

MBHASHE PROTOCOL FOR SOURCING OF LEGAL OPINIONS



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1. PREAMBLE

One of the founding values of the Constitution of the Republic of South Africa is the Supremacy of the Constitution and the rule of law. The rule of law imposes a serious obligation to an organ of State in relation to decision making and action because an organ of State can only perform those functions that are authorized to it by law. This is also a requirement in terms Promotion of Administrative Justice Act (PAJA) in relation to administrative action.

Failure to take decisions also has serious legal consequences in terms of PAJA and the Constitution. A municipality may be compelled to take a decision by judiciary if it fails to do so. Section 237 of the Constitution further requires that all constitutional obligations must be performed diligently and without delay.

Constitutional democracy like ours therefore requires utmost vigilance when it comes to decision making by municipality.

These are some of the reasons why decision makers would solicit a legal opinion or at the very least, legal comments or inputs before taking decisions.

This protocol therefore is intended to regulate how legal opinions in Mbhashe Municipality must be solicited from Legal Advisory Services to mitigate the risk of indecision, delayed decisions, wrongful and/or unlawful decisions.

2. PURPOSE

The purpose of this protocol is to ensure that decisions and actions to be taken by Mbhashe Municipality are consistent with legislation and are as authorised by law, and to ensure uniformity in the understanding and interpretation of law in the Municipality.

3. DEFINITIONS

Definitions in this Protocol, unless the context otherwise indicates.

Words/Terms	Definition (with examples if required)
Accounting Officer	Means Municipal Mnager
Decision Maker	Mbhashe Council.
External Legal Practitioner	Means a practising attorney or advocate
State Attorney	Means any person who is an Attorney in the office of the State Attorney created in terms of State Attorney Act, 1957 (Act No.56 of 1957)

4. APPLICATION AND SCOPE

This protocol is applicable to all officials of the municipality who solicits or have solicited legal advice, comments or input from Legal Advisory Services.

5. LEGISLATIVE FRAMEWORK

All legislation applicable to the department, including but not limited to the following:

- Constitution of the Republic of South Africa of 1996
- Public Service Act, 1994 (Proclamation 101 of 1994) as amended
- Labour Relations Act, 1995 (Act No.66 of 1995) as amended
- Public Service Regulations, 2016
- Basic Conditions of Employment Act (Act 75 of 1997) as amended by Act 20 of 2013
- Employment Equity Act (Act 55 1998) as amended by Act 47 of 2013
- Promotion of Administrative Justice Act, 2000 (Act No.3 of 2000)
- Promotion of Access to the Information Act, 2000(Act No 2 of 2000)
- Promotion of Equity and Prevention of Unfair Discrimination Act (Act No 4 of 2000)
- Protected Disclosures Act, 2000 (Act No.26 of 2000)
- Protection of Personal Information Act, 2013 (Act 4 of 2013)
- Prevention and Combating of Corrupt Activities Act, 2004 (Act No.12 of 2004)
- Disaster Management Act, 2002 (Act No. 57 of 2002)
- Spatial Planning and Land Use Management Act, 2013 (Act No. 16 of 2013)
- Interpretation Act, 1957 (Act No.3 of 1957)
- Skills Development Act, 1998 (Act No. 97 of 1998)
- Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000) and regulations
- Municipal Finance Management Act and Treasury regulations
- Intergovernmental Relations Framework Act, 2005
- State Liability Act, 1957 (Act 20 of 1957) as amended
- State Attorneys Act, 1957 (Act 56 of 1957) as amended

- Eastern Cape Traditional Leadership and Governance Act., 2017 (Act No.1 of 2017)
- Traditional Leadership and Governance Framework Act, 2003 (Act 41 of 2003)
- Eastern Cape Traditional Leadership and Governance Act, 2004 (Act 4 of 2005)
- Local Government: Municipal Structures Act, 1998 (Act No. 117 of 1998)
- Local Government: Municipal Systems Act, 2000 (Act No. 32 of 2000)
- Local Government: Municipal Finance Management Act 2003 (Act No.56 of 2003)

6. GUIDING PRINCIPLES

6.1 Professionalism

Legal Advisory Services staff of the municipality that generates legal opinions is expected to maintain a high standard of professional ethics. Conflict of interests must be avoided and the doctrine of professional legal privilege must be adhered to. The staff must, both during or after term of employment in the department treat as confidential the information which comes to their knowledge in the course of performance of their official duties, except if the communication of such information is required by law or in the proper performance of their duties.

6.2 Respect for the rule of law

The municipality acknowledges that as an organ of State it must obey the law and that its directorates cannot exercise power unless authorized by law.

6.3 Diligence

Constitutional obligations must be performed diligently and without delay. Decision makers must timeously request legal advice when a need arises because delayed request may render the advices insignificant due to factors like prescription.

7. THE NATURE AND STATUS OF LEGAL OPINIONS AND ADVICES

7.1. Legal Professional Privilege

As a general rule, communications between a legal advisor and his or her client are protected from disclosure. Consequently, privileged materials like opinions may not be admitted as evidence in a Court of law without the consent of the client. The client may also not be required to testify in any tribunal about the content of the privileged material.

In order for a legal opinion or advice to attract legal professional privilege the following requirements must be met:

- (a) The legal opinion or advice must be given by the legal advisor acting in his or her professional capacity. In South Africa, advices given by a salaries-in house legal advisors are also classified as privileged provided the legal advisor is an attorney or advocate (though not necessarily practising as such) and that he or she was acting in the capacity of a legal advisor¹.
- (b) The communication must have been made in confidence. A mere friendly communication is not covered.
- (c) The client must have communicated to the legal advisor for purposes of obtaining legal advice.
- (d) Legal professional privilege must and can only be claimed by client.

7.2 It is worth to note that legal professional privilege does NOT apply if an advice is sought for purposes of committing crime or misconduct.

7.3 A legal opinion is not a directive, a decision maker is still required to consider the opinion and may in appropriate circumstances not accept it or request a second opinion .

8. REFERRAL OF DOCUMENTS SOLICITING LEGAL OPINIONS OR LEGAL COMMENTS

8.1 All documents that are sent for legal advice or comment must be done through a memorandum setting out the advice that is solicited and all relevant documents

8.2 It must be noted that legal advices and comments are intended to assist decision makers and are limited only to the mandate of the department. Only decision makers may solicit a legal opinion from Legal Advisory Services. A member of Senior Management Service who is not delegated to take a decision, may not solicit an opinion for purposes of making a recommendation to a decision maker, unless she or he has agreed with the decision maker that an opinion must be solicited.

8.3 Referrals to Legal Advisory Services must be responded to within 7 working days from the date of their receipt or any other shorter time as the case may be.

8.4 In appropriate circumstances, a consultation may be required to get proper instructions from the client.

8.5 No opinion must be given orally unless in truly exceptional and compelling circumstances .

9. UNAUTHORISED DISCLOSURE OF LEGAL OPINIONS

9.1 All legal opinions are classified as confidential and attract professional legal privilege and thus may not be unlawfully disclosed to anyone. Unauthorized disclosure constitutes breach of information security of the municipality.

9.2 Legal Advisory Services may, with the approval of the Council, suspend providing a legal opinion directly to a person who is found to have unlawfully disclosed a legal opinion until the breach has been

remedied. It must be said in such circumstances; advices can only be done to the affected directorate when requested by the Council.

10. SOLICITING OPINIONS FROM PRIVATE LEGAL PRACTITIONERS

10.1 The duty to generate legal opinions or advices is the primary responsibility of the Municipal Legal Advisory Services.

10.2 The municipality must strive to ensure that less or no fees are paid to external legal practitioners for sourcing of legal opinions except on aspects that need specialized legal skill.

10.3 It is therefore imperative for the municipality to adequately capacitate legal advisory services personnel to deal with complex matters to ensure quality legal advisory service.

10.4 A decision to solicit external legal advice can only be done by the Council through the Office of the Legal Manager after having considered the following:

- Capacity within Legal Advisory Services;
- Timelines and level of urgency;
- Expertise and experience required;
- Policy requirement;
- Security considerations;
- Costs implications
- Unique considerations associated with the service and
- If Legal Advisory Services recommends so due to ethical considerations like conflict of interests.

11 MONITORING OF COMPLIANCE WITH THE PROTOCOL

Legal Advisory Services will monitor the extent of compliance with this protocol

12. COMMUNICATION

The protocol will be communicated by means of meetings , memos and advocacy sessions to all employees of the Department.

13. IMPLEMENTATION

This protocol will come into effect immediately on approval by the Council

14. REVIEW OF THE PROTOCOL

This protocol will be reviewed annually from the date of approval and when there are compelling developments in the legal framework regulating provision of legal advices.