DISABILITY_RIGHTS_CHARTER.pdf

which relates to education and which confirms that disabled people shall have the right to mainstream education with personal assistance, appropriate assistive technology and specialised teaching where necessary.

7.10. Education White Paper 3: Transformation of the Higher Education System³⁰ recognizes the need to prevent unfair discrimination and to put in place measures to address inequalities.³¹

7.11. The Protection of Personal Information Act³² protects personal information and was enacted to give effect to the Constitutional right to privacy.

8. **ANALYSIS AND FINDINGS**

8.1. The principle of full participation in society, family and community is confirmed in the Universal Declaration of Human Rights and applies to all people, including those with disabilities. However, in reality persons with disabilities are often denied these opportunities for various reasons, including ignorance, indifference and fear. Prejudicial societal attitudes and behaviour often leads to the exclusion of persons with disabilities from social activities. This exclusion results in adverse psychological and social consequences for persons with disabilities and broader society. A report prepared by the Foundation of Tertiary Institutions of the Northern Metropolis notes that obstacles in respect of tertiary education prevail for the same reasons.³³

³⁰ http://www.che.ac.za/media_and_publications/legislation/education-white-paper-3-programme-transformation-higher-education. Education White Paper 6: Special Needs Education. This paper covers inclusive education. However, the paper makes limited reference to tertiary education.

³¹ Ibid note 4 at pg 20

³² Act 4 of 2013. This Act came into force in November 2013

³³ Ibid note 4 at pg 23

8.2. Notwithstanding the broad normative principles protecting the rights of this particularly vulnerable group at international level, the Commission notes that applicable legislation—both nationally and internationally—relating to people with disabilities and higher education is relatively underdeveloped. The Commission is therefore guided in its understanding of the special measures which must be put in place to protect the rights of this vulnerable group by the broad framework and principles found in the Constitution and the Republic’s equality legislation. In respect of the latter, one of the specific objectives of PEPUDA, in recognition of continuing barriers, is to “*provide for measures to facilitate the eradication of unfair discrimination...particularly on the grounds of ... disability.*”³⁴

8.3. In comparison to South Africa, several other nations around the world have taken legislative action to specifically ensure that disabled individuals are protected and not discriminated against in their pursuit of higher education. Some examples are as follows:³⁵

8.3.1. In the United States, the Americans with Disabilities Act (ADA), makes it a violation of federal law for any state or privately run university to deny individuals with disabilities access to the same educational opportunities as other learners.³⁶ Universities are therefore specifically required to offer “reasonable modifications or accommodations” to their programs for persons with disabilities, as long as such modifications do not fundamentally alter the nature of the program or place an undue financial burden on the institution.³⁷

8.3.2. Ireland’s Equal Status Act (ESA) prohibits any form of discrimination against disabled persons at any “educational establishment,” including tertiary

³⁴Section 2 of PEPUDA.

³⁵ Also see United Kingdom’s Disability Discrimination Act, 1995 and Equality Act, 2010 and Australia’s Disability Discrimination Act, 1992 (Ibid note 4 at pg 22)

³⁶ United States Code, § 794 (passed 1990; amended 2008).

³⁷ *Ibid*, at § 12-182(b)(2)(A)(ADA requirements).

education.³⁸ This includes direct and indirect discrimination and requires that steps be taken to ensure disabled students have the same conditions of admission and access to courses, so long as such necessary modifications are not unduly burdensome on the institution.³⁹

8.3.3. Most members of the European Union are subject to “a legislative framework...which in principle supports the integration of students with disabilities” into a higher education system.⁴⁰

8.4. Unfortunately, no separate and distinct legislation exists in Africa⁴¹ specifically relating to non-discrimination against students with disabilities in tertiary institutions.⁴² This lacuna has contributed to the general absence in institutions of learning, specific, coherent disability policies and practises. There is however other legislation, including PEPUDA, that refer to non-discrimination based on disability generally and which do create enforceable obligations on both the state and private actors.

8.5. In South Africa, the Constitution and PEPUDA expressly prohibit discrimination on the basis of disability.

³⁸Ireland Civil Law (Miscellaneous Provisions) of 2011, renewing Equal Status Act 2000 (8/2000).

³⁹*Ibid.* at §§ 3(1) and 7(4)(b).

⁴⁰*Support and Inclusion of students with Disabilities at higher education institutions in Montenegro*, published by Arcola Research and the European Commission, Section 5.1. Available at: http://www.sinche.uom.gr/sites/default/files/report_dev1.1.pdf.

⁴¹ Within the Southern African Development Community, Swaziland creates positive obligations in respect of tertiary education. Its official Policy on Education states that the country “*shall facilitate access to education for all learners with disabilities by improving the infrastructure to make it user-friendly from [a] basic through tertiary level.*”

⁴² Several countries, including Mozambique and Malawi have specific directives relating to the right to non-discriminatory *primary* school education for students with disabilities. See *From Exclusion to Inclusion: Promoting the Rights of Children with Disabilities in Malawi*, UNICEF (2012), p. vi. And National Education Policy of Swaziland, Section 5.3. Full quote: “*The Ministry of Education shall facilitate access to education for all learners with disabilities by improving the infrastructure to make it user-friendly from basic through tertiary level [and] shall support the integration and inclusion of children with special learning needs in the Education System.*”

- 8.6. As per its preliminary assessment, the Commission notes that some aspects forming the basis of the complaints lodged with the Commission fall outside its Constitutional mandate, in particular, those relating to ordering retrospective relief, such as the re-mark of any past examination papers. These aspects of the complaint may more appropriately be dealt with by the relevant educational authorities with whom the Complainant has already lodged complaints.
- 8.7. However, the Commission recognised that the absence of a formally approved disability policy required further investigation. In addition, further investigation was required in respect of the Respondent's alleged responses to the Complainant's various PAIA requests and concerns.
- 8.8. In its consideration of the complaint before it, the Commission paid heed to the allegations lodged by the Complainant, the numerous correspondence exchanged with the parties and the relevant international, regional and domestic legal frameworks. In applying the law to the facts the Commission finds as follows.
- 8.9. The Respondent violated PEPUDA, in particular Section 28, for the following reasons:
- 8.9.1. At the time of the cause of action arising, the Respondent did not have a formally approved disability policy in place. The Commission recognises that disabilities take many, and in some instances multiple forms, not all of which would necessarily be addressed by the Respondent's Disability Unit and other various modes of addressing needs. The absence of a clear policy renders a person unable to effectively plan and order conduct to avail themselves of its protections to limit any potential prejudice to themselves in a timely, and effective manner. However, the Respondents approach to accommodating disability and whether this impact adversely

affected the Complainant is in dispute. The establishing of actual adverse impact and appropriate remedy should such impact be established, is more appropriately to be determined by the Department of Higher Education and Training.

8.9.2. The Commission finds that the Respondent's lack of a clear policy **constituted a violation of Section 28 of PEPUDA** which places a positive obligation on *inter alia* institutions performing public functions to enact policies to eliminate discrimination based on disability.

8.9.3. The Commission records however, that in the course of its investigation into this complaint, the Respondent developed a Policy on Students with Disabilities, which was implemented on 8 October 2013, and that a satisfactory process was undertaken in respect of the preparation and subsequent communication thereof to relevant stakeholders.

8.9.4. The Commission does not make any findings as regards Section 9 of PEPUDA given the disputes of fact as to whether or not the Complainant was reasonably accommodated. The consideration under this provision is material to the outcomes the Complainant seeks and are therefore more appropriately to be considered by the appropriate authority.

8.10. The Commission makes the following observations and findings as regards PAIA:

8.10.1. The Commission notes that the Section 14 manual of the Respondent does not provide a list of record categories that are automatically

available in the body of the manual (the Commission however acknowledges that the Respondent does have a Section 15 notice⁴³ on its website and annexed to its Section 14 manual);

- 8.10.2. The Respondent's PAIA manual does not reflect that examination scripts constitute a category of records that are available on request from the Respondent; nor does it indicate as required in terms of PAIA that such records are exempted from request fees if the information requested is the personal information of the requestor;
- 8.10.3. The Respondent's Section 15 notice does not clearly state that the records listed therein can be requested without the need for a formal PAIA request;
- 8.10.4. The Commission notes the Complainant's allegation that the Respondent failed to respond to his internal appeal within prescribed time periods (as set out in PAIA). However, the Commission notes that all universities are classified as type B public bodies in terms of PAIA. As a result, where such bodies have refused access to information, the legislation does not provide for an internal appeals process, but requires the matter to be determined by a court. The Commission while strongly discouraging non responsiveness, undue delays in responses, and deemed refusals, does not find the Respondent in violation of PAIA in this respect. However, the Respondent in embracing the spirit of the legislation ought to have informed the Complainant that he did not have a right of appeal against it in terms of PAIA;

⁴³ Point 8 of the Respondent's Section 14 manual states that a Section 15 notice has been submitted to the Department of Justice but has not been published

- 8.10.5. The Commission finds that the Respondent did not comply with PAIA by failing to initially provide an affidavit in terms of Section 23 of PAIA in the first instance, to substantiate its assertion that only a draft policy on disability was available. In this regard, the Commission notes that the Respondent provided the required affidavit subsequent to receiving a request for same;
- 8.10.6. The Respondent's offer of inspection of records as opposed to reproduction thereof is permitted in terms of PAIA, unless the requestor has stipulated that the form of access required is a copy of such record on the PAIA request form, or in the event that the Respondent can justify inspection over copying under PAIA⁴⁴;
- 8.10.7. In relation to automatic access to examination scripts, the Commission finds that it is not incumbent upon the Respondent to make exam scripts available automatically to all persons, given *inter alia* privacy and resource considerations⁴⁵. However, that where individuals demonstrate the scripts constitute their personal information, and where resources permit, such access should be provided.

9. **RECOMMENDATIONS**

- 9.1. In making the recommendations below, the Commission emphasizes that the Complainant was advised that certain material aspects of the complaint were outside of its jurisdiction. In respect of these legs of the complaint, the Commission referred the Complainant to more appropriately-situated bodies.

⁴⁴ On receipt of the PAIA request, which asked for copies of the records, the Respondent furnished such copies

⁴⁵ See paragraph 7.11

9.2. The Commission recognises that it has not included the Department of Higher Education and Training in the findings it has made in this complaint. However, given the impact and need for clear disability policies and practises in institutions of higher learning, this report is to be provided to the Department of Higher Education and Training. In addition the Commission will recommend that an audit of policies supporting the education of persons with disabilities be conducted at all institutions of higher learning and that the Department takes urgent steps to provide such bodies with best practise guidelines for the development and implementation of such policies before the end of December 2015.

9.3. Based on the findings set out above, the Commission recommends:

9.3.1. That sustained messaging of the disability policy, which was implemented on 8 October 2013 be undertaken to the wider university community.

9.3.2. The reviewing and aligning of all information related policies and protocols with PAIA and PAIA training for the designated deputy information officer of the respondent within 6 months hereof;

9.3.3. The Commission notes that the Respondent has compiled a list of automatically available records in terms of Section 15 of PAIA. The Commission however recommends that the Respondent provide a list of automatically available records in the body of its Section 14 manual (as opposed to a Section 15 notice annexed to the Section 14 manual). In addition, it is recommended that the Section 15 notice clearly indicate that a record listed in the notice may be requested (without the need to engage in the formal PAIA process if

this is appropriate) and that examination scripts constitute a category of records that are available for inspection on request in line with laws protecting personal information. If an alternative process is in place for accessing such records by students, such process should clearly be referenced and described in the Section 14 manual of the Respondent.

In respect of those findings relating to PAIA, the Commission recommends that **within a period of six (6) months from the date hereof**, the Respondent provide the Commission with its amended Section 14 manual and Section 15 notice and make the amended manual and notice available for access.

10. **APPEAL**

10.1. Should you not be satisfied with this decision, you may lodge an appeal, in writing within 45 days of receipt of this letter. A copy of the appeal form is available at any office of the Commission. The appeal should be lodged with the Head Office of the Commission – contact details are as follows:

Physical Address:

Appeals Section
33 Hoofd Street
4th Floor, Forum 3
Braampark
Braamfontein
2017

Postal Address:

Appeals Section
Private Bag X2700
Houghton
2041

Fax number: 011 403 0567 (Attention – Appeals Section)

Telephone number: 011 877 3654 / 3653

SIGNED IN BRAAMFONTEIN ON THE 08 DAY OF
April 2015.

B. J. Malatji

Commissioner Bokankatla Malatji
South African Human Rights Commission