QUALIFIED COMPLIANCE

Report on an investigation into allegations of maladministration, unfair discrimination on the basis of disability, undue delay and failure to comply with the Promotion of Access to Information Act and the Examinations and Other Related Matters Policy by the University of Pretoria

Report No: 8 of 2015/16
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Executive Summary

(i) "Qualified Compliance" is my report as the Public Protector issued in terms of section 182(1) (b) of the Constitution of the Republic of South Africa, 1996, and section 8(1) of the Public Protector Act No. 23 of 1994.

(ii) The report communicates my findings and the appropriate remedial action I am taking in terms of section 182(1)(c) of the Constitution, following an investigation into the alleged maladministration relating to the unfair marking of Mr Lubbe Viljoen's (hereinafter referred to as the Complainant) examination scripts, communication of conflicting final marks regarding the special examination undertaken by him in January 2012, undue delay to respond to his application in terms of the Promotion of Access to Information Act No. 2 of 2000 (PAIA); failure by the University of Pretoria (the University) to put in place the Student Disability Policy, which the Complainant alleged to be unfair discrimination on the ground of disability as listed in Section 9(3) of the Constitution of the Republic of South Africa, 1996 (The Constitution), and the failure by the University to follow the moderation process as tabled out in the University's Examinations and Related Matters Policy.

(iii) The Complainant is a 26 year old male who alleged that in 2008 he was diagnosed with Mitochondrial Cytopathy, a rare genetic metabolic disease classified as a disability. The symptoms of this disease include cramping and muscle pains, autism of the brain, weakness of the nerves, kidney dysfunction, eye problems and cardiac conduction disease, etc.¹

(iv) In 2007 he enrolled for a Bachelor of Commerce Degree in Accounting Sciences (BCom) with the University. In 2011, and upon completion of his

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¹ See Cleveland Clinical Journal of Medicine (Volume 69 – Number 7; July 2001; Page 625-642)
BCom Degree, he registered for an Honours Degree in Accounting Sciences. During this period, he registered four modules, *viz*; Auditing (ODT 700), Financial Accounting (FRK 700), Finance (FBS 700) and Taxation (BEL 700) and in November 2011 he sat for the final examination wherein he wrote all these modules. The results were released in November 2011 and the outcome thereof was that he had obtained 42% on the FRK 700 and 43% on the ODT 700, whilst he obtained supplementary examinations on FBS 700 and BEL 700 – which he eventually passed. He was allowed to write FRK 700 and ODT 700 during the special examinations that were written in January 2012.

(v) In the main, the complaint is that:

a) his examination scripts for the examinations he wrote in November 2011 and January 2012 were unfairly marked by the University;

b) the University improperly communicated conflicting marks for his special examinations which he wrote in January 2012, thereby resulting in improper prejudice;

c) the University failed to accommodate his disability in that it failed to put in place a Student Disability Policy, the conduct of which, he submitted, amounted to unfair discrimination on the basis of disability;

d) in an attempt to get these issues resolved, he made an application to the University in terms of the University’s Policy on the Promotion of Access to Information (PAIA) but the University delayed to respond to it;

e) the University failed to follow the process of moderation regarding the examination papers that were issued, thereby violating the provisions of the Examinations and Other Related Matters Policy; and

f) the conduct of the University caused him to suffer prejudice in that he could neither be awarded his BCom Honours Degree nor register for and write the 2012 South African Institute For Chartered Accountants
(SAICA) Board Examination. He further alleged that as a result of the University's conduct, he could not commence with his SAICA Training programme in 2012 and also lost personal study benefits.

(vi) While the University did not dispute that it issued conflicting marks to the Complainant for his special examinations, it submitted that none of the marks that were issued, including the incorrect marks, misled him to believe that he had passed his examinations. The University further submitted that there is a process in terms of the University's Rules and Regulations, setting out the procedure to follow in the event that a student is not satisfied with the outcomes of the examinations. The University argued that despite even going to the extent of offering to assist the Complainant in invoking this process at no cost, he failed to invoke it.

(vii) The University also did not deny that it had no disability policy at the time. However, it argued that there has always been reasonable accommodation of the Complainant's disability through the assistance that the Complainant has been receiving from the University's Disability Unit. It further argued that during the examinations it complied with the policy on Examinations and Other Related Matters in that the Complainant was granted concessions and an opportunity to write his examinations in a separate venue meant to accommodate specifically students with disabilities.

(viii) On analysis of the complaint, the following issues were considered and investigated:

(a) Whether the University unfairly marked the Complainant's scripts in the examinations that he wrote in November 2011 and January 2012 and if so whether this amounts to maladministration;
(b) Whether the University improperly communicated conflicting marks to the Complainant, thereby improperly prejudicing him from qualifying for SAICA Board Examination;

(c) Whether the University unduly failed to provide the Complainant with reasonable accommodation relating to his disability;

(d) Whether there was any undue delay on the part of the University to respond to the application that was lodged by the Complainant in terms of PAIA. In the event that there was, whether such delay improperly prejudiced the Complainant;

(e) Whether the University unduly failed to follow the process of moderation as prescribed by the Examinations and Related Matters Policy. In the event that there was failure, whether such resulted in prejudice on the part of the Complainant; and

(f) Whether the absence of the Student Disability Policy constitutes unfair discrimination on the basis of disability as listed in Section 9(3) of the Constitution.

(ix) A formal investigation was conducted through meetings and interviews with the Complainant and the Registrar: Academic, Professor Grové, and the relevant officials of the University, as well as inspection of all the relevant documents and analysis and application of all relevant laws, policies and related prescripts.

(x) In arriving at the findings, I have been guided by the standard approach adopted by the Public Protector South Africa as an institution, which simply involves asking: What happened? What should have happened? Is there a discrepancy between what happened and what should have happened? if there is a discrepancy, does the conduct amount to improper conduct or
maladministration? If there was indeed improper conduct or maladministration, what would be the appropriate remedial action?

(xi) As is customary, the "what happened" enquiry is a factual question settled on the assessment of evidence and making a determination on a balance of probabilities. To arrive at a finding on what happened, the investigation, like all others, relied on oral and documentary submissions by the Complainant and the University of Pretoria management, principally represented by the Registrar: Academic – Professor N. Grové. The question regarding what should have happened on the other hand, relates to the standard that the conduct in question should have been complied with.

(xii) In determining the standard that the University and its functionaries should have complied with to avoid improper conduct or maladministration, I was guided, as is customary, by the Constitution, national legislation, applicable policies and guidelines. Key among these policies were the University’s Rules and Regulations, Rules applicable to the Faculty of Economic and Management Science and the Policy on Examinations and Other Related Matters.

(xiii) Having considered the evidence uncovered during the investigation against the relevant regulatory framework, I make the following findings:

(a) Regarding whether the University unfairly marked the Complainant’s scripts in November 2011 and January 2012 examinations, I find that:

1) On the allegation that the University unfairly marked the Complainant’s examination scripts I reserve my finding;
2) As indicated above, the only way to disprove the marks currently recorded in the Complainant's name would be to get the scripts remarked in terms of Regulation 14 of the University's Rules and Regulations. I could not find any evidence to prove unfairness in the awarding of marks by the University as the process of remarking as laid down in the University's Rules and Regulations was not fully complied with by both parties; and

3) Without an independent view solicited through the University's Rules and Regulations of re-marking as prescribed in Rule 14 of its Rules and Regulations, I am unable to find that the Complainant's scripts were unfairly marked.

(b) Regarding whether the University improperly communicated conflicting marks to the Complainant, thereby prejudicing him from qualifying for SAICA Board Examination, I find that:

1) The allegation that the University improperly communicated conflicting marks to the Complainant, relating to the outcome of his special examinations is substantiated.

2) Whilst the Complainant was informed telephonically that he had obtained 46% for FRK 700 and 45% for ODT 700, the correspondence that was issued to him by the course coordinator, Professor Oberholster dated 8 February 2012 reflects that he obtained 46% for FRK 700 and 43% for ODT 700.

3) By issuing the conflicting marks, the University contravened Rule 7.4 of the University's Policy on Examinations and Other Related Matters which states that the Heads of Departments and examiners are
responsible for submitting the correct marks to the Student Administration and that it is the responsibility of the latter to indicate the marks correctly on the marks system.

4) Therefore the conduct of the University relating to the issuing of the conflicting marks amounts to maladministration as envisaged in Section 6(4) of the Public Protector Act and improper conduct as envisaged in Section 182(1) of the Constitution.

5) However, the allegation that had it not been for the conflicting marks that were issued, the Complainant would have qualified for SAICA Board Examinations has not been substantiated. In fact, there is no evidence that has been adduced to show that he passed all four modules in one examination session as required by the EMS Faculty’s Regulations for Postgraduate Programmes and Regulation 3.2.8 of SAICA Qualifying Examination Regulations. Furthermore, no evidence has been adduced to suggest that the University acted in bad faith in communicating these marks to the Complainant.

6) Furthermore, it must be noted that the University attempted to rectify the error by inviting the Complainant to make an application for re-marking. When the Complainant did not respond to this invitation, and on its own accord, the University took the papers in dispute for re-marking by other institutions of higher learning.
(c) Regarding the alleged undue failure on the part of the University to provide the Complainant with reasonable accommodation relating to his disability, I find that:

1) The allegation that the University unduly failed to accommodate the Complainant's disability is not substantiated.

2) In accommodating the Complainant's disability, the University, through the communication prepared by the University's disability unit and confirmed with him, granted him extra reading and writing time for his examinations, whilst he was also allowed (offered) to write at a separate venue to the one where his able-bodied counterparts were writing. The concessions that the Complainant received were not applicable to the able-bodied students.

3) The University therefore complied with Rule 3.4.3 of the University's Policy on Examinations and Other related Matters, which requires the University to allow extra reading and writing time, as well as ensuring a special venue suitable for the students with disabilities.

(d) Regarding the allegation of undue delay to respond to the Complainant's application in terms of PAIA and whether such resulted in improper prejudice on the part of the Complainant, I find that:

1) The allegation that the University unduly delayed to respond to the Complainant's application in terms of PAIA is not substantiated.

2) The University communicated its decision to the Complainant within the 30-day prescribed period, although the information was furnished to him three days later.
3) It is my considered view that although section 29(1) (b) of PAIA requires that the information be given to the requester immediately if there is no fee payable, the three days delay by the University to furnish the information cannot, in my view, be construed as undue delay and therefore does not warrant a finding of improper conduct in terms of section 182(1) of the Constitution.

(e) Regarding the allegation that the University failed to follow the Examination and Related Matters Policy in getting the examination papers moderated, I find that:

1) The allegation that the University failed to follow the moderation process is not substantiated;

2) The University presented examination scripts that were moderated in terms of the University's Policy on Examinations and Other Related Matters, and further confirmed that the Complainant's papers were not amongst those that were selected for moderation;

3) Rule 2.2 of the Policy on Examinations and Other Related Matters requires that the external examiner should examine by means of a sample, the standard of the answers and the quality of the evaluation of the scripts;

4) The fact that the Complainant’s scripts were not amongst the scripts that were moderated does not automatically mean that the University did not follow the moderation process as set out in terms of the policy; and
(f) Regarding whether the absence of a Students Disability Policy constitutes unfair discrimination on the basis of disability as listed in section 9 of the Constitution, I find that:

1) The allegation that the University’s failure to put in place a Students Disability Policy constitutes unfair discrimination is substantiated.

2) The University confirmed that at the time when the Complainant was a student at the University, it did not have a policy regarding the rights of people or students with disabilities in place.

3) By failing to put a disability policy in place the University violated the provisions of section 6(b) of PEPUDA which requires the University 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.

4) The South African Human Rights Commission has extensively dealt and made its recommendations to the University regarding failure to put in a Students Disability Policy and I therefore agree with the Commission’s outcome.

5) As a remedy, the University has since passed the Students Disability Policy in October 2013, in fulfillment of its obligation under section 6(b) of PEPUDA and section 9(3) of the Constitution.

(xiv) The appropriate remedial action I am taking is in pursuit of section 182(1)(c) of the Constitution, with the view of placing the Complainant as close as
possible to where he would have been had the improper conduct or maladministration not occurred is the following:

(a) In order for the University’s Regulations on re-marking to apply, the Complainant must, within fourteen days from date of receipt of this report, apply to the University for re-marking of the examination scripts in question and in line with General Regulation 14 of the University’s Rules and Regulations. Considering that the University has indicated its willingness to embark on the process at no cost to the Complainant, he must be exempted from paying the prescribed fee for re-marking;

(b) The University must within thirty (30) days from date of receipt of that application, proceed to appoint an independent external examiner as per GR 14 of the University’s General Regulations. The Dean of Faculty should take over the process entailed in Regulation 14. Considering that on its own accord, the University approached the University of Orange Free State and UNISA, the appointment of the external examiners must be done to the exclusion of these two Universities.

(c) The Vice Chancellor of the University must within fourteen (14) days from date of receipt of this report, tender a written apology on behalf of the University to the Complainant for the uncertainty that was caused by the issuing of conflicting examination marks to him.
REPORT INTO THE ALLEGATIONS OF MALADMINISTRATION, UNFAIR DISCRIMINATION ON THE BASIS OF DISABILITY, UNDUE DELAY AND FAILURE TO COMPLY WITH THE PROMOTION OF ACCESS TO INFORMATION ACT AND THE EXAMINATIONS AND RELATED MATTERS POLICY BY THE UNIVERSITY OF PRETORIA

1. INTRODUCTION

1.1 "Qualified Compliance" is my report as the Public Protector issued in terms of section 182(1) (b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act), following an investigation into the alleged maladministration pertaining to the marks that were allocated to the Complainant by the University; undue delay to respond to the Complainant's PAIA application; undue failure by the University to accommodate the disability of the Complainant; undue failure by the University to get the examination papers moderated and undue failure by the University to put in place a Students Disability Policy.

1.2 The report is submitted in terms of section 8(1) of the Public Protector Act to the following persons:

1.2.1 The Vice Chancellor and Principal of the University of Pretoria, Professor Cheryl de la Rey; and to

1.2.2 The Registrar of the University of Pretoria, Professor N. Grové.

1.3 A copy of the report is provided to:

1.3.1 The Complainant, Mr Lubbe Viljoen
1.4 The report relates to an investigation into the alleged maladministration, undue delay, unfair discrimination and failure to comply with the University’s policies on PAIA and Examinations and Other Related Matters by the University of Pretoria.

2. THE COMPLAINT

2.1 Mr Lubbe Viljoen lodged a complaint on 12 April 2012, alleging that the University unfairly marked his final and special examination scripts on B Com Honours Degree which he wrote in November 2011 and January 2012 respectively. He further alleged that the University communicated conflicting marks regarding the outcomes of his special examinations to him and unduly delayed to respond to his application for information in terms of PAIA. Further that the University failed to moderate the examination papers and to put a Students Disability Policy in place.

2.2 The Complainant alleged that as a result of the University’s conduct, he suffered prejudice in that he could not be awarded his B Com Honours Degree and could also not be able to register for and write the 2012 South African Institute for Chartered Accountants (SAICA) Board Examinations. He further alleged that this conduct caused him not to be able to commence with his SAICA Training Programme in 2012 and that he also lost his personal study benefits, including a bursary of about Eighty Thousand Rand (R80 000.00) per annum.

2.3 The Complainant also alleged that in 2008 he was diagnosed with Mitochondrial Cytopathy, a rare genetic metabolic disease classified as a disability. The symptoms of this disease include cramping and muscle
pains, autism of the brain, weakness of the nerves, kidney dysfunction, eye problems and cardiac conduction disease, etc.\(^3\).

2.4 In 2007 he enrolled for a Bachelor of Commerce Degree in Accounting Sciences (BCom) with the University. In 2011, and upon completion of his BCom Degree, he registered for an Honours Degree in Accounting Sciences. During this period, he registered four (4) modules, namely: Auditing (ODT 700), Financial Accounting (FRK 700), Finance (FBS 700) and Taxation (BEL 700). In November 2011 he sat for the final examination wherein he wrote all these modules. The results were released in November 2011 and the outcome thereof was that he obtained 42% in FRK 700 and 43% in ODT 700 – both being a fail. He obtained supplementary examinations in FBS 700 and BEL 700 and eventually passed these two. He was additionally allowed to write FRK 700 and ODT 700 during special examinations that were written in January 2012.

2.5 He alleged that up until 2010, he had been able to manage the effects of the disease by applying for concessions on his tests and examinations. He also utilised sick tests and larger format examination papers. On the 23 May 2011 his parents met with the Dean of the Faculty of Economic and Management Sciences (the Dean) and requested concessions and the University’s support regarding the Complainant’s medical condition. His parents further requested on his behalf, alternative and additional assessment. Subsequent to the meeting, a memorandum was sent to the Dean confirming the request. According to the Complainant, the Dean declined the possibility of additional assessments. He nonetheless agreed that where the examination papers were exceptionally long, specific additional arrangements would be made to assist Complainant.

\(^3\) See footnote no. 1 above
2.6 In the event that the Complainant passed all four papers in one session, as defined in the EMS Faculty’s Regulations, he would be certified for Theory of Accountancy and be eligible to sit for the January 2012 Board Examination under the auspices of SAICA. In the event that he passed a module on special examination, which is an examination granted by the Faculty on condition that a student passes three modules in one examination session and is only left with one, the Complainant would still be awarded his Honours Degree by the University but would be ineligible to sit for the SAICA Board Examinations. By December 2011, the Complainant’s FRK 700 and ODT 700 final results reflected a fail, and he was disqualified from writing the 2012 SAICA Board Examination.

2.7 Between 21 November 2011 and 7 December 2012, the Complainant communicated with the Registrar, the Dean and the Course Coordinator, requesting a copy of the Students Disability Policy, additional examination on the outstanding modules, examination papers, answer sheets and memoranda for external medical assessment and evaluation. The Complainant did not obtain the requested documents at the time.

2.8 Between 6 January 2012 and 10 January 2012, the Complainant wrote the special examinations on ODT 700 and FRK 700. On 13 January 2012, the Complainant’s special examination results were communicated to him telephonically by Professor Oberholster, the course Coordinator and Head of the Department of Accounting. According to the telephone communication, the Complainant had obtained 46% for FRK 700 and 45% for ODT 700. However, the correspondence from Professor Oberholster dated 8 February 2012, addressed to the Complainant reflected the marks as 46% for FRK 700 and 43% for ODT 700. These marks corresponded with those that were reflected in the University’s system, and they differed from those that were communicated to him telephonically, albeit he had not attained the passing mark on both occasions.
2.9 On 5 April 2012, the Complainant made an application to the University in terms of PAIA, wherein he requested a copy of the Students Disability Policy, his examination scripts and clarity regarding the conflicting final examination marks communicated to him by Professor Oberholster. The University responded to the request on 8 May 2012, whereby all the information requested by the Complainant was furnished, save for the Students’ Disability Policy, which the University did not have. The Complainant alleges that his special examination scripts reflected the same marks that were given to him telephonically by Professor Oberholster.

2.10 In the main, the Complainant now alleges unfair marking by the University as he believes that he has passed both the main and the special examinations. He further alleges maladministration by the University relating to the communication of conflicting special examination marks to him. He stated in his complaint that even if he were to apply for re-marking, the process would not be objective as it is the responsibility of the University to appoint an external examiner. The Complainant further alleged undue delay by the University to comply with his request in terms of PAIA, including failure to correspond with him. He further alleged that the University unduly failed to accommodate his disability. In this regard, he confirms having made an application for concessions. The concessions were granted by the University but he feels they were not sufficient because each paper was about eight (8) hours long and with his disability, he would not have been able to write such a long paper without breaks. He further alleged failure by the University to put in place a Student Disability Policy, which he believes is an unfair discrimination in terms of Section 9(3) of the Constitution.

2.11 Despite raising these issues on several occasions with the University, the latter had up to the time of approaching the Public Protector, failed to resolve the dispute.
2.12 I met with the Complainant on 18 December 2013 during which meeting the Complainant informed me that the University also failed to follow its own process on moderation as it had failed to get the examination papers moderated as per the University’s Examination and Related Matters Policy.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

3.1 The Public Protector is an independent constitutional institution established under section 181(1)(a) of the Constitution to strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.

3.2 Section 182(1) of the Constitution provides that:

"The Public Protector has the power as regulated by national legislation –

(a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;

(b) to report on that conduct; and

(c) to take appropriate remedial action".

3.3 Section 182(2) directs that the Public Protector has additional powers and functions prescribed by legislation.

3.4 The Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector Act also confers power to resolve the disputes through conciliation, mediation, negotiation or any other appropriate dispute resolution mechanism.
3.5 The University of Pretoria is a public higher education institution performing a public function in terms of the Higher Education Act No. 101 of 1997 and is therefore an organ of state in terms of section 239 of the Constitution.

3.6 The Public Protector's powers and jurisdiction to investigate and take appropriate remedial action were not disputed by any of the parties.

4. THE INVESTIGATION

4.1 Methodology

4.1.1 The investigation was conducted in terms of Section 182 of the Constitution and Section 6 and 7 of the Public Protector Act, 1994.

4.1.2 The Public Protector Act confers on Public Protector the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration. Section 6 of the Public Protector Act gives the Public Protector the authority to resolve a matter without conducting an investigation and resolve a complaint through appropriate dispute resolution (ADR) measures such as conciliation, mediation and negotiation.

4.1.3 The complaint was initially classified as an early resolution matter capable of resolution by way of a conciliation process or mediation in line with Section 6(4) (b) of the Public Protector Act, 1994. However, after fruitless attempts to conciliate the matter, it was escalated into an investigation.

4.2 Approach to the investigation

4.2.1 Like every Public Protector investigation, the investigation was approached using an enquiry process that seeks to find out:
4.2.1.1 What happened?

4.2.1.2 What should have happened?

4.2.1.3 Is there a discrepancy between what happened and what should have happened and if there is a deviation does that deviation amount to improper conduct or maladministration?

4.2.1.4 In the event of improper conduct or maladministration what would it take to remedy the wrong or to place the Complainant as close as possible to where they would have been but for the maladministration or improper conduct?

4.2.2 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation and making a determination based on a balance of probabilities. In this particular case, the factual enquiry principally focused on whether or not the University acted improperly in communicating the outcomes of the Complainant's examination results, whether or not the University unduly delayed to furnish the Complainant with the requested information, whether or not, by failure to put a disability policy in place, the University unfairly discriminated the Complainant on the basis of his disability, and whether or not the University failed to follow its own moderation process.

4.2.3 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the organ of state to prevent maladministration and prejudice.

4.2.4 The enquiry regarding the remedy or remedial action seeks to explore options for correcting the maladministration and redressing its
consequences. Where a Complainant has suffered prejudice, the idea is to place him or her as close as possible to where they would have been had the organ of state complied with the regulatory framework setting the applicable standards for good administration.

4.3 On analysis of the complaint, the following were issues considered and investigated:

4.3.1 Whether the University unfairly marked the Complainant’s scripts in the examinations that he wrote in November 2011 and January 2012;

4.3.2 Whether the University improperly communicated conflicting marks to the Complainant, thereby improperly prejudicing him from qualifying for SAICA Board Examination;

4.3.3 Whether the University unduly failed to provide the Complainant with reasonable accommodation relating to his disability;

4.3.4 Whether there was any undue delay on the part of the University to respond to the application that was lodged by the Complainant in terms of PAIA. In the event that there was, did such delay improperly prejudice the Complainant;

4.3.5 Whether the University failed to follow the process of moderation as prescribed by the Examinations and Related Matters Policy. In the event that there was failure, whether such resulted in prejudice on the part of the Complainant; and

4.3.6 Whether the absence of a Student Disability Policy constitutes unfair discrimination on the basis of disability and as listed in Section 9(3) of the Constitution.
4.4 The key sources of information

4.4.1 Documents

4.4.1.1 Documents relating to the allegation that the University unfairly marked the examination scripts of the Complainant:

4.4.1.1.1 No documents were submitted in respect of any application for a remark by the University or the Complainant.

4.4.1.2 Documents relating to the allegation of the issuing of conflicting marks

4.4.1.2.1 Copy of the Complainant’s full academic record dated-stamped 27 January 2012

4.4.1.2.2 The Complainant’s special examination answer sheet for FRK 700

4.4.1.2.3 The Complainant’s special examination answer sheet for ODT 700

4.4.1.3 Documents relating to the allegation of undue delay by the University to supply the information requested in terms of PAIA

4.4.1.3.1 Copy of the Complainant’s PAIA application dated 5 April 2012

4.4.1.3.2 Special examination question paper for FRK700 dated 6 January 2012

4.4.1.3.3 Memorandum/Suggested Solutions for FRK 700

4.4.1.3.4 Special examination question paper for ODT 700 dated 10 January 2012

4.4.1.3.5 Memorandum/Suggested solutions for ODT 700
4.4.1.4 Documents relating to the allegation of failure by the University to put in place a Students Disability Unit

4.4.1.4.1 Copy of the University's draft Policy: Unit for students with special needs (physical and learning disabilities)

4.4.2 Interviews and meetings conducted

4.4.2.1 Consultation with the Complainant on 19 July 2012;

4.4.2.2 Telephone consultation with the Complainant on 21 September 2012;

4.4.2.3 Meeting between the Investigation Team and the Registrar: Professor Grové assisted by Professor Oberholster and the University's legal and disability units on 25 October 2012;

4.4.2.4 Meeting between the Public Protector and the Complainant on 18 December 2013; and

4.4.2.5 Meeting between the Complainant and the Chief Executive Officer of the Public Protector South Africa on 29 May 2015

4.4.3 Correspondence

4.4.3.1 Electronic correspondence from the Public Protector to the Registrar: University of Pretoria dated 13 April 2012;

4.4.3.2 Response from the University of Pretoria, dated 20 April 2012

4.4.3.3 Letter to the Complainant dated 18 April 2012
4.4.3.4 Letter from the Complainant dated 26 June 2012

4.4.3.5 Electronic mail from the Complainant dated 26 June 2012

4.4.3.6 Letter to the Registrar: University of Pretoria dated 24 August 2012

4.4.3.7 Letter from the Registrar: University of Pretoria dated 25 September 2012

4.4.3.8 Electronic mail to the Complainant dated 5 October 2012

4.4.3.9 Letter from the Registrar: University of Pretoria dated 7 November 2012
4.4.3.10 Letter from the Registrar to the Department of Higher Learning and Training dated 5 October 2012

4.4.3.11 Letter to the Registrar dated 24 February 2014

4.4.3.12 Letter from EOH Legal Services dated 19 March 2014

4.4.4 Websites consulted/electronic sources

4.4.4.1 www.ccjm.org

4.4.5 Legislation and other prescripts

4.4.5.1 The Constitution of the Republic of South Africa, 1996 (The Constitution);

4.4.5.2 The Public Protector Act 23 of 1994 (The Public Protector Act);

4.4.5.3 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA);
4.4.4.4 General Rules and Regulations of the University of Pretoria;

4.4.4.5 South African Institute of Chartered Accountants Bylaws;

4.4.4.6 Promotion of Access to Information Act 2 of 2000 (PAIA);

4.4.4.7 University of Pretoria’s Policy on PAIA;

4.4.4.8 Interpretation Act 33 of 1975 (The Interpretation Act);

4.4.4.9 The University’s Policy on Examinations and Other Related Matters;

4.4.4.10 Higher Education Act 101 of 1997 (The Higher Education Act);

4.4.5 Caselaw

4.4.5.1 Prinsloo v Van der Linde 1997 (3) SA 1012 (CC); and

4.4.5.2 Lettie Hazel Oortman v St Thomas Aquinas Private School & Bernard Langton – Equality Court Case 1/2010 (December 2010)

4.4.5.3 Esthé Muller v DoJCD and Department of Public Works (Equality Court, Germiston Magistrates’ Court 01/03).

4.4.6 Notice in terms of section 7(9) of the Public Protector Act

4.4.6.1 At the conclusion of the investigation, a notice in terms of section 7(9) of the Public Protector Act was issued to the Complainant and the University of Pretoria, for the parties to comment and/or make submissions on the intended findings.

4.4.6.2 The comments were summarised, assessed and where appropriate, integrated in the factual and maladministration findings.
4.4.6.3 The Complainant’s response was that the bulk of the core issues of the complaint have still not been adequately reported on and there seems to be very little understanding of his disease especially because the report does not even mention the name and nature of the medical condition. Furthermore the core evidence and policies which he submitted were disregarded; there are numerous factual errors and clear misunderstandings of core concepts, for instance the difference between supplementary examination and special examination; evidence and correspondence proving contrary to the University’s submissions. He further indicated that the Public Protector’s report relates to aspects that were referred to the South African Human Rights Commission.

4.4.6.4 The Complainant further states that it does not look like the Public Protector will now be able to address the core issues of the complaint and that he has lost trust in the Public Protector processes and requested me to discontinue the investigation of his complaint.

4.4.6.5 Section 182(1) empowers me to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice and to report on that conduct. I decided to continue with the investigation and issue the report on the basis of this provision. Furthermore the Complainant had already lodged a complaint of undue delay to finalise the investigation to the Portfolio Committee on Justice and Correctional Service, the Office of the Speaker and the Office of the President.
5. THE STANDARDS THAT SHOULD HAVE BEEN COMPLIED WITH

5.1 Regarding the allegation that the University unfairly marked the Complainant’s examination scripts:

5.1.1 This issue is regulated by Regulation 12.2.2 of the University’s Rules and Regulations, which requires that in order to pass a module, a student must obtain a final mark of at least 50%. Furthermore, the Faculty of Economic Management Science Regulations⁴ requires that candidates be awarded the Certificate in the Theory of Accountancy if all four modules are passed during the same examination session. The Faculty Regulations further explain that “the same examination session” includes the supplementary session immediately following the examination session, excluding any subsequent special examinations.

5.1.2 Section 65B(2) (b) of the Higher Education Act further states that no diploma or certificate may be awarded and no degree may be conferred by a public higher education institution upon any person who has not completed the work and attained the standard proficiency determined through assessment as required by the senate of the public higher education institution.

5.1.3 The pass mark that the Complainant was expected to obtain in terms of the applicable rules and regulations were 50%. For the Complainant to be awarded the CTA, he would have been expected to pass all four modules in one session as prescribed by the Faculty Regulations. Furthermore, had he obtained the 50% pass mark during the special examinations which he wrote in January 2012, he would have been awarded the Honours Degree in accounting, although he would not have qualified for the CTA.

⁴ Faculty of Economic Management Science Yearbook 2013 (Page 12)
5.2 Regarding the allegation of improperly communicating conflicting marks to the Complainant, thereby prejudicing him from qualifying for SAICA Board Examination:

5.2.1 This issue is regulated by Rule 7.4 of the University’s Policy on Examination and Other Related Matters, which requires the Heads of Departments and examiners to submit the correct marks to the Student Administration and for the latter to indicate the marks correctly on the marks system. Regulation 14 of the University’s Rules and Regulations further states that the Head of Department concerned determines the manner in which feedback is provided to students. It further gives students a right to apply for the re-marking of their examination scripts and that the Head of Department will appoint the examiner.

5.2.2 Furthermore, Regulation 3.2.8 of the Qualifying Examination Regulations of SAICA requires that for a candidate to be eligible to sit for the Initial Test of Competence (ITC) Part 1 of the Qualifying Examination, a candidate must have satisfied all the requirements for a Certificate in Theory of Accountancy (CTA) or equivalent programme accredited by the Initial Professional Development (IPD)

5.2.3 Rule 7.4 above sets out the standard that is expected of examiners and heads of departments in submitting marks to the Students Administration, whilst it is required of the latter to indicate the marks correctly on the marks system. It further gives the Head of Department authority to determine the manner in which feedback should be provided to the students.

5.2.4 Furthermore, with regard to the alleged prejudice suffered by the Complainant in relation to qualifying for SAICA Examinations, SAICA Regulations state clearly the calibre of candidates that should qualify to write these examinations. This Regulation needs to be read with Faculty's
Regulations on Postgraduate programmes which indicate how candidates qualify to for the CTA. This therefore means that for the Complainant to qualify for the ITC Part 1 of the Qualifying Examinations, he was required to pass all four modules in one session as described above.

5.3 Regarding the allegation of failure to provide the Complainant with reasonable accommodation relating to his disability;

5.3.1 This issue is regulated by Rule 3.4.3 of the University's Policy on Examinations and Other Related Matters, and which states that relevant provision must be made to allow extra time for students with disabilities, as well as ensuring a special venue suitable for such students. It further requires that provision be made for an additional invigilator.

5.3.2 Furthermore, section 9 (b) of PEPUDA states that subject to section 6, no person may unfairly discriminate against any person on the ground of disability, including 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.

5.3.3 The requirement for reasonable accommodation was also dealt with by the Equality Court in the case of Esthé Muller v DoJ&CD and Department of Public Works. In this case the complainant, a quadriplegic lawyer, brought a case before the Equality Court and in terms of PEPUDA, due to the fact that the court buildings were structured in a manner that a person with her kind of disability would not be able to gain access to the court building. The Equality Court decided in favour of the complainant and decided that the Respondent Departments start to work in ensuring that court structures are accessible to all users, including persons with disabilities.

5 See 4.4.5.4 above
5.3.4 In response to the requirement of section 9 of PEPUDA, the University would have to comply with the provisions of Rule 3.4.3 above, which requires it to grant certain concessions to the students with disabilities, and to further make provision for a special examination venue for such students.

5.4 Regarding the allegation of undue delay by the University to respond to the application that was lodged by the Complainant in terms of PAIA and in the event that there was, whether such delay improperly prejudiced the Complainant;

5.4.1 Section 25(1) of PAIA provides that the Information Officer to whom the request is made or transferred, must, as soon as reasonably possible but within 30 days after the request is received, decide whether to grant the request and notify the requester.

5.4.2 Rule 5.5 of the University’s Manual on PAIA also provides that the information Officer must, subject to certain exceptions, as soon as possible, but in any event within 30 days, decide in accordance with the Act whether to grant the request and notify the requester of the decision (Section 25).

5.4.3 Section 4 of the Interpretation Act requires that when any particular number of days is prescribed for the doing of any act, or for any other purpose, the same shall be reckoned exclusively of the first day and inclusively of the last day, unless the last day happens to fall on a Sunday or on a public holiday, in which case the time shall be reckoned exclusively of the first day and exclusively also of every Sunday or public holiday.

5.4.3 In this case, the Complainant submitted his application in terms of PAIA to the University on 5 April 2012. In terms of the Interpretation Act above, 30 days for the University to decide whether to grant the request and notify the requester lapsed on 04 May 2012.
5.4.4 Section 29(1) of PAIA provides that once a requester has been notified that his request for access has been granted and if no access fee is payable immediately be given access in the applicable form as indicated by the requester.

5.4.5 In this case no access fee was payable therefore in accordance with section 29(1), the Complainant must have been access immediately in the form indicated in his PAIA request.

5.4.6 The courts have not interpreted the word “immediately” as provided for in section 29(1)(b) of PAIA. In terms of the Oxford Dictionary, “immediately” means “without any delay or lapse of time”. Other sources such as Black’s Law Dictionary provide a more expansive entry, defining “immediately” as meaning “within a reasonable time under the circumstances of a case”.

5.4.7 International and national case law confirm that the interpretation of “immediately” is subject to a reasonableness standard – “as soon as it can be done”. Whatever the source, the touchstones for the interpretation of the time limit envisaged by “immediately” is always the same – reasonableness under the circumstances.

5.4.8 In this case, the Complainant submitted his application in terms of PAIA to the University on 4 April 2012. In terms of the Interpretation Act above, the last day for the furnishing of the information was the 4th of May 2012, which therefore should have been the date when the University handed over the requested information to the Complainant.
5.5 Regarding the allegation of failure by the University to follow the process of moderation as prescribed by the Examinations and Related Matters Policy and in the event that there was failure, whether such resulted in prejudice on the part of the Complainant;

5.5.1 The issue of moderation is regulated by the University’s Policy on Examinations and Other Related Matters (Document No: S 4671/10). Rule 2.2 thereof requires that the head of department, in consultation with the lecturer, nominates the external examiner on the basis of his/her competence qualifications and experience. The dean or his/her delegated academic representative approves the nomination. The purpose of the external moderation is to ensure that students are assessed in a consistent, accurate and well-designed manner (i.e. fair, valid and reliable). In this regard, an external examiner, amongst others, determines:

a) The extent to which the curriculum is covered by the examination paper;
b) The relevance of the examination paper to the subject matter covered;
   and
c) The standard reached by students.

5.5.2 Rule 2.2 further states lists the duties of the external examiner as follows:

5.2.2.1 act as a moderator when the examination paper and memorandum have been drafted by the internal examiner(s)

5.2.2.2 examine by means of a sample (10% or a minimum of 10 of the total number of examination answer scripts) the standard of the answers and the quality of the evaluation of the scripts;
5.2.2.3 Comment on the standard of the module as reflected by the examination paper and/or the oral and/or the practical examination and on whether the paper covers the curriculum;

5.2.2.4 Determine whether the level of difficulty of the questions is up to standard; and

5.2.2.5 Determine whether the length of the examination is appropriate for the time allowed.

5.5.3 In terms of this Rule, external examiners are required to report on the examination of a particular module to the relevant head of department.

5.5.4 Furthermore the University has a duty to prove that it followed the process above in seeing to it that the examination scripts were moderated.

5.6 Regarding whether the absence of a Student Disability Policy, constitutes unfair discrimination on the basis of disability and as listed in Section 9(3) of the Constitution.

5.6.1 This issue is regulated by PEPUDA. Section 6 thereof prohibits the state or any person from unfairly discriminating on any other person. The University is further required to comply with the provisions of Section 9 (b) of PEPUDA.

5.6.2 Section 9 (1), (2) and (3) of the Constitution, 1996 states that everyone is equal before the law and has the right to equal protection and benefit of the law. It states that 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. It further states that the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including disability

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6 See 5.3.2 above
5.6.3 The issue of non-discrimination on the basis of disability was emphasised by the court in the case of *Oortman v St Thomas Aquinas Private School & Another*\(^7\) (wherein the Court decided that the school must take reasonable steps to remove all obstacles to enable Chelsea Oortman (the complainant) to have access to all the classrooms and the toilets allocated to her by using a wheelchair. Furthermore, in the case of *Prinsloo v Van der Linde*\(^8\), the court emphasized that the right to equality means the right to be treated as equals.

5.6.4 In order to comply with section 9(b) of the Constitution, the University would be expected to put in place legislative and other means to protect and advance the category of persons disadvantaged by unfair discrimination. The University would further be required to eliminate any 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, including the Complainant.

6. **EVIDENCE AND INFORMATION OBTAINED**

6.1 With regard to the issue of the alleged unfair allocation of marks to the Complainant

6.1.1 Issues in dispute

6.1.1.1 The Complainant insists that he was unfairly marked by the University and believes that he had passed both his main and special examinations. He acknowledged that the only way to prove that would be through a re-marking but feels the University will not be objective in following the process of re-marking. During the consultation of the 19\(^{th}\) of July 2012, he requested (the Office of the Public Protector) to issue a letter instructing other Universities accredited by SAICA to do the re-marking.

\(^7\) See 4.4.5.3 above  
\(^8\) See 4.4.5.2 above
6.1.1.2 The University on the other side insists that the Certificate of Theory in Accountancy or Honours Degree in Accounting would only be awarded to the Complainant when he attains the standard proficiency as required of section 65B of the Higher Education Act. Due to the fact that at this stage, the marks that were attained by the Complainant in FRK 700 and ODT 700 were less than 50%, which is the required pass mark, he therefore did not attain the required standard proficiency as required of the Higher Education Act.

6.1.1.3 In its response in terms of section 7(9) of the Public Protector Act, the University further indicated its willingness to appoint another independent external examiner in terms of Regulation 14 of the University’s Rules and Regulations, and at no cost to the Complainant.

6.1.1.4 In my evaluation, the version of the University is highly probably in the circumstances, as no evidence has been adduced to suggest that the Complainant’s scripts were unfairly marked or that he actually passed the aforesaid examination.

6.2 With regard to the allegation of issuing conflicting examination marks by the University

6.2.1 Issues not in dispute

6.2.1.1 In January 2012, the University communicated conflicting final marks to the Complainant. On 13 January 2012, the Complainant was informed telephonically by Professor Oberholster that he had obtained 46% for FRK 700 and 45% for ODT 700. However, as per the University’s marks system and the letter that Professor Oberholster issued to him regarding the outcome of his special examination, he was informed that he obtained 46% and 43% for FRK 700 and ODT 700 respectively. Upon
receipt of his examination scripts after requesting them in terms of PAIA, the marks reflected in them corresponded with those that were communicated to him telephonically.

6.2.2 Issues in dispute

6.2.2.1 The Complainant submitted that the examination results of his special examinations that were communicated to him by Professor Oberholster were different from those that were reflected in the University’s student portal. He argued that had it not been failure on the part of the University to issue correct marks, he would have qualified for his B Com Honours Degree. He further argued that he could have progressed to write the SAICA Examinations in January 2012 and also commenced with his SAICA training programmes in the year 2012. Furthermore he could have retained his study benefits of about R80 000.00 per annum.

6.2.2.2 The University indicated that during the main examination that was written in November 2011, the Complainant obtained 42% on FRK 700 and 43% on ODT 700. However, due to the fact that students are permitted to write only one module on special examinations, there was an anomaly in the loading of two modules on the system in respect of the Complainant, but because of the concessions granted, the University diverted from the normal way of registering students for special examinations. This led to the Faculty’s Administration experiencing glitches in inserting the special examination marks into the University’s marks system. On communicating the marks in writing to the Complainant, Professor Oberholster relied on the marks that were reflected in the system, and informed the Complainant that he had obtained 46% on FRK 700 and 43% on ODT 700, the latter which was incorrect. However, the actual marks obtained in the special examination for FRK 700 and ODT 700 remained 46% and 45% respectively, and as
was initially communicated telephonically to the Complainant by Professor Oberholster.

6.2.2.3 The University acknowledged this error and further offered to grant the Complainant an opportunity to have his special examination scripts re-marked by an external examiner at no cost. However, the Complainant failed to submit an application in terms of GR 14 of the University’s Rules and Regulations.

6.2.2.4 Ultimately, the University caused the Complainant’s examination scripts in ODT 700 and FRK 700 to be re-marked by the external examiners from the University of the Free State and the University of South Africa. According to these Universities, the Complainant obtained 43% and 42.5% in ODT and FRK respectively, on re-marking. To date, the Complainant has not complied with section 65B (2) (b) of the Higher Education Act 101 of 1997, in order for him to be awarded the degree in question.

6.2.2.5 In its response in terms of section 7(9) of the Public Protector Act, the University reiterated that the reason why the Complainant experienced difficulties in obtaining his correct results for the two modules he wrote on special examination was because due process was not followed to get him registered to write the examinations. As a result of this, the Faculty experienced problems in inserting the outcomes of his special examinations on the University’s system. This resulted in a situation where his combined main examination and year mark for ODT 700 (i.e. 43%) was reflected on the system as his final mark, instead of the actual mark he obtained on his special examination, which is 45%.

6.2.2.6 The University further reiterated that despite the administrative error, the Complainant was unable to successfully complete the aforesaid modules.
6.2.2.7 The Complainant elected not to comment on this issue in his response in terms of section 7(9) of the Public Protector Act.

6.2.2.8 It is my considered view that the communication of conflicting marks had a potential of creating uncertainty on the part of the Complainant regarding the actual marks he had attained in his special examination. However, from the evidence submitted by both parties, the version of the University on how the conflict came about is highly probable. No evidence has been submitted to suggest that the Complainant was at any stage led to believe that he had passed his special examinations.

6.2.2.9 Further, Rule 14 of the University’s Rules and Regulations leaves it to the Head of Department to determine the manner in which feedback is provided to the students regarding the outcome of their examinations. The Rule does not specify whether the communication can be done telephonically or in writing.

6.3 With regard to the alleged undue delay by the University to respond to the Complainant’s application in terms of PAIA:

6.3.1 Issues not in dispute

6.3.1.1 The fact that the Complainant was placed in possession of the documents he requested in terms of PAIA on the 8th of May 2012 is not disputed. The University was late in furnishing the information by approximately three (3) days.

6.3.2 Issues in dispute

6.3.2.1 The Complainant submitted that the University exceeded the prescribed 30-day period to furnish the requested information and that no
explanation was given in terms of the PAIA Policy. It must also be noted that the Complainant approached the Office of the Public Protector before the 30 day period expired, alleging undue delay to furnish the information requested in the PAIA application.

6.3.2.2 The Complainant's Application is dated 5 April 2012, whilst the University's response is dated 4 May 2012. However, the Complainant alleges that he only received it on the 8th of May 2012.

6.3.2.3 It must be noted once again, that the Complainant was granted an opportunity by this office to submit his comments in terms of section 7(9) regarding this issue, and once again, no comments were received from him.

6.3.2.4 The University submitted that the Complainant was made aware of the outcome of his application in terms of PAIA by the 4th of May 2012, through an electronic mail that was sent to him by the University's Information Officer, Ms Gardiner. In this correspondence, the Complainant was being requested to arrange for collection of the requested information by the 8th of May 2012. The University therefore believes that they did comply with the time frames set by PAIA to respond to a PAIA application.

6.3.2.5 In its response in terms of section 7(9) of the Public Protector Act, the University emphasized that in terms of section 25 of PAIA the Information Officer must, subject to certain exceptions, as soon as possible, but in any event, within 30 days, decide in accordance with the Act, whether or not to grant the request and notify the requester of the decision. Due to the fact that no fee was payable by the Complainant, section 29(1) (b) of PAIA became applicable. The University confirmed that the 30 day period
required of PAIA and relating to the Complainant's application was to expire on 5 May 2012, which fell on a Saturday. The decision regarding the outcome of the application was communicated to the Complainant on 4 May 2012, through the electronic correspondence that was sent by the Information Officer, Ms Gardiner to the Complainant. In this correspondence, Ms Gardiner requested the Complainant to come and collect the requested information or to nominate a person to come for the collection on Tuesday the 8th of May 2012.

6.3.2.6 It is my considered view that the issue for determination in this regard is whether the three days delay can be construed as undue delay. This question will be best answered by looking into what the required standard for compliance was in this regard.

6.4 Regarding the allegation of failure to provide the Complainant with reasonable accommodation relating to his disability

6.4.1 Issues in dispute

6.4.1.1 The Complainant alleged failure by the University to accommodate his disability. He complained of lack of support by Professor Oberholster despite the fact that he suffered from a disability. However, he also furnished copies of the requests for concessions which were made and submitted on his behalf by the Disability Unit to the EMS Faculty and for the years 2010 and 2011.

6.4.1.2 The University submitted that its Disability Unit, the mandate of which is amongst other things, to assist students with special needs by liaising with departments and faculties to see to it that these students are able to compete on an equal footing with able-bodied students, confirmed having
assisted the Complainant throughout the years of his enrollment at the University. The Complainant’s disability was brought to the attention of the Faculty of Economic Management Sciences (EMS), in order that concessions on tests and examinations could be obtained for the Complainant.

6.4.1.3 The University further submitted that it is the practice of the Disability Unit to invite the student concerned to review the correspondence that would be sent to the relevant faculty regarding the request for concessions, and also to confirm if that correspondence captures all that the disability entails. This process is done in a way that does not compromise or devalues the discipline concerned. This was also done in the case of the Complainant, and he did give a go-ahead for the request to be submitted to the Faculty in all the relevant years.

6.4.1.4 With regard to accommodating the Complainant’s disability, specifically during the year 2011 the University reported as follows:

6.4.1.4.1 All students who register for the Accounting 700 and Auditing 700 modules at the University receive additional reading time in the relevant papers as follows:

<table>
<thead>
<tr>
<th>Auditing</th>
<th>30 minutes reading time for three and four paper hours (writing time)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>30 minutes reading time per session for a paper of more than four hours (writing time)</td>
</tr>
<tr>
<td>Accounting</td>
<td>20 minutes reading time per session for a four hour paper (writing time)</td>
</tr>
<tr>
<td></td>
<td>All Accounting tests/ exam papers of four hours or more (writing time) are split into two sessions. In respect of writing time of the papers, Mr Viljoen was given 10 minutes extra writing time per hour limited to a maximum of 30 minutes per paper/ test/ examination.</td>
</tr>
</tbody>
</table>
6.4.1.4.2 In the case of the April 2011 test papers in both Accounting 700 and Auditing 700, Mr Viljoen was given only the normal extra time allocation on writing time (i.e. 10 minutes per hour limited to a maximum of 30 minutes), since no request for additional concessions had been received at that time.

6.4.1.4.3 Subsequent to a later request for extra concessions around mid-year, it was arranged that where papers were exceptionally long (such as four or five hours writing time), specific additional arrangements would be made to assist Mr Viljoen. The extra concessions entailed the following:

a) dividing four hour and five hour (writing time) papers into two sessions (where this was not already done for all students.)

b) giving him an extended break between the two parts/ sessions of the papers, in addition to the normal extra writing time allocation granted to him.

c) The time of the break between the two parts/ sessions given in this regard was agreed on by Mr Viljoen and varied from 30 minutes to one hour and forty five minutes, depending on the test/ examination and the arrangements made with Mr Viljoen.

6.4.1.4.4 The extra concessions resulted in the following:

a) Although concession arrangements were made for the two papers in the July 2011 test series, Mr Viljoen did not write these, due to medical circumstances;
b) In the case of the three hour (writing time) September 2011 test of Auditing 700, Mr Viljoen was given only the normal extra time allocation on writing time, since the length of the paper did not exceed four hours.

c) In the case of the four hour (writing time) exam paper of Auditing 700 the total time exceeded four hours and his paper was thus artificially divided into two sessions with a rest period of 30 minutes in between the two sessions, proposed by Mr Viljoen and granted by the Department of Auditing.

d) In the case of Accounting 700, four and five hour papers (writing time) are divided into two parts/ sessions for all registered Honours students and students normally receive a short break between the two parts. In the case of the four hour papers, the normal break between the two parts (two hours writing time each) for all students is approximately 30 to 40 minutes and in the case of the five hour papers, the normal break between the two parts (two and a half hours writing time each) is approximately an hour. The purpose of this test/ exam format is to simulate the SAICA QE 1 exam conditions, since this particular Honours Degree aims to prepare students for that exam. In the case of the four hour (writing time) paper of Mr Viljoen written in September 2011, he elected to have a break of approximately one and a half hours between the two sessions and he was also granted his extra writing time allocation of 30 minutes. In the case of the five hour (writing time) exam paper of Mr Viljoen, he was granted a break of approximately one hour and forty five minutes between the two sessions, as well as his extra writing time allocation of 30 minutes.

e) As is the general practice, the Departments of Accounting and Auditing arrange for all students requiring extra time, to write in venues separate
from normal-time students to ensure that the disruptions to the extra-time students are kept to a minimum.

f) Since both the special examinations in the beginning of January 2012 comprised three hours of writing time, 30 minutes of reading time and 30 minutes of extra writing time for Mr Viljoen, the total time per paper did not exceed 4 hours. Mr Viljoen was therefore given the normal amount of extra writing time during these examinations, namely 10 minutes extra per hour limited to the maximum of 30 minutes.”

6.4.1.5 The University submitted further that it is not within its policy to hand examination scripts to students. However, the Registrar gave approval to the Complainant’s request for perusal by 28 February 2012 in an endeavor to reasonably accommodate the Complainant, as he had previously indicated his wish to employ the services of a medical expert. The University further confirmed their approval that a medical expert would also be allowed to attend the perusal, as per the Complainant’s request. The University further indicated that it was prepared to make the relevant documentation available to a medical practitioner for assessment, but the Complainant failed to adhere to the proposal.

6.4.1.6 The Complainant does not deny having received concessions, but simply disputes sufficiency or reasonableness thereof, whilst the University has argued that the concessions were done in consultation with both the Complainant and the University’s Disability Unit. It is my considered view that the issue of the sufficiency or reasonableness of the concessions should be interpreted in line with what was expected of the University in terms of the applicable law and policy.
6.5 Regarding whether the absence of the Student Disability Policy constitutes unfair discrimination on the basis of disability and as listed in terms of Section 9(3) of the Constitution.

6.5.1 Issues not in dispute

6.5.1.1 The University did not, at the time when the complaint was received, have a Students' Disability Policy in place. However, there is a Disability Unit, the purpose of which is to act as liaison between the faculties and the people with disabilities in general, and students in particular, within the University community. The Complainant registered with this Unit and communication had also been issued on his behalf, informing the Faculty that he would still require concessions during the 2011 academic year, and such concessions were granted by the Faculty.

6.5.2 Issues in dispute

6.5.2.1 The Complainant submitted that the absence of the Student Disability Policy was tantamount to unfair discrimination on his part and on the ground of disability.

6.5.2.2 The University’s response regarding the Students' Disability Policy was that at the time of the Complainant's application in terms of PAIA, the University did not have a formally approved Students Disability Policy in place. However, certain general guidelines and procedures pertaining to students with special needs have been followed by the University for a number of years. These guidelines and procedures have been incorporated into a formal draft policy that is currently being finalized. The said draft had been made available to the Complainant on 24 May 2012.
6.5.2.3 The University further argued that despite the absence of the policy, the Complainant did receive reasonable accommodation afforded to students with disabilities in terms of policy and practice.

6.5.2.4 In its response in terms of section 7(9) of the Public Protector Act, the University submitted that despite not having had the Policy prior to October 2013, there has always been general guidelines and procedures to be followed within the University pertaining to students with special needs. In particular, the University has a unit for students with special needs that assists students with physical and learning disabilities. The information pertaining to this unit has always been available in the University’s brochure and website. According to the information at the University’s disposal, in October 2011 the Complainant visited the Unit requesting extra writing time for tests and examinations. A letter was issued to that effect for the attention of the Faculty. Subsequently, the Complainant’s four hour examination papers were divided into two sections and in between the hours he was given a concession of about three hours to rest, to accommodate his disability.

6.5.2.5 The University further stated that the structure and curriculum content of this degree program does not accommodate the use of sick tests or alternative assessment methods such as oral examinations. Furthermore, SAICA also does not allow oral examination in the professional SAICA examination. However, there are three tests that are written in the program. These tests get written in April, July and September respectively. If a student fails to write any of these tests, it simple does not get included as part of the calculation for the final mark of a student and the year mark formula gets adjusted accordingly. The same principle was applicable to the Complainant.
6.5.2.6 In my view, the issue of whether the absence of the Students Disability Policy amounted to discrimination on the part of the Complainant will be best answered by taking into consideration what was expected of the University in terms of the law.

6.6 Regarding the allegation of failure by the University to follow the process of moderation as prescribed by the Examinations and Related Matters Policy. In the event that there was failure, whether such resulted in prejudice on the part of the Complainant

6.6.1 Issues in dispute

6.6.1.1 This part of the complaint emerged during the meeting that was held between the Complainant and the Public Protector on 18 December 2013. Save for making the allegation that the University failed to follow due process regarding moderation and submitting a copy of the Policy on Examinations and Related matters, the Complainant did not submit any evidence to show how the University failed to follow the process of moderation.

6.6.1.2 The University submitted that the final examination has always been subject to an external review process (moderation) and up to the end of 2011, the supplementary examinations were compiled from former examination papers, which had already been externally moderated. After compilation, the supplementary papers would be subjected to an external review process by the quality controller within the Department. The Department, since 2012, also commenced with submitting supplementary examinations for external review process by an external examiner. The process of moderation is done before the examination and in terms of the University’s regulations.
6.6.1.3 The University further submitted that in the process of selecting examination scripts for moderation by an external examiners, the test pack (being 50 students selected at the beginning of the year and comprising the first 20 Afrikaans students in alphabetical order and the first 30 English students in alphabetical order) is used in every assessment during the year to ensure consistent marking and to predict the final result of the exam. For this reason, this test pack is used as the population from which papers to be moderated are selected. The scripts of the first ten students in the test pack (as placed in alphabetical order), are selected for moderation by an external examiner. Due to the above selection process, the Complainant's papers were not part of the moderation process as his surname would be close to the end of the alphabetical list of students, whilst the papers to be moderated were taken from students at the beginning of the alphabetical list.

6.6.1.4 Furthermore, the University submitted copies of the ODT 700 and FRK 700 examination scripts that were moderated in terms of the Examination and Other Related Matters Policy.

6.6.1.5 The Complainant's contention that that University failed to comply with its own policies regarding moderation is not supported by any evidence, whilst on the other side, the University furnished information regarding the required standard in terms of the Policy, and further submitted proof to that effect, in the form of the moderated examination scripts. The University's version in this regard is highly probably, as it is supported by evidence.
6.7 The Complainant's response to the Discretionary Notice issued for him to comment in terms of section 7(9) of the Public Protector Act

6.7.1 On 30 October 2014 the response to the section 7(9) notice was received from the Complainant. However, it must be noted that he did not respond to the substantive issues raised in the discretionary notice.

6.7.2 In his response, he expressed his dissatisfaction with the manner in which my office handled his complaint and specifically referred to the following:

6.7.2.1 Failure to comprehend and address the core issues of the complaint which are denial of adequate assistance by the University to accommodate his medical disability; lack of policies, procedures, rules and regulations; access to information and lack of internal mechanism such as an Ombud, which acts independently to resolve cases like his without the need to go to court or public investigative forums;

6.7.2.2 His view is that naturally the investigation of the Public Protector should have included understanding of the nature of his medical condition and the nature of support required for it like additional or alternative assessment; reasons why the University does not have a student support or student disability policies in place; reasons for undue delay, discrepancy in the final marks and academic performance; unconstitutionally blocking access to information and misuse of PAIA to delay and block access to records;

6.7.2.3 Failure by the Public Protector to comply with its Service Delivery Charter with regard to giving him feedback at least once after six weeks; and

6.7.2.4 Failure to comply with the undertakings made at the meeting of the 18th of December 2014 in relation to establishing whether the University of Cape Town is SAICA accredited and beyond that, to send a request to
UCT by close of business on the 19th of December 2013 for UCT to conduct external moderation;

6.7.2.5 Failure to comply with PAIA with regard to supplying information requested through PAIA;

6.7.2.6 The manner in which his report to the Justice Portfolio Committee was handled;

6.7.2.7 Disregard of the numerous requests to meet with the investigative team and for re-allocation of his case to a different investigator.

6.7.3 Ultimately he requested that I should discontinue the investigation of the case. However, I decided to proceed with the finalisation of the report on the matter. Before the report could be finalised, and at the meeting that was held between the Complainant and the Chief Executive Officer of the Public Protector South Africa on 29 May 2015, it was agreed that the Complainant will be granted another opportunity to respond to the discretionary notice issued to him.

6.7.4 The response from the Complainant was received on 15 June 2015. It must be noted again that the Complainant failed to respond to the substantive issues raised in the discretionary notice. In his response, he stated that he had requested the Public Protector to discontinue the investigation of his complaint and had tabled out the reasoning thereof. He further stated in his response that the Public Protector failed to do the following:

a) To meet its vision statement of acting with integrity, rectifying and redressing any improper or prejudicial conduct
b) Failed to meet its service delivery charter
c) Failed to conduct a proper investigation
d) Failed to execute specific instructions that were required to resolve the case

e) Failed to properly record meetings

f) Denied existence of minutes and recording of meetings

g) Caused severe undue delay

h) Failed to respond to request for internal review

i) Failed to respond to about 20 letters

j) Failed to respond to his request for the case to be transferred to a competent investigating officer

6.7.5 It further transpired from his response that he was not satisfied with the outcomes of the meeting that was held between himself and the Chief Executive Officer of the Public Protector South Africa as he is of the view that the investigators were protected and he was not allowed to raise any detail of his complaint.

6.7.6 He further stated in his response that he can only be able to engage the Public Protector after he has exhausted his complaints before Parliament, the Presidency and the SAHRC, which also directly involves the Public Protector and his rights in the event that the Public protector does not conduct proper investigations and does not follow procedures.

6.7.7 It must be once again noted that save for raising complaints against the Public Protector, the Complainant’s response does not address any of the issues that were raised in the discretionary notice issued to him.

6.7.8 It is my considered view further that the complaints that the Complainant has lodged against my office with the other institutions do not take away the obligations of my office in terms of section 182(1) of the Constitution, read with the Public Protector Act, and thus my decision to proceed to finalise this investigation.
7. MEASURING CONDUCT AGAINST THE RULES

7.1 Whether the Complainant’s examination scripts were unfairly marked by the University

7.1.1 In terms of Rule 12.2.2 of the University’s Rules and Regulations, and for the Complainant to pass his examinations, he was expected to get at least 50% in his examinations. Furthermore, for a degree to be conferred upon the Complainant in terms of section 65B (2) of the Higher Education Act, he would have been expected to complete the work and attain proficiency determined through assessment as required by the senate of the University.

7.1.2 According to the evidence presented, the Complainant’s November 2011 results in FRK 700 and ODT 700 were 42% and 43% respectively. In the special examinations that he wrote in January 2012, he obtained 46% and 45% on FRK 700 and ODT 700 respectively, although he still disputes the marks due to the conflict arising when the results were communicated to him.

7.1.3 Whilst the Complainant holds a view that he was unfairly marked, however, he has not adduced any evidence to prove that he obtained higher marks that what is on record. He is aware of the re-marking process that the University caters for. However, he is against going through the process as he feels it will not be objective. His view of what is objective in this instance would be for the Public Protector to issue a letter to a SAICA accredited University to instruct it to re-mark the Complainant’s examination scripts.

7.1.4 Regulation 14 appears to be the law of general application as it is applicable across the University’s faculties and students. In my view, the only way to disprove the marks currently recorded in the Complainant’s name in relation to the FRK 700 and ODT 700 would be to get the scripts
re-marked. As indicated above, the process entailed in Regulation 14 is applicable across all faculties and and as long as no evidence has been adduced to disprove the marks allocated to the Complainant, it cannot be said that he qualified to write the SAICA Board Examination or qualified for the Honours Degree in Accounting Science in terms of the Higher Education Act.

7.2 Whether the University improperly communicated conflicting marks to the Complainant, thereby prejudicing him from qualifying for SAICA Board Examination

7.2.1 The acceptable standard for the communication of the results to students is as set out in Rule 7.4 of the University’s Policy on Examinations and Related Matters, which states that the heads of department and examiners have a responsibility to submit correct (own emphasis) marks to the Student Administration, which is responsible to indicate the marks correctly on the marks system. One would expect a level of due diligence to be applied in the process.

7.2.2 The University conceded that there was a contradiction in the communication of the final special examination marks relating to ODT 700 to the Complainant. The explanation advanced by the University in this regard is that the Complainant did not follow the correct administrative procedure regarding the special examination as he did not formally apply for the said examination at the Faculty Administration, and a special concession was made for him to write the special examinations on two modules instead of one, as would be the case under normal practice. Due to the fact that the correct procedure was not followed, the Faculty Administration experienced problems in inserting the marks on the University’s system that were obtained by the Complainant in the special examination. This resulted in a situation where his combined main
examination mark and year mark for ODT 700 (43%) was reflected on the system as his final mark instead of the mark he obtained on special examination (45%), which would now be regarded as his final mark. Professor Oberholster relied on the marks reflected herein when he conveyed the final marks to the Complainant as 46% for FRK and 43% for ODT, the latter of which was supposed to be 45%. The University further argues that irrespective of the administrative error, the Complainant was unable to complete any of the modules concerned.

7.2.3 In terms of the SAICA Qualifying Examination Regulations, for a candidate to be eligible to sit for the ICT Part 1 of the qualifying examination, a candidate must have satisfied all the requirements for a CTA or equivalent programme accredited by the IPD Committee. In terms of the University’s EMS Regulations for Postgraduate Programmes, candidates will be awarded the CTA if all four modules are passed at the University during the same examination session. It is common cause that the Complainant sat for the final examination on the four prescribed modules, viz; FRK 700, ODT 700, FBS 700 and BEL 700. It is common cause further that the Complainant wrote and passed supplementary examinations for FSB 700 and BEL 700 within the same examination session. GR 14 of the University’s General Rules makes provision for re-marking of the examination scripts where a student is not satisfied with the outcome of the examination, and the process thereof. There is no evidence that has been adduced to prove that the Complainant invoked the provisions of GR 14 after receiving the outcome of his initial examination.

7.2.4 The University’s policy on examination and other related matters further provides that in the event that a student requires a limited number of modules to complete his or her degree, they may, in terms of the faculty regulations, be admitted to a special examination if he or she sat for the prescribed examination in the preceding year of study. The fact that the
Complainant wrote two modules on special examination in January 2012 is not in dispute. The University argued that in terms of the EMS Faculty rules, a student would qualify for special examination if they had only one module outstanding. However, with regard to the Complainant, the University, and in view of the Complainant's medical condition, made special concessions for him to write both modules on special examinations.

7.2.5 From the evidence that was submitted on behalf of the University, together with our numerous interactions with it, I have no reason to believe that the University acted in bad faith when it communicated the conflicting marks to the Complainant, and in my view, the version adduced by the University in this regard is highly probable.

7.2.6 I must also mention that the fact that the manner of communicating examination results to students is not prescribed in terms of the Rules and Regulations, has a potential of creating hazards that the University would find itself having to defend. As much as in this particular case, the telephonic results corresponded with the results reflected on the examination scripts, but this manner of communication creates a loophole when it comes to the communication of results. Further, the fact that the University's marks system does not permit the capturing of more than one special examination module also requires attention.

7.3 Regarding the allegation of undue delay by the University to respond to the application that was lodged by the Complainant in terms of PAIA and in the event that there was, whether such delay improperly prejudiced the Complainant

7.3.1 The Complainant alleges failure on the part of the University to communicate. The communication relates to, amongst other issues, the Complainant's request for alternative and additional assessment. As per the
information received from the Complainant, by October 2011, he was made aware that there shall not be any additional assessments granted by the University. Further, the Complainant argues that the University delayed to provide him with the information that he requested in his application in terms of PAIA. The evidence adduced reflects that the application was submitted to the University on 5 April 2012. The University's response is dated 4 May 2012, but same was received by the Complainant on 8 May 2012.

7.3.2 Section 25 of PAIA, together with the University's Manual on PAIA state that the turn-around times for the University to decide whether to grant the request and to notify the requester of the decision is 30 days. In the absence of any definition of "days" herein, then Section 4 of the Interpretation Act becomes applicable. The 30 day period for the University to decide and communicate such decision to the Complainant prescribed on the 4th of May 2012. The University has furnished me with a copy of an electronic correspondence from the University's Information Officer communicating its decision and making arrangements for collection of the information on 08 May 2012.

7.3.3 Further, section 29(1) (b) of PAIA states that if a requester has been given a notice in terms of section 25 (1) of PAIA, he or she must, subject to subsections (3) and (9) and section 31, if no access fee is payable, immediately (own emphasis), be given access in the applicable forms referred to in subsection (2) as the requester indicated in the request, and in the language contemplated in section 31.

7.3.4 The question that I had to pronounce on is whether pursuant to the decision made in terms of section 25(1), the Complainant was immediately given access to the documents in the form indicated in his PAIA request.
7.3.5 The courts have not interpreted the word “immediately” as provided for in section 29 (1)(b) of PAIA. In terms of the Oxford Dictionary, “immediately” means “without any delay or lapse of time”. Other sources such as Black’s Law Dictionary provide a more expansive entry, defining “immediately” as meaning “within a reasonable time under the circumstances of a case”. In my view, the touchstone for the interpretation of the time limit envisaged by “immediately” is—reasonableness under the circumstances.

7.3.6 The University was late with three days to provide the information to the Complainant. It must be noted that two of those days fell on a weekend.

7.3.7 In my assessment, the period of time (three days including a weekend) that the University took to physically give the Complainant access to the requested records is not unreasonable in the circumstances.

7.4 Regarding the allegation of failure to provide the Complainant with reasonable accommodation relating to his disability;

7.4.1 The University’s Policy on Examinations and Other Related Matters in paragraph 3.4.3 states that relevant provision must be made to allow extra time for students with disabilities, as well as ensuring a special venue suitable for such students and possibly also an additional invigilator. The Complainant has stated that besides the concessions, he requested alternative or additional assessment. According to the information received from the University, the structure and curriculum content of the Degree the Complainant had chosen does not accommodate the use of sick tests or alternative assessment methods such as oral examinations. Further, SAICA does not allow oral examination in the professional SAICA examination.
7.4.2 The Complainant does not dispute that he applied for concessions in 2011. In fact, he confirmed in his complaint that on 26 October 2011, his request for additional assessment was denied by the then Acting Dean of the EMS Faculty. The University informed our office that a request for concessions was received from the Faculty in October 2011, and was adhered to and implemented accordingly.

7.4.3 Further, despite the fact that the Complainant had failed two modules, he was afforded an opportunity to write both during the January special examination. Further to that, he was offered an opportunity to get his examinations papers assessed by a medical practitioner. However, there is no evidence proving that the Complainant adhered to this offer.

7.5 Regarding the allegation of failure by the University to follow the process of moderation as prescribed by the Examinations and Related Matters Policy. In the event that there was failure, whether such resulted in prejudice on the part of the Complainant

7.5.1 As indicated above, the Complainant has argued failure on the part of the University to follow its own processes, including embarking on the moderation of the examination papers. He argued that the University failed to conduct moderation, the process of which includes sampling of the examination papers by an external examiner. In their response, the University set out the process of moderation and the sampling or selection of students for moderation as per the University's policy on Examinations and Related Matters. They have stated that due to the selection criteria they use, the Complainant's scripts were not amongst the scripts that were selected for moderation.

7.5.2 The University's Policy on Examinations and Other Related Matters in paragraph 2.2 sets out the process of moderation and the selection of an external examiner for moderation. In terms of the policy the head of
department in consultation with the lecturer, nominates the external examiner on the basis of his or her competencies, qualifications and experience. One of the duties of an external moderator is to examine by means of a sample (10% or a minimum of 10 of the total number of examination scripts) the standard of the answer answers and the quality of the evaluation of the scripts.

7.5.3 The University submitted evidence that an external lecturer from the Centre for Accounting at the University of Free State was appointed to moderate the papers. The University further submitted copies of all scripts selected and moderated by the external examiner.

7.5.4 Save for the allegation made by the Complainant that the University did not follow this process, there is no evidence to support this idea.

7.6 Regarding whether the University's conduct, relating to the issue of the Disability Policy, constitutes unfair discrimination on the basis of disability and as listed in terms of Section 9(3) of the Constitution.

7.6.1 The Complainant's further or alternative argument is that the absence of the Student Disability Policy which sets out guidelines on how students with disabilities should be accommodated amounted to unfair discrimination on his part. He believes that he should have at least been entitled to an additional assessment besides the concessions which he received during the examination, albeit he does not state the form of additional assessment he would have preferred.

7.6.2 The University on the other side has argued that, despite the absence of the Policy during the period when the Complainant was a student there, the Disability Unit acted as a mouthpiece in seeing to it that there are guidelines and procedures to be followed in accommodating students with
disabilities. These procedures are done in a manner that enables the students with disabilities to compete on an equal footing with able-bodied students, but within the boundaries of fairness and without compromising the standard of that particular discipline. They have argued that throughout the examination, the Complainant enjoyed concessions which were negotiated with him, and which the able-bodied students did not equally enjoy.

7.6.3 Rule 3.4.3 of the University’s Examinations and Other Related Matters Policy states that relevant provision must be made to allow extra time for students with disabilities, as well as ensuring a special venue suitable for such students and possibly also an additional invigilator. We have further been provided with correspondence from the University’s Disability Unit, addressed to the Dean of the EMS Faculty, requesting concessions on behalf of the Complainant. The University argues that all the concessions above were allowed. This has not been disputed by the Complainant.

7.6.4 Section 9(3) of the Constitution affirms the right to equality and outlaws unfair discrimination on the listed grounds, including unfair discrimination on the basis of disability. The Constitution further states in Section 9 (2) that in order to achieve equality, legislative and other measures must be taken in order to protect or advance persons or categories of persons disadvantaged by unfair discrimination. The state further has a duty to reasonable accommodate disabled people by creating necessary and appropriate modification and adjustments, not causing disproportional or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedom. Both the Constitution and PEPUDA preclude the state from unfairly discriminating against its citizens, particularly, on the ground of disability.
7.6.5 The question then arises whether the University did take the measures referred to in Section 9 of the Constitution, to protect and advance the rights of those with disabilities within the University's community. Moreover, the University had a responsibility to comply with Rule 3.4.3 of the Examinations and Other Related Matters Policy, which gives the University a responsibility of granting concessions to students with disabilities and further ensuring a special examination venue suitable for such students.

7.6.6 The Complainant has argued that the fact that the University does not have a valid policy on student's disability is unfair discrimination and has unduly infringed upon his right to equality. He has argued that the absence thereof impacted negatively on his academic performance, and particularly for the year 2011. The University has conceded to not having the aforesaid policy in place. However, it has argued that in an endeavour to reasonably accommodate students with disabilities, the University has put in place the Disability Unit to address the concerns and raise awareness with relevant faculties with regard to the protection of the rights of the students affected. Through this Unit, students with special needs would get assistance to see to it that their special needs are catered for. However, this is done in a manner that does not impact negatively on the standard of the discipline or degree concerned. In this particular case, the University argued that the Complainant did receive assistance from the Unit whereby the EMS Faculty was informed of the Complainant's disability and concessions requested on his behalf. The EMS Faculty proceeded to grant the concessions as communicated to it by the Disability Unit.

7.6.7 It is common cause that the University has a disability Unit which seeks to address the needs of the people with disabilities within the University's community. It is further common cause that the Policy on Examinations
and Related matters further addresses the needs of the students with disabilities when it comes to their assessments. The question to be asked is whether these, especially the single clause on the policy on Examinations and Related Matters, are enough to address the needs of the students with disabilities.

7.6.8 In the case of *Oortman v St Thomas Aquinas Private School & Another* (supra), the Court decided that the school must take reasonable steps (*own emphasis*) to remove all obstacles to enable Chelsea Oortman to have access to all the classrooms and the toilets allocated to her by using a wheelchair. In the case of *Prinsloo v Van der Linde*, the court emphasized that the right to equality means the right to be treated as equals, which does not always mean the right to receive equal treatment. In this particular case, and in an endeavor to comply with Rule of the University's examinations and Other Related Matters Policy, the Complainant wrote his examination in a separate venue from that where the other able-bodied students were writing. Further, he was awarded extra time to write that the time that was allocated to the able-bodied students.

7.6.9 It is further worth mentioning that despite the absence of any form of evidence to that effect, the Complainant believes that he in fact passed both the initial examination and the special examination. On the same token, he believes that the absence of the Students Disability Policy impacted negatively on his academic performance, specifically for the year 2011. This is despite the fact that neither the University nor our office was placed in possession of any medical evidence to that effect. Furthermore, the argument he advanced at the meeting of the 18th of December 2013 with the Public Protector was that he received an informal opinion that the examination that was set for the special examination was very difficult, and thus believes that the papers should be moderated so that this opinion can
be confirmed. He further mentioned having approached the UCT which expressed its willingness to assist in the moderation or re-marking of the scripts. It is however unclear whether this latter argument still tallies with his initial belief that he indeed passed all the examinations he wrote on these two modules, despite the difficulty. It must be stated that it is not for the Office of the Public Protector to decide whether the Complainant passed his examination or not, but to look into whether due process was followed as tabulated in the University's rules and Regulations.

7.6.10 It is further common cause that the Policy on Examinations and Related matters addresses the needs of the students with special needs when it comes to their assessments. The question to be asked is whether this provision is enough to address the needs of the students with special needs.

8. FINDINGS

My findings are the following:

8.1 Regarding whether the University unfairly marked the Complainant's scripts in November 2011 and January 2012 examinations, I find that:

8.1.1 On the allegation that the University unfairly marked the Complainant's examination scripts I reserve my finding;

8.1.2 As indicated above, the only way to disprove the marks currently recorded in the Complainant's name would be to get the scripts re-marked in terms of Regulation 14 of the University's Rules and Regulations. I could not find any evidence to prove unfairness in the awarding of marks by the University as the process of remarking as laid down in the University's Rules and Regulations was not fully complied with by both parties; and
8.1.3 Without an independent view solicited through the University's Rules and Regulations of re-marking as prescribed in Rule 14 of its Rules and Regulations, I am unable to find that the Complainant's scripts were unfairly marked.

8.2 Regarding whether the University improperly communicated conflicting marks to the Complainant, thereby prejudicing him from qualifying for SAICA Board Examination, I find that:

8.2.1 The allegation that the University improperly communicated conflicting marks to the Complainant, relating to the outcome of his special examinations is substantiated.

8.2.2 Whilst the Complainant was informed telephonically that he had obtained 46% for FRK 700 and 45% for ODT 700, the correspondence that was issued to him by the course coordinator, Professor Oberholster dated 8 February 2012 reflects that he obtained 46% for FRK 700 and 43% for ODT 700.

8.2.3 By issuing the conflicting marks, the University contravened Rule 7.4 of the University's Policy on Examinations and Other Related Matters which states that the Heads of Departments and examiners are responsible for submitting the correct marks to the Student Administration and that it is the responsibility of the latter to indicate the marks correctly on the marks system.

8.2.4 Therefore the conduct of the University relating to the issuing of the conflicting marks amounts to maladministration as envisaged in Section 6(4) of the Public Protector Act and improper conduct as envisaged in Section 182(1) of the Constitution.
8.2.5 However, the allegation that had it not been for the conflicting marks that were issued, the Complainant would have qualified for SAICA Board Examinations has not been substantiated. In fact, there is no evidence that has been adduced to show that he passed all four modules in one examination session as required by the EMS Faculty’s Regulations for Postgraduate Programmes and Regulation 3.2.8 of SAICA Qualifying Examination Regulations. Furthermore, no evidence has been adduced to suggest that the University acted in bad faith in communicating these marks to the Complainant.

8.2.6 Furthermore, it must be noted that the University attempted to rectify the error by inviting the Complainant to make an application for re-marking. When the Complainant did not respond to this invitation, and on its own accord, the University took the papers in dispute for re-marking by other institutions of higher learning.

8.3 Regarding the alleged undue failure on the part of the University to provide the Complainant with reasonable accommodation relating to his disability, I find that:

8.3.1 The allegation that the University unduly failed to accommodate the Complainant’s disability is not substantiated.

8.3.2 In accommodating the Complainant’s disability, the University, through the communication prepared by the University’s disability unit and confirmed with him, granted him extra reading and writing time for his examinations, whilst he was also allowed(offered) to write at a separate venue to the one where his able-bodied counterparts were writing. The concessions that the Complainant received were not applicable to the able-bodied students.
8.3.3 The University therefore complied with Rule 3.4.3 of the University's Policy on Examinations and Other related Matters, which requires the University to allow extra reading and writing time, as well as ensuring a special venue suitable for the students with disabilities.

8.4 Regarding the allegation of undue delay to respond to the Complainant’s application in terms of PAIA and whether such resulted in improper prejudice on the part of the Complainant, I find that:

8.4.1 The allegation that the University unduly delayed to respond to the Complainant's application in terms of PAIA is not substantiated.

8.4.2 The University made its decision and notified the Complainant within the 30-day prescribed period, although the information was furnished to him three days later.

8.4.3 It is my considered view that although section 29(1) (b) of PAIA requires that the information be given to the requester immediately if there is no fee payable, the three days delay by the University to furnish the information cannot, in my view, be construed as undue delay in terms of the Public Protector Act and therefore does not warrant a finding of improper conduct in terms of section 182(1) of the Constitution.

8.5 Regarding the allegation that the University failed to follow the Examination and Related Matters Policy in getting the examination papers moderated, I find that:

8.5.1 The allegation that the University failed to follow the moderation process is not substantiated;

8.5.2 The University presented examination scripts that were moderated in terms of the University's Policy on Examinations and Other Related Matters, and
further confirmed that the Complainant’s papers were not amongst those that were selected for moderation;

8.5.3 Rule 2.2 of the Policy on Examinations and Other Related Matters requires that the external examiner should examine by means of a sample, the standard of the answers and the quality of the evaluation of the scripts;

8.5.4 The fact that the Complainant’s scripts were not amongst the scripts that were moderated does not automatically mean that the University did not follow the moderation process as set out in terms of the policy; and

8.6 Regarding whether the absence of a Students Disability Policy constitutes unfair discrimination on the basis of disability as listed in section 9 of the Constitution, I find that:

8.6.1 The allegation that the University’s failure to put in place a Students Disability Policy constitutes unfair discrimination is substantiated.

8.6.2 The University confirmed that at the time when the Complainant was a student at the University, it did not have a policy regarding the rights of people or students with disabilities in place.

8.6.3 By failing to put a disability policy in place the University violated the provisions of section 6(b) of PEPUDA which requires the University 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.

8.6.4 The South African Human Rights Commission has extensively dealt and made its recommendations to the University regarding failure to put in a
Students Disability Policy⁹ and I therefore agree with the Commission’s outcome.

8.6.5 As a remedy, the University has since passed the Students Disability Policy in October 2013, in fulfillment of its obligation under section 6(b) of PEPUDA and section 9(3) of the Constitution.

9. REMEDIAL ACTION

9.1. The appropriate remedial action I am taking in pursuance of section 182(1)(c) of the Constitution, with the view of placing the Complainant as close as possible to where he would have been had the improper conduct or maladministration not occurred is the following:

9.1.1 In order for the University’s Regulations on re-marking to apply, the Complainant must, within fourteen days from date of receipt of this report, apply to the University for re-marking of the examination scripts in question and in line with General Regulation 14 of the University’s Rules and Regulations. Considering that the University has indicated its willingness to embark on the process at no cost to the Complainant, he must be exempted from paying the prescribed fee for re-marking;

9.1.2 The University must within thirty (30) days from date of receipt of that application, proceed to appoint an independent external examiner as per GR 14 of the University’s General Regulations. The Dean of Faculty should take over the process entailed in Regulation 14. Considering that on its own accord, the University approached the University of Orange Free State and UNISA, the appointment of the external examiners must be done to the exclusion of these two Universities;

9.1.3 The Vice Chancellor of the University must within fourteen (14) days from date of receipt of this report, tender a written apology on behalf of the University to the Complainant for the uncertainty that was caused by the issuing of conflicting examination marks to him.

10 MONITORING

10.1 The University must, within 14 days from the expiry of the thirty (30) days' period, submit a report to the Public Protector on the outcome of the re-marking; and

10.2 The Public Protector will monitor the progress on the matter until its finality and may from time to time require the University to report on the matter as the Public Protector deems most expedient.

ADV: T MADONSELA
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 31/03/2016

Assisted by: Ms P Mogaladi, Adv. Raubenheimer and Ms Z. Zenani