

URGENT

Ms Baleka Mbete

Speaker of the National Assembly

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Your reference

Our reference

Date

D Milo / S Scott
2583744

14 April 2015

Dear Speaker

APPOINTMENT PROCESS FOR THE INSPECTOR-GENERAL OF INTELLIGENCE BY THE JOINT STANDING COMMITTEE FOR INTELLIGENCE

1. As you are already aware, we act for the M&G Centre for Investigative Journalism ("**amaBhungane**"). We confirm that we also act for the Right2Know Campaign ("**Right2Know**"), the Council for the Advancement of the South African Constitution ("**CASAC**") and the Institute for Security Studies ("**ISS**") (collectively "**our clients**").
2. We understand that the Joint Standing Committee on Intelligence ("**the Committee**") is still in the process of appointing the new Inspector-General of Intelligence ("**IGI**") in terms of section 210(b) of the Constitution and section 7 of the Intelligence Services Oversight Act 40 of 1994 ("**the Act**"). We are instructed that the interview process of shortlisted candidates commenced on 17 March 2015 in closed proceedings.
3. Moreover, we understand that the Committee has now finalised its consideration of the matter and will soon be reporting to the National Assembly in relation to its nominated candidate, in terms of section 7(1)(b) of the Act (see in this regard a letter from the Chairperson of the National Council of Provinces to the Right2Know Campaign, dated 30 March 2015 and annexed hereto marked "**A**").
4. For the reasons set out in more detail below, we submit that the appointment process was manifestly unconstitutional and irrational.

WW To The Speaker 20150414 New

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Chief Operating Officer: SA Boyd

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5. Accordingly, we humbly request and urge the National Assembly not to endorse any nominated candidate (whoever it may be) proposed by the Committee and to refer the process back to the Committee so that there can be a fresh, constitutional and open appointment process.

The legal difficulties with the appointment process which was already held

6. Section 2(7) of the Act grants the Committee a discretion to permit access to the proceedings of the Committee. In this regard we record that the appointment of the new IGI is manifestly an appointment of paramount public importance, and is also a special case unlike the ordinary proceedings of the Committee (in which there might plausibly be certain information discussed which necessitated secrecy). Accordingly we submit that the Committee was required to exercise its discretion to open the proceedings to the public and the media.
7. Indeed this is borne out by the fact that the previous appointment process (by which Advocate Faith Radebe was appointed as the IGI) was an open process. That decision was compliant with ss 59(2) and 72(2) of the Constitution which provide that Parliament *"may not exclude the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society."*
8. The Committee has not provided any reasons why the present appointment process should be any different, nor why the decision to hold the appointments in closed proceedings was reasonable and justifiable. In this regard we place on record again that our clients are deeply disappointed by the clandestine manner in which the Committee conducted the appointment process by, *inter alia*:
 - 8.1 failing to issue any public statement regarding when the interviews would be held and/or whether the proceedings would be open or closed;
 - 8.2 failing to provide any reasons why the proceedings ought to have been closed when it was deemed appropriate for the previous appointment processes to be held in the open;
 - 8.3 committing to the importance of public participation in the appointment process of the new IGI, only to provide the public with an unduly-redacted opportunity to make submissions (of merely 4 business days); and
 - 8.4 despite calls by organisations such as Right2Know and the ISS to make the *curricula vitae* and other relevant information regarding the candidates public, failing to disclose any information which would have enabled the public properly to make use of the opportunity to make submissions on the candidates, other than providing the names of the candidates.
9. Thus while the decision of the Chairperson to invite public comments in respect of the eight candidates for appointment was undoubtedly correct as a matter of legal principle, the manner in which this was done in the present case completely undermined the legitimate objective of facilitating public participation in the process and was therefore irrational as well as unconstitutional.
10. We note that our clients' disappointment is further amplified since Right2Know, directed several letters to, *inter alia*, the Committee requesting information regarding when the appointment process would take place and whether the process would be open (attached hereto marked "B") and these letters only received one vague response from the

Chairperson of the Committee (annexed hereto marked "C").

11. In addition ISS sent a letter, dated 11 March 2015 (attached as "D"), urging the Committee (as noted above) to disclose the *curricula vitae* of the shortlisted candidates, to re-open the window for public submissions on the shortlisted candidates. The letter from ISS also implored the Committee not to hold the appointment process behind closed doors, since this would also undermine the process of public participation as the public would then have no way of assessing whether submissions they had made had been given due consideration.
12. Right2Know also sent a letter to the Speaker of the National Assembly and the Chairperson of the National Council of Provinces (dated 9 March 2015), copying the Chairperson of the Committee. Only the Acting Speaker responded before the interview process was finished and only on 17 March 2015 (though the letter is erroneously dated 12 March 2015), the date on which the interview process began. These letters are attached as "E" and "F". The Chairperson of the National Council of Provinces only responded on 30 March 2015 (in the letter attached above as "A").
13. We are instructed, further, that during a telephone conversation on 16 March 2015 the Secretary of the Committee informed Mr Murray Hunter of Right2Know that the interview process had been postponed.
14. Once our clients heard that the interview process had begun, amaBhungane wrote an urgent letter to the Committee, dated 18 March 2015. The letter demanded that the Committee urgently:
 - 14.1 postponed the remaining portion of the interview process;
 - 14.2 refrained from conducting any deliberations or taking any decisions based on the present interview process;
 - 14.3 provided the public with the *curricula vitae* of the shortlisted candidates as well as a fresh and reasonable opportunity to make submissions regarding the candidates; and
 - 14.4 conducted a fresh appointment process which is open to the public and the media (subject to any lawful and reasonable restrictions should the need arise).
15. The letter made clear that if the Committee failed to do so, amaBhungane took the view that any subsequent appointments following the unconstitutional and irrational appointment process would fall to be reviewed and set aside. This letter is attached as "G". The Committee replied to this letter after the interviews had been held, on 19 March 2015 (the Committee's reply is attached hereto marked "H").
16. The process outlined above details the extent to which the Committee has failed to be forthright with our clients and the public regarding the fact that the proceedings would be closed and in relation to the reasons why this should have been so.
17. In addition, amaBhungane wrote to the Committee on 20 March 2015 expressly requesting the reasons for the Committee's decision not to exercise its discretion to open the appointment process for the new Inspector-General of Intelligence ("IGI") to the media and the public. This letter is attached as "I". In reply, the Committee again merely responded with a letter phrased in vague and general terms (attached hereto as "J").

18. We submit that there can be no suggestion that the appointment proceedings required blanket secrecy. In this regard we record that there are plainly less-restrictive means of achieving any legitimate purpose regarding the need for confidentiality. For instance, if there were any particular portions of the interviews which required the proceedings to be closed, then only these portions of the interviews could have been closed to the media and the public.
19. And even if it were deemed appropriate in such rare instances to exclude members of the public, then members of the media could still be permitted to remain in the proceedings subject to appropriate reporting restrictions.
20. On this score we emphasise that in ***S v Leepile and Others* [1986] 3 ALL SA 429 (W)** an application was made for a court hearing to be held *in camera* and for the press to be excluded. But even in the height of apartheid, the Court declined to make an order excluding the press from an *in camera* hearing and held as follows:

"If suitable safeguards are imposed on the reporting of this witness' evidence, I do not think that press reporting will render nugatory the effect of an in camera hearing."

21. As regards permitting the public to make submissions on the candidates, no reason whatsoever has been advanced for why the process needed to have such grossly-truncated time periods within which the public had to respond, nor why the candidates' *curricula vitae* could not be made available.
22. In summary, we submit that the IGI is a critical constitutional office which is intended to fulfil the function of an ombudsman for the public and who will receive complaints from the public about alleged maladministration, abuse of power, transgressions of law and policies, corruption and improper enrichment within the intelligence services. And it is because of the importance of this office that the Chairperson of the Committee invited members of the public to submit their comments in the first place. The failure to make it possible for the public to make meaningful submissions, and the exclusion of the public and the media from the hearings, rendered the process both unconstitutional and irrational.
23. Accordingly, as set out above, we request that this letter be brought to the attention of the National Assembly when this matter is tabled before the Assembly and request that the Assembly does not endorse any candidate nominated by the Committee.

Yours sincerely

WEBBER WENTZEL

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Letter may be sent electronically if so a signed copy will be sent on request

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And to:

The Chairperson, Joint Standing Committee on Intelligence (JSCI)

Care of: the Chairperson's Assistant

Ms Carmelita van de Bergh

By email: cvanderbergh@parliament.gov.za

The Secretary to the JSCI Committee

Ms Ntombe Mbuqe

By email: nmbuqe@parliament.gov.za



PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

NATIONAL COUNCIL OF PROVINCES

THE CHAIRPERSON:

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30 March 2015

Mr M Hunter
Right2Know
1st Floor, Community House
41 Salt River Road
CAPE TOWN
8001

Dear Mr Hunter

Re: APPOINTMENT OF THE INSPECTOR GENERAL OF INTELLIGENCE

I refer to your letter dated 9 March 2015 to which due to unforeseen circumstances, I could not respond. For that, I beg your indulgence.

I am advised that the matter relating to the appointment of the Inspector General of Intelligence is before the Joint Standing Committee on Intelligence. I am further advised that the Committee has finalised its consideration of the matter and that it will be reporting thereon in due course.

Given the above, it will therefore serve no purpose for the current purposes to respond in detail to matters raised in your correspondence referred to above.

Sincerely

MS TR MODISE, MP
CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES



RIGHT2KNOW

1st Floor, Community House, 41 Salt River Rd, Salt River, Cape Town
Tel: 021 447 1000 admin@r2k.org.za www.r2k.org.za

20 January 2015

To: Chairperson, Joint Standing Committee on Intelligence

Dear Hon. September,

I am writing on behalf of my organisation, noting news reports this week that the Joint Standing Committee on Intelligence is scheduled to contemplate candidates for the position of Inspector General of Intelligence.

We write to urge the Committee to adopt a process that is fully open and transparent, including open short-listing of names for interview, open interviews, and open deliberations on the final nominee.

We believe such a process is necessary to ensure that the Committee's nominee for Inspector General receives the consideration and input of the public. (It is worth noting that candidates in the nomination process for the current Inspector General were interviewed in open meetings in November 2009.)

This is particularly important as the Intelligence Services Oversight Act mandates the Office of the Inspector General to act as a public ombud, with the responsibility to "Receive and investigate complaints from members of the public and members of the services..."

It is therefore a given that the process of identifying a nominee for Inspector-General should be subject to input from all stakeholders, including the public, in order to perform that role. This will enhance the next Inspector General's capacity to provide oversight.

We note that S16(1) of the Rules of the Joint Standing Committee on Intelligence empowers the Committee to resolve to make its meetings open.

Doing so in this case would be in keeping with international best practice as contained in the 2013 Global Principles of National Security (the Tshwane Principles), which note that:

"...Legitimate national security interests are, in practice, best protected when the public is well informed about the state's activities, including those undertaken to protect national security...[Transparency] permits the public to play a role in determining the policies of the state and thereby forms a crucial component of genuine national security, democratic participation, and sound policy formulation."¹

¹ The Global Principles on National Security and the Right to Information (Tshwane Principles), June 2013

We therefore urge the Committee to adopt a transparent process that encourages public participation in this matter, including open transparent deliberations on all aspects of the appointment process by the Committee, as is practice in other committees of Parliament.

I thank you for your consideration, and respectfully request a response to this letter by Tuesday 27 January 2015 and that the content is shared with the members of the Committee at its first meeting in 2015.

Sincerely,

Murray Hunter

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Right2Know Campaign

murray@r2k.org.za | 021-447-1000 | 072-672-5468

R2K National Working Group: Carina Conradie, Meshack Mbangula, Dale T. McKinley, Nkosingiphile Mpanza, Roegshanda Pascoe, Julie Reid, Nomvula Sikakane, Alison Tilley, Hennie Van Vuuren, Khaya Xintolo



RIGHT2KNOW

1st Floor, Community House, 41 Salt River Rd, Salt River, Cape Town
Tel: 021 447 1000 admin@r2k.org.za www.r2k.org.za

30 January 2015

To: Chairperson, Joint Standing Committee on Intelligence

Dear Chairperson,

Thank you for your letter dated 27 January 2015, and for drawing our attention to the press statement of 21 January 2015.

We had hoped that the question of open hearings on this matter would have been beyond doubt, but as we understand from the press statement issued on 21 January, the JSCI is still to meet to deliberate on this question.

Considering the importance and public interest in this matter, we urge the Committee to give public clarity on when it will take a decision on this matter, and further to publish a timeline of how the process will unfold.

We would also request that if there any doubts exist within the JSCI on the merits and importance of an open process, that the Committee consider taking representations on the matter before deciding on a closed process.

Sincerely,

Murray Hunter

Right2Know Campaign

R2K National Working Group: Carina Conradie, Meshack Mbangula, Dale T. McKinley, Nkosingiphile Mpanza, Roegshanda Pascoe, Julie Reid, Nomvula Sikakane, Alison Tilley, Hennie Van Vuuren, Khaya Xintolo

CONFIDENTIAL



PARLIAMENT
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Joint Standing Committee on Intelligence

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27 January 2015

Murray Hunter
Right2Know Campaign
1st Floor
Community House
41 Salt River Road
Salt River
CAPE TOWN
8000

Dear Mr Murray,

RE: YOUR LETTER DATED 20TH JANUARY 2015

I refer to your letter dated 20th January 2015, the contents of which are noted.

I further refer to our media release dated 21st January 2015.

I reiterate that we are mindful of our legislative obligations, and that we remain committed to uphold same in line with the values enshrined in the Constitution.

I trust that you will remain confident in the Parliamentary process that will see the most appropriate candidate appointed.

Yours faithfully

CC SEPTEMBER, MP
CHAIRPERSON: JOINT STANDING COMMITTEE ON INTELLIGENCE (JSCI)

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11 March 2015

To: Chairperson, Joint Standing Committee on Intelligence (JSCI)

CC: Committee Secretary, Ntombe Mbuqe - nmbuqe@parliament.gov.za

Chairperson's Assistant, Carmelita van de Bergh - cvanderbergh@parliament.gov.za

Dear Ms September,

On the 24 February 2015, the Joint Standing Committee on Intelligence ("the Committee") issued a statement inviting public comment on the 8 short-listed candidates for the position of Inspector-General - without providing their curriculum vitae (CV) or any information about their experience or background and without a clearly defined eligibility criterion for the position. The deadline for public comment, as per the statement, was the 02 March 2015, providing the public with only four (4) working days to make submissions. I urge the Committee to reopen the period for public comments, and make the shortlisted candidates' CVs public.

Public participation is an integral part of our democracy, which upholds the constitutional principles of accountability, responsiveness and openness. Established by sections 59(1)(a), 72(1)(a) and 118(1)(a)9 of the Constitution, public participation in the legislative and other processes of the Assembly and its committees, whether individually or as a collective, signifies that everyone is regarded as significant and that their opinions are taken into consideration by the government.¹

Even though legislative bodies have discretion in determining what processes and procedures will be utilised to facilitate public involvement, the Constitutional Court set the standard for this

¹ Linda Nyati, "Public Participation: What has the Constitutional Court given the public?"
<<http://www.saflii.org/za/journals/LDD/2008/15.pdf>>

constitutional obligation in the *Doctors for Life International v The Speaker of the National Assembly* CCT 12/05. The case tested whether the legislature acted reasonably in discharging the duty to facilitate public involvement. It hinged this duty on providing **meaningful opportunities for public participation** and, making sure that **people have the ability to take advantage of the opportunities provided**.

The *Doctors for Life* judgment, and subsequent jurisprudence, has firmly established the benchmark of the legislature's constitutional obligation in facilitating meaningful public participation.

It is further worth noting here, that the President's recent referral of the Mineral and Petroleum Resources Development Amendment Bill, 2013 [B15B-2013] to NA, cited concerns that the:

"NCOP and Provincial Legislatures did not afford sufficient opportunity for public participation, as required by sections 72 and 118 of the Constitution. This is because the consultation period at this level was highly compressed and there appears to have been insufficient notice of public hearings at Provincial Legislatures."

1. On the 18 February 2015, the Parliamentary Legal Adviser offered an opinion to the Mineral and Resources Committee on the President's referral. The opinion affirmed the constitutional grounds of the President's reservations on the unduly rushed public participation process. She noted that while *'Parliament has a significant measure of discretion to determine the public participation necessary, however what is required is that Parliament acts reasonably'*. Reasonableness, she offered, in this context is *'dependent on several factors, including: the nature and extent of public impact brought about by the legislation...'*

It goes without doubt, that the appointment of the new Inspector-General is a matter firmly in the public interest. *The Inspector-General is after all a form of public ombud who will be expected to receive complaints from the public about alleged maladministration, abuse of power, transgressions of law and policies, corruption and improper enrichment within the intelligence services.*

Without sufficient information on the short-listed candidates, including; CV's, eligibility criteria and so forth, the public were provided no basis on which to base their submissions. The timeframe for comment (4 working days) similarly placed the public in a disadvantageous position. The combination of these factors, read in light of the Doctors for Life judgement and the recent parliamentary legal opinion on the President reservations on the Amendment Bill, clearly indicate that the public participation measures provided by the Committee were neither sufficient nor reasonable for meaningful public participation

We urge the Committee to re-open the window for public submissions on the shortlisted candidates, premised on the constitutional principle of meaningful public participation. This would include: publically disclosing the CV's of shortlisted candidates and providing an additional time for public comment.

Finally, the call for a public participation process makes a closed interview process contradictory. Should the appointment process proceed behind closed doors, the public who choose to make submissions, will have no way of assessing whether these have been given due consideration. It stands to reason that the call for public submission on the candidates should necessitate an open appointment process.

Yours Sincerely,



JUDITH FEBRUARY

(contact: jfebruary@issafrica.org)

"E"



[Home](#) » » [Security State & Intelligence](#) » R2K condemns Spy Chief's secret appointment process!

Posted in: [Security State & Intelligence](#) | [March 10, 2015](#)

R2K was shocked to hear that Parliament's intelligence oversight body, the Joint Standing Committee on Intelligence, intends to appoint the next Inspector General of Intelligence in secret. We have written the following letter to the presiding officers of Parliament:

9 March 2015

To: The Speaker, National Assembly

The Chairperson, National Council of Provinces

CC: Chairperson, Joint Standing Committee on Intelligence

Dear Honourable Speaker,

1. We wish to raise our concern at media reports that the Joint Standing Committee on Intelligence will interview candidates for Inspector General of Intelligence behind closed doors. In terms of the Joint Rules of Parliament (rule 14 (2)), and the rules of the National Assembly (rule 40) and the NCOP (rule 26), the power to regulate access to proceedings of the relevant House, falls under the control of the Speaker and Chairperson, as appropriate.
2. The Inspector-General is a form of public ombud, and is expected to receive complaints from the public about alleged maladministration, abuse of power, transgressions of law and policies, corruption and improper enrichment within the intelligence services.
3. The Right2Know Campaign wrote to the Chairperson of the JSCI on 20 January 2015, calling for an open recruitment process in line with the process adopted in recruiting the current Inspector General in 2009. The Chairperson responded on 27 January 2015, to the effect that the decision on open or closed process was still under discussion. The letter was marked 'Confidential'.
4. We responded on 30 January, requesting a timeline of the recruitment process, including when the Committee would decide on an open or closed process. We also requested that the Committee take additional representations on the matter if any doubt existed on the importance of an open process. We did not receive a response.
5. Subsequent to this correspondence, after a brief open meeting of a subcommittee of the JSCI to shortlist candidates, in which no documents were made publically available, all further meetings on the matter have been behind closed doors.
6. The Inspector-General remains a critical appointment, especially in light of recent developments within the intelligence agencies. To give effect to the Chairperson's commitment that the appointment process will continue to have the *'highest regard for promoting the best interests of the country and protecting the rights of its citizens'*, a transparent and participatory process is required. The precedent set in the 2009 appointment process, set a bare minimum on what an open process can entail.
7. We note the provisions of section 59 of the constitution:

Public access to and involvement in National Assembly

59.

(1) *The National Assembly must —*

(a) facilitate public involvement in the legislative and other processes of the Assembly and its committees; and

(b) conduct its business in an open manner, and hold its sittings, and those of its committees, in public, but reasonable measures may be taken —

(i) to regulate public access, including access of the media, to the Assembly and its committees; and

(ii) to provide for the searching of any person and, where appropriate, the refusal of entry to, or the removal of, any person.

(2) The National Assembly may not exclude the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society.

8. The right to an open Parliament underpins the right to public participation in the law-making and other processes of the NA and NCOP, guaranteed in ss 59(1)(a) and 72(1)(a) of the Constitution. In *Doctors for Life International v Speaker of the National Assembly*, the Constitutional Court affirmed this link:

"Public access to Parliament is a fundamental part of public involvement in the law-making process. It allows the public to be present when laws are debated and made. It enables members of the public to familiarise themselves with the law-making process and thus be able to participate in the future."

9. The onus rests on the office of the Speaker to justify why the committee hearings should be closed. We request that the Speaker disclose the reasons for this process to be held in secret, especially given that the previous interviews were held in public.

10. We also request the Speaker publically to disclose, as per Rule 157 (1), the following:

- i. Detailed timelines for the appointment process including; dates, times and agenda for each meeting.
- ii. A full list of all 56 applicants to the positions [as discussed at the 24 February 2015 open sub-committee meeting]
- iii. Copies of the Curriculum Vitae's of all eight shortlisted candidates

11. While we recognise that some of the activities of intelligence agencies require confidentiality, specifically, 'operational techniques of covert collection', it is in the spirit of our constitutional democracy that 'the rest of our intelligence activities should be open and above board... in accordance with fundamental human rights and freedoms.' The 2009 appointment process set a bare minimum precedence for openness which should be upheld. This will serve not only as a clear commitment to upholding these democratic principles, but also build public confidence in a key oversight body, at the time when it is greatly needed.

Regards,
Murray Hunter
Right2Know Campaign

Why does this matter? *The Inspector General of Intelligence is meant to be a public ombud with a mandate to investigate abuses of the intelligence structures at the request of any member of the public. How can the JSCI expect the public to put their faith in a candidate who was interviewed and selected in a secret process?*

In January we wrote twice to the [JSCI Chairperson](#), the Honorable Connie September, to call for [an open process](#). The current Inspector General, adv Faith Radebe, was interviewed for the job in an open meeting in 2009.

Read her reply [here](#).



[Police 'will crack down on brutality'](#)
March 17, 2015



[R2K to protest Secrecy Bill vote](#)
April 25, 2013



[Picks and Video from Marikana commemoration](#)



PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

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THE SPEAKER

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12 March 2015

Mr M Hunter
Right2Know Campaign
1st Floor, Community House
41 Salt River Road
SALT RIVER

Dear Mr Hunter

SELECTION PROCESS FOR INSPECTOR-GENERAL OF INTELLIGENCE

Thank you for your letter of 9 March 2015 on the above matter.

I wish to point out that the Joint Standing Committee on Intelligence (JSCI) is governed by the Intelligence Services Oversight Act, 1994 (No 40 of 1994), the Joint Rules and Schedule B to the Joint Rules.

Section 2(7) of the Act clearly determines that "no person other than members of the Committee" and specially designated staff members "may be present during the proceedings of the Committee, except with the permission of the Committee".

Item 16 of Schedule B to the Joint Rules deals with the admission of the public and media to JSCI meetings. It determines that meetings of the JSCI are not open to the public and neither the chairperson nor the Committee may include the public or media in a meeting, except if it is done in accordance with legislation, the provisions of Schedule B or resolutions of the Committee.

It is clear that, in law, the JSCI is not an open committee under normal circumstances, and that it may only open its meetings if the committee so decides. Furthermore, the Speaker does not have the power to override the Act or the Joint Rules that govern the activities of the JSCI and the nature of its meetings.

Yours sincerely

Lechesa Tsenoli MP
Acting Speaker of the National Assembly

"G"

WEBBER WENTZEL

in alliance with > Linklaters

Attention: The Chairperson, Joint Standing Committee on Intelligence (JSCI)

Copied to:

The Secretary to the JSCI Committee

Ntombe Mbuqe

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The Chairperson's Assistant

Carmelita van de Bergh

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Your reference

Our reference

D Mlo / D Wild / SS

Date

18 March 2015

Dear Sir

APPOINTMENT PROCESS FOR THE INSPECTOR-GENERAL OF INTELLIGENCE BY THE JOINT STANDING COMMITTEE FOR INTELLIGENCE

1. We act for the M&G Centre for Investigative Journalism ("amaBhungane" or "our client").
2. We are instructed that the Joint Standing Committee on Intelligence ("JSCI") is presently holding the appointment process for the new Inspector-General of Intelligence ("IGI") in terms of section 210(b) of the Constitution and section 7 of the Intelligence Services Oversight Act 40 of 1994 ("the Act").
3. We understand, further, that the interview process of shortlisted candidates commenced yesterday (17 March 2015) in closed proceedings.
4. We underscore that section 2(7) of the Act grants the Committee a discretion to permit access to the proceedings of the Committee. In this regard we record that the appointment of the new IGI is manifestly an appointment of paramount public importance, and is a special case unlike the ordinary proceedings of the Committee (in which there might plausibly be certain information discussed which necessitated secrecy). Accordingly the Committee was required to exercise its discretion to open the proceedings to the public and the media.

WW To JSCI 20150318 (Signed)

Senior Partner: JC Els Managing Partner: SJ Hutton Partners: SM Adcock RB Africa NG Alp OA Ampofo-Anti RL Appelbaum BA Baillie JM Bellew AE Bennett HJ Bester DHL Booysen AR Bowley PG Bradshaw EG Brandt JL Brink MS Burger RS Coelho KL Collier KM Colman KE Coster K Couzyn CR Davidow JH Davies ME Davis PM Daya JHB de Lange DW de Villiers BEC Dickinson MA Diermont DA Dingley NF Dlamini KZ Dlothi HJ du Preez CP du Toit SK Edmundson AE Esterhuizen MJR Evans GA Fichardt DT Fisher-Jeffes JB Forman MM Gibson CI Gouws JP Gouws PD Grealy A Harley VW Harrison JM Harvey MH Hathorn JS Henning KR Hillis NA Hlatshwayo XNC Hlatshwayo S Hockey CM Hoffeld PM Holloway HF Human KA Jarvis ME Jarvis CM Jonker S Jooste LA Kahn M Kennedy A Keyser MD Kota J Lamb PSG Leon PG Leyden L Marais S McCafferty MC McIntosh SI Meltzer SM Methula CS Meyer AJ Mills JA Milner D Mlo NP Mngomezulu VS Moodaley LA Morphet VM Movshovich M Mshali SP Naicker RA Nelson BP Ngoepe ZN Ntshona MB Nzimande L Odendaal GJP Olivier N Paige AMT Pardini AS Parry S Patel GR Penfold SE Phajane MA Phillips C Pilleary HK Potgieter S Rajah D Ramjetan NJA Robb DC Rudman JW Scholtz KE Shepherd DMJ Simaan AJ Simpson J Simpson N Singh AA Sourvas MP Spalding L Stein PS Stein LJ Swaine ER Swanepoel Z Swanepoel A Thakor A Toefy D Vallabh PZ Vanda JP van der Poel SE van der Meulen ED van der Vyver M van der Walt N van Dyk A van Niekerk NM van Schaardenburgh JE Veeran D Venter HM Venter B Versfeld MG Versfeld TA Versfeld DM Visagie J Watson JWL Westgate KL Williams RH Wilson M Yudaken

Chief Operating Officers: SA Boyd

Webber Wentzel is associated with ALN

Nye 09:20
18/03/2015

5. Indeed this is borne out by the fact that the previous appointment process (by which Advocate Faith Radebe was appointed as the IGI) was an open process. That decision was compliant with ss 59(2) and 72(2) of the Constitution Parliament "*may not exclude the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society.*" The Committee has not provided any reasons why the present appointment process should be any different, nor why the decision is reasonable and justifiable.
6. In this regard we record that our client is deeply disappointed by the clandestine manner in which the Committee has conducted the appointment process by, *inter alia*:
 - 6.1 failing to issue any public statement regarding when the interviews would be held and/or whether the proceedings would be open or closed;
 - 6.2 failing to provide any reasons why the present proceedings ought to be closed when it was deemed appropriate for the previous appointment processes to be held in the open;
 - 6.3 committing to the importance of public participation in the appointment process of the new IGI, only to provide the public with an unduly-redacted opportunity to make submissions; and
 - 6.4 despite calls by organisations (such as the Right2Know Campaign and the Institute for Security Studies) to make the *curricula vitae* and other relevant information regarding the candidates public, failing to disclose any information which would enable the public properly to make use of the opportunity to make submissions on the candidates, other than providing the names of the candidates.
7. Thus while the decision of the Chairperson to invite public comments in respect of the eight candidates for appointment was undoubtedly correct as a matter of principle, the manner in which this was done in the present case completely undermined the legitimate objective of facilitating public participation in the process and was therefore irrational.
8. We note that our client's disappointment is further amplified since the Right2Know Campaign, of which our client is a member, directed several letters to your offices requesting information regarding when the appointment process would take place and whether the process would be open (attached hereto marked "A") and these letters only received one vague response from the Chairperson of the Committee (annexed hereto marked "B").
9. Moreover, the Right2Know Campaign sent a letter to the Speaker of the National Assembly and the Chairperson of the National Council of Provinces (dated 9 March 2015), copying the Chairperson of the Committee. Only the Acting Speaker responded and only on 17 March 2015 (though the letter is erroneously dated 12 March 2015), the date on which the proceedings were due to begin. These letters are attached as "C" and "D".
10. We are instructed, further, that during a telephone conversation on 16 March 2015 the Secretary of the Committee informed Mr Murray Hunter of the Right2Know Campaign that the interview process had been postponed.
11. The process outlined above details the extent to which the Committee has (seemingly by design) failed to be forthright with the public, that the proceedings would be closed and regarding the reasons why this should be so.

12. We submit that there can be no suggestion that the appointment proceedings require blanket secrecy. In this regard we record that there are squarely less-restrictive means of achieving any legitimate purpose regarding the need for confidentiality. For instance, if there were any particular portions of the interviews which required the proceedings to be closed, then only these portions of the interviews could be closed to the media and the public.
13. And even if it were deemed appropriate in rare instances to exclude members of the public, then members of the media could still be permitted to remain in the proceedings subject to appropriate reporting restrictions.
14. On this score we emphasise that in *S v Leepile and Others* [1986] 3 ALL SA 429 (W) an application was made for a court hearing to be held *in camera* and for the press to be excluded. But even in the height of apartheid, the Court declined to make an order excluding the press from an *in camera* hearing and held as follows:

"If suitable safeguards are imposed on the reporting of this witness' evidence, I do not think that press reporting will render nugatory the effect of an in camera hearing."
15. In summary, we submit that the IGI is a critical constitutional office which is intended to fulfil the function of an ombudsman for the public and who will receive complaints from the public about alleged maladministration, abuse of power, transgressions of law and policies, corruption and improper enrichment within the intelligence services. And it is because of the importance of this office that the Chairperson of the Committee invited members of the public to submit their comments in the first place. The failure to make it possible for the public to make meaningful submissions, and the exclusion of the public from the hearings, render the process both unconstitutional and irrational.
16. Accordingly, based on the above, we demand that the Committee urgently:
 - 16.1 Postpones the remaining portion of the interview process;
 - 16.2 Refrains from conducting any deliberations or taking any decisions based on the present interview process;
 - 16.3 Provides the public with the *curricula vitae* of the shortlisted candidates as well as a fresh and reasonable opportunity to make submissions regarding the candidates; and
 - 16.4 Conducts a new appointment process which is open to the public and the media (subject to any lawful and reasonable restrictions should the need arise);
17. Failing which we submit that any subsequent appointments following the unconstitutional and irrational appointment process would fall to be reviewed and set aside. Our client reserves all of its rights in this regard.

Yours faithfully

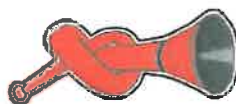


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Dario Milo / Duncan Wild

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"A"



RIGHT2KNOW

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20 January 2015

To: Chairperson, Joint Standing Committee on Intelligence

Dear Hon. September,

I am writing on behalf of my organisation, noting news reports this week that the Joint Standing Committee on Intelligence is scheduled to contemplate candidates for the position of Inspector General of Intelligence.

We write to urge the Committee to adopt a process that is fully open and transparent, including open short-listing of names for interview, open interviews, and open deliberations on the final nominee.

We believe such a process is necessary to ensure that the Committee's nominee for Inspector General receives the consideration and input of the public. (It is worth noting that candidates in the nomination process for the current Inspector General were interviewed in open meetings in November 2009.)

This is particularly important as the Intelligence Services Oversight Act mandates the Office of the Inspector General to act as a public ombud, with the responsibility to "Receive and investigate complaints from members of the public and members of the services..."

It is therefore a given that the process of identifying a nominee for Inspector-General should be subject to input from all stakeholders, including the public, in order to perform that role. This will enhance the next Inspector General's capacity to provide oversight.

We note that S16(1) of the Rules of the Joint Standing Committee on Intelligence empowers the Committee to resolve to make its meetings open.

Doing so in this case would be in keeping with international best practice as contained in the 2013 Global Principles of National Security (the Tshwane Principles), which note that:

"...Legitimate national security interests are, in practice, best protected when the public is well informed about the state's activities, including those undertaken to protect national security...[Transparency] permits the public to play a role in determining the policies of the state and thereby forms a crucial component of genuine national security, democratic participation, and sound policy formulation."¹

¹ The Global Principles on National Security and the Right to Information (Tshwane Principles), June 2013

We therefore urge the Committee to adopt a transparent process that encourages public participation in this matter, including open transparent deliberations on all aspects of the appointment process by the Committee, as is practice in other committees of Parliament.

I thank you for your consideration, and respectfully request a response to this letter by Tuesday 27 January 2015 and that the content is shared with the members of the Committee at its first meeting in 2015.

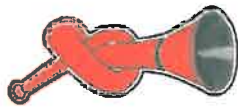
Sincerely,

Murray Hunter

--

Right2Know Campaign

murray@r2k.org.za | 021-447-1000 | 072-672-5468

**RIGHT2KNOW**

1st Floor, Community House, 41 Salt River Rd, Salt River, Cape Town
Tel: 021 447 1000 admin@r2k.org.za www.r2k.org.za

30 January 2015

To: Chairperson, Joint Standing Committee on Intelligence

Dear Chairperson,

Thank you for your letter dated 27 January 2015, and for drawing our attention to the press statement of 21 January 2015.

We had hoped that the question of open hearings on this matter would have been beyond doubt, but as we understand from the press statement issued on 21 January, the JSCI is still to meet to deliberate on this question.

Considering the importance and public interest in this matter, we urge the Committee to give public clarity on when it will take a decision on this matter, and further to publish a timeline of how the process will unfold.

We would also request that if there any doubts exist within the JSCI on the merits and importance of an open process, that the Committee consider taking representations on the matter before deciding on a closed process.

Sincerely,

Murray Hunter

Right2Know Campaign

R2K National Working Group: Carina Conradie, Meshack Mbangula, Dale T. McKinley, Nkosingiphile Mpanza, Roegshanda Pascoe, Julie Reid, Nomvula Sikakane, Alison Tilley, Hennie Van Vuuren, Khaya Xintolo

"B"

CONFIDENTIAL



PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

Joint Standing Committee on Intelligence
PO Box 15 Cape Town 8000 Republic of South Africa
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www.parliament.gov.za

27 January 2015

**Murray Hunter
Right2Know Campaign
1st Floor
Community House
41 Salt River Road
Salt River
CAPE TOWN
8000**

Dear Mr Murray,

RE: YOUR LETTER DATED 20TH JANUARY 2015

I refer to your letter dated 20th January 2015, the contents of which are noted.

I further refer to our media release dated 21st January 2015.

I reiterate that we are mindful of our legislative obligations, and that we remain committed to uphold same in line with the values enshrined in the Constitution.

I trust that you will remain confident in the Parliamentary process that will see the most appropriate candidate appointed.

Yours faithfully

A handwritten signature in black ink, appearing to be 'G. September', written over the printed name.

**G. SEPTEMBER, MP
CHAIRPERSON: JOINT STANDING COMMITTEE ON INTELLIGENCE (JSCI)**

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"C"



[Home](#) » [Security State & Intelligence](#) » R2K condemns Spy Chief's secret appointment process!

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Posted in: [Security State & Intelligence](#) | [March 10, 2015](#)

R2K was shocked to hear that Parliament's Intelligence oversight body, the Joint Standing Committee on Intelligence, intends to appoint the next Inspector General of Intelligence in secret. We have written the following letter to the presiding officers of Parliament:

9 March 2015

To: The Speaker, National Assembly

The Chairperson, National Council of Provinces

CC: Chairperson, Joint Standing Committee on Intelligence

Dear Honourable Speaker,

1. We wish to raise our concern at media reports that the Joint Standing Committee on Intelligence will interview candidates for Inspector General of Intelligence behind closed doors. In terms of the Joint Rules of Parliament (rule 14 (2)), and the rules of the National Assembly (rule 40) and the NCOP (rule 28), the power to regulate access to proceedings of the relevant House, falls under the control of the Speaker and Chairperson, as appropriate.

2. The Inspector-General is a form of public ombud, and is expected to receive complaints from the public about alleged maladministration, abuse of power, transgressions of law and policies, corruption and improper enrichment within the intelligence services.

3. The Right2Know Campaign wrote to the Chairperson of the JSCI on 20 January 2015, calling for an open recruitment process in line with the process adopted in recruiting the current Inspector General in 2009. The Chairperson responded on 27 January 2015, to the effect that the decision on open or closed process was still under discussion. The letter was marked 'Confidential'.

4. We responded on 30 January, requesting a timeline of the recruitment process, including when the Committee would decide on an open or closed process. We also requested that the Committee take additional representations on the matter if any doubt existed on the importance of an open process. We did not receive a response.

6. Subsequent to this correspondence, after a brief open meeting of a subcommittee of the JSCI to shortlist candidates, in which no documents were made publicly available, all further meetings on the matter have been behind closed doors.

6. The Inspector-General remains a critical appointment, especially in light of recent developments within the intelligence agencies. To give effect to the Chairperson's commitment that the appointment process will continue to have the 'highest regard for promoting the best interests of the country and protecting the rights of its citizens', a transparent and participatory process is required. The precedent set in the 2009 appointment process, set a bare minimum on what an open process can entail.

7. We note the provisions of section 59 of the constitution:

Public access to and involvement in National Assembly

59.

(1) The National Assembly must —

(a) facilitate public involvement in the legislative and other processes of the Assembly and its committees; and
 (b) conduct its business in an open manner, and hold its sittings, and those of its committees, in public, but reasonable measures may be taken —
 (i) to regulate public access, including access of the media, to the Assembly and its committees; and
 (ii) to provide for the searching of any person and, where appropriate, the refusal of entry to, or the removal of, any person.
 (2) The National Assembly may not exclude the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society.

8. The right to an open Parliament underpins the right to public participation in the law-making and other processes of the NA and NCOP, guaranteed in ss 59(1)(a) and 72(1)(a) of the Constitution. In *Doctors for Life International v Speaker of the National Assembly*, the Constitutional Court affirmed this link:

Public access to Parliament is a fundamental part of public involvement in the law-making process. It allows the public to be present when laws are debated and made. It enables members of the public to familiarise themselves with the law-making process and thus be able to participate in the future."

9. The onus rests on the office of the Speaker to justify why the committee hearings should be closed. We request that the Speaker disclose the reasons for this process to be held in secret, especially given that the previous interviews were held in public.

10. We also request the Speaker publicly to disclose, as per Rule 157 (1), the following:

- i. Detailed timelines for the appointment process including: dates, times and agenda for each meeting.
- ii. A full list of all 56 applicants to the positions (as discussed at the 24 February 2015 open sub-committee meeting)
- iii. Copies of the Curriculum Vitae's of all eight shortlisted candidates

11. While we recognise that some of the activities of intelligence agencies require confidentiality, specifically, 'operational techniques of covert collection', it is in the spirit of our constitutional democracy that 'the rest of our intelligence activities should be open and above board... In accordance with fundamental human rights and freedoms.' The 2009 appointment process set a bare minimum precedence for openness which should be upheld. This will serve not only as a clear commitment to upholding these democratic principles, but also build public confidence in a key oversight body, at the time when it is greatly needed.

Regards,
 Murray Hunter
 Right2Know Campaign

Why does this matter? The Inspector General of Intelligence is meant to be a public ombud with a mandate to investigate abuses of the intelligence structures at the request of any member of the public. How can the JSC/I expect the public to put their faith in a candidate who was interviewed and selected in a secret process?

In January we wrote twice to the JSC/I Chairperson, the Honorable Connie September, to call for an open process. The current Inspector General, adv Faith Redebe, was interviewed for the job in an open meeting in 2009.

Read her reply [here](#).

[Police 'will crack down on brutality'](#)
 March 17, 2015

[R2K to protest Secretary Bhe's vote](#)
 April 25, 2015



[Picks and Video from Marikana commemoration](#)

"D"



PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

NATIONAL ASSEMBLY
THE SPEAKER

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speaker@parliament.gov.za
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12 March 2015

Mr M Hunter
Right2Know Campaign
1st Floor, Community House
41 Salt River Road
SALT RIVER

Dear Mr Hunter

SELECTION PROCESS FOR INSPECTOR-GENERAL OF INTELLIGENCE

Thank you for your letter of 9 March 2015 on the above matter.

I wish to point out that the Joint Standing Committee on Intelligence (JSCI) is governed by the Intelligence Services Oversight Act, 1994 (No 40 of 1994), the Joint Rules and Schedule B to the Joint Rules.

Section 2(7) of the Act clearly determines that "no person other than members of the Committee" and specially designated staff members "may be present during the proceedings of the Committee, except with the permission of the Committee".

Item 16 of Schedule B to the Joint Rules deals with the admission of the public and media to JSCI meetings. It determines that meetings of the JSCI are not open to the public and neither the chairperson nor the Committee may include the public or media in a meeting, except if it is done in accordance with legislation, the provisions of Schedule B or resolutions of the Committee.

It is clear that, in law, the JSCI is not an open committee under normal circumstances, and that it may only open its meetings if the committee so decides. Furthermore, the Speaker does not have the power to override the Act or the Joint Rules that govern the activities of the JSCI and the nature of its meetings.

Yours sincerely

Lechesa Tsenoli MP
Acting Speaker of the National Assembly



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Joint Standing Committee on Intelligence

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19 March 2015

Webber Wentzel
PO Box 61771
Marshalltown
Johannesburg
2107

Dear Sir

**Re: APPOINTMENT PROCESS FOR THE INSPECTOR-GENERAL OF
INTELLIGENCE BY THE JOINT STANDING COMMITTEE FOR INTELLIGENCE**

1. I refer to the above matter and your letter dated 18 March 2015, the contents of which are noted.
2. You are referred to Annexure D of your correspondence aforesaid, which sets out the applicable legislature and regulatory framework.
3. Kindly note that any omission on my part to respond to any portion of your correspondence aforesaid may not be construed as an admission of the contents thereof or the correctness of your contentions.
4. I trust that the above is in order

Yours faithfully

A handwritten signature in black ink, appearing to be 'CC September', written over a large, stylized, and somewhat illegible signature.

CC September, MP
Chairperson: Joint Standing Committee on Intelligence (JSCI)

Attention:

Ms CC September, MP

The Chairperson, Joint Standing Committee on Intelligence (JSCI)

Copied to:

The Secretary to the JSCI Committee

Ntombe Mbuqe

By email: nmbuqe@parliament.gov.za

The Chairperson's Assistant

Carmelita van de Bergh

By email: cvanderbergh@parliament.gov.za

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Your reference

Our reference

D Milo / D Wild / SS
2583744

Date

20 March 2015

Dear Chairperson

APPOINTMENT PROCESS FOR THE INSPECTOR-GENERAL OF INTELLIGENCE BY THE JOINT STANDING COMMITTEE FOR INTELLIGENCE

1. We refer to your letter, dated 19 March 2015.
2. Apart from the broad reference to the legislative and regulatory framework in paragraph 2 of your letter, the letter does not provide any further detail in relation to the reasons for the decision, as to why the Committee decided not to exercise its discretion to open the appointment process for the new Inspector-General of Intelligence ("IGI") to the media and the public.
3. Our client accordingly requests adequate reasons for the decision, in terms of section 59 of the Constitution as well as under the principle of legality.
4. Given the importance of this matter, kindly furnish our client with such reasons within 5 days, by close of business on **27 March 2015**.
5. All our client's rights are reserved.

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Senior Partner: JC Els **Managing Partner:** SJ Hutton **Partners:** SM Adcock RB Africa NG Alp OA Ampofo-Anti RL Appelbaum BA Baillie JM Bellew AE Bennett HJ Bester DHL Booysen AR Bowley PG Bradshaw EG Brandt JL Brink MS Burger RS Coelho KL Collier KM Colman KE Coster K Couzyn CR Davidow JH Davies ME Davis PM Daya JHB de Lange DW de Villiers BEC Dickinson MA Diemont DA Dingley NF Dlamini KZ Dlothi HJ du Preez CP du Toit SK Edmundson AE Esterhuizen MJR Evans GA Fichardt DT Fisher-Jeffes JB Forman MM Gibson CI Gouws JP Gouws PD Greal A Harley VW Harrison JM Harvey MH Hathorn JS Henning KR Hillis NA Hlatshwayo XNC Hlatshwayo S Hockey CM Hofeld PM Holloway HF Human KA Jarvis ME Jarvis CM Jonker S Jooste LA Kahn M Kennedy A Keyser MD Kota J Lamb PSG Leon PG Leyden L Marais S McCafferty MC McIntosh SI Meltzer SM Methula CS Meyer AJ Mills JA Milner D Milo NP Mngomezulu VS Moodaley LA Morphet VM Movshovich M Mtshali SP Naicker RA Nelson BP Ngoepe ZN Ntshona MB Nzimande L Odendaal GJP Olivier N Paige AMT Pardini AS Parry S Patel GR Penfold SE Phajane MA Phillips C Pillay HK Potgieter S Rajah D Ramjettan NJA Robb DC Rudman JW Scholtz KE Shepherd DMJ Simaan AJ Simpson J Simpson N Singh AA Sourvas MP Spalding L Stein PS Stein LJ Swaine ER Swanepoel Z Swanepoel A Thakor A Toefy D Vallabh PZ Vanda JP van der Poel SE van der Meulen ED van der Vyver M van der Walt N van Dyk A van Niekerk MM van Schaardenburgh JE Veeran D Venter HM Venter B Versfeld MG Versfeld TA Visagie J Watson JWL Westgate KL Williams RH Wilson M Yudaken

Chief Operating Officer: SA Boyd

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in alliance with > **Linklaters**

Page 2

Yours sincerely



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"J"



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27 March 2015

Webber Wentzel
PO Box 61771
Marshalltown
Johannesburg
2107

Dear Sir,

**RE: APPOINTMENT PROCESS FOR THE INPSECTOR GENERAL OF
INTELLIGENCE BY THE JOINT STANDING COMMITTEE ON
INTELLIGENCE**

1. I refer to the above matter and your letter dated 20th March 2015.
2. I once more refer you to the applicable legislative and regulatory framework.
3. I trust that this matter is now concluded.

Yours faithfully

A handwritten signature in black ink, appearing to be 'MS CC SEPTEMBER', written over a horizontal line.

MS CC SEPTEMBER, MP
CHAIRPERSON: JOINT STANDING COMMITTEE ON INTELLIGENCE (JSCI)