

5. FIRST NOTICE

How to respond to a first notice

We have covered the definition of an administrative action under the AJA – the key to understanding the Act – and we have an overview understanding of how administrators should be using the Act. Now we are going to look in some detail at how you can use the AJA to protect people’s rights and legitimate interests, beginning with the **first notice**.

1. A preliminary decision

The process begins when a person applies for something (e.g. a building permit). The administrator’s job is to measure the facts of the matter against the conditions in their empowering provision and come to a **preliminary decision**. (It may also be that the administrator initiates the action, like in the Ntombela case described in the previous chapter – the same process applies). One of two possible options faces them:

- a. Either:
 - The person has complied with all the procedures;
 - The person meets the conditions in the empowering provision;
 - The person is clearly entitled to what they are applying for; and
 - No-one else’s rights could be affected by the decision...

In which case the administrator can decide in favour of the person and send them a notice that the **decision is in their favour**. This notice should give the person any other information they might require (such as when they may begin construction).

- b. Or, the administrator may want to make a **decision which goes against someone’s rights** (including the rights of the applicant *and/or* the rights of third parties). A notice must now be sent to that person or these people **before the decision is taken**.



BY THE END OF THIS SECTION

You will:

- Understand the importance of a first notice – i.e. the administrator is intending to take a decision against you;
- Know when the administrator has followed procedure in writing the notice;
- Know how to recognise and well written, and poorly written notice;
- Be in a position to challenge the administrator if they have not followed procedure; and
- Know how to write a response to a first notice if you wish to dispute the administrator’s intended decision.

2. The first notice

Section 3 of the AJA stipulates that, **before taking a final decision** which may adversely affect someone's rights, the administrator must give a person whose rights will be affected:

- a) **Adequate notice** of the nature and purpose of the proposed administrative action;
- b) A reasonable **opportunity to make representations**;
- c) A **clear statement** of the administrative action;
- d) Adequate **notice of the right to request reasons**; and
- e) Adequate notice of any **right to review or internal appeal**, where applicable.

In practice, an administrator can only do (c), (d) and (e) **after** they have made a final decision. And, they can only make a final decision **after** they have given the person notice of the decision they are planning to take and a chance to make representations. As a result, the only way for these criteria to be met, is for two notices to be sent:

- A **first notice** to cover the requirements in (a) and (b); and
- A **second notice** to cover the requirements in (c), (d) and (e).

a. **Adequate notice of the nature and purpose of the action**

'Adequate notice' means that the person must be given **enough time to respond to the planned administrative action**. The person also needs to have enough information to be able to work out how to respond to the proposed action. They need to know the **nature** of the action (what is being proposed) and the **purpose** (why the action is being proposed).

b. **A reasonable opportunity to make representations**

The length of time to allow a person to make representations will be different in different circumstances. Sometimes, this will be set out in the administrator's enabling statute or in their

guidelines. If not, the person should be allowed at least **enough time to raise objections, provide new information, or answer charges**.

A 'reasonable opportunity to make representations' can sometimes mean that a person affected by the administrative action must be given a **hearing** where that person can make a verbal input. At other times, it may only mean that a person must be allowed to submit **written representations** to the administrator and that they must read and think about them.

To meet these requirements, the administrator's notice should include:

- Adequate notice of the nature of the decision:
 - **Who** will take the decision?
 - **What** decision will be taken?
 - **When** will the decision be taken?
 - **Where** will the decision be taken?
 - **How** is the decision going to be taken?
- Adequate notice of the purpose of the decision:
 - **Why** is the decision going to be taken?
- Reasonable opportunity to make representations:
 - **By when** should representations be made (the **deadline**)?
 - **How** should they be made?
 - **To whom** should they be addressed?
 - **Where** should they be sent?

The letter should say what the **deadline** for making representations will be. If, by this date, representations have not been received, **they are entitled to proceed with the matter, make a decision and advise the person of what has been done**.

An example of what this first notice should look like is on the following page.

A FIRST NOTICE

The Administrator's address, telephone number, fax number and email (usually be on their letterhead).

Department of Social Development
Private Bag X 61
Johannesburg
0001
Tel: 011-322-7558
Fax: 011-322-7550
Email: abrooks@dspd.gov.gau.za

Date
Reference number
Mailing instruction
Applicants name and address
Greeting / salutation
Subject

1 September 2002
Reference: 12345/01
CERTIFIED MAIL
Ms A Dube
PO Box 123
Diepkloof, 0123
Dear Ms Dube
RE: Your application dated 20/08/2002

The problem
The nature of the decision to be taken
The purpose of the decision

You have applied for an old age pension.
Unfortunately, it seems that you may not be a South African citizen.
The document you sent us to prove your age is a Lesotho birth certificate. As a result, I may not be able to award you a pension.
The reason why I would not be able to award you a pension is that Section 3 of the Social Assistance Act says that only South African citizens qualify for old age pensions from the state. If you are a Lesotho citizen, you will not qualify.

REQUEST FOR FURTHER INFORMATION

If you have a document that shows that you are a South African citizen, please send it to me at the above address as soon as you can. It will probably be easiest for you to take a photocopy of this document (as well as the original document) to a police station or magistrates' court in your area. These people will certify the document for you. Once you have a certified copy of such a document, please send it to me at the above address.

Reasonable opportunity to make representations

If you do not agree with this decision, you may write to me at the above address explaining why you do not agree. Please make sure that you do so before 30 September 2002. If I have not heard from you by then, I will have to turn down your application.

Complimentary closing
Signature

Sincerely

A Brooks

Administrator's name, job title and department
Administrator's initials

DIRECTOR GENERAL, DEPT OF SOCIAL DEVELOPMENT
ab

RESPONSE TO A FIRST NOTICE

PO Box 123
Diepkloof, 0123
Tel: 073-4452367

15 September 2002

Reference: 12345/01

CERTIFIED MAIL

Mr. A Brooks
Department of Social Development
Private Bag X 61
Johannesburg
0001

Dear Mr. Brooks

RE: Your notice about my pension application (1/9/2002)

You have indicated your intention to reject my pension application based on your understanding that I am not a South African citizen.

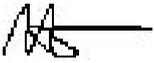
I was born in Maseru, Lesotho, but am married to a South African, Mr. P. Dube of Diepkloof, Johannesburg, and have been a South African citizen since 1984.

Unfortunately, when I made my initial application I had left my South African identity book in Maseru after visiting relatives. I have now made a special trip back there at great cost to go and fetch the document.

A copy of the ID book is attached to this letter. It has been certified at the Diepkloof police station.

I hope that this now satisfies your requirements and there will be no further delays in issuing my pension.

Sincerely



Mrs. P. Dube

Your address, telephone number, (and fax number and email, if you have them).

Date

Reference number

Mailing instruction

Administrator's name, department and address.

Greeting / salutation

Subject

The problem

Your response

Reasons for the missing documentation

Information about the attached documentation – in case it becomes detached

Complimentary closing

Signature

Your name

3. Responding to a first notice

As an NGO, you will often be in a situation where someone comes to you for assistance after receiving a notice letter from an administrator.

You should take the following steps to respond to that first notice:

1. First, **check to see if the notice is in fact a first notice**, and not a second notice – i.e. has the AJA been complied with. If the letter is actually a second notice (i.e. notice of a final decision), and the person never received a first notice, write to the administrator asking why the AJA has not been followed, and requesting for a first notice to be issued and procedure to be followed.

In doing so you can help to play an important role in ensuring the implementation of the AJA.

2. If the letter is a first notice (notice of an intention to take a decision), check that there are instructions on how to make representations. **Write a letter of representation** on behalf of your client, or assist your client to write one themselves. It is not essential that this response be sent by certified mail. It can be:
 - sent by ordinary mail;
 - faxed;
 - emailed; or
 - if you cannot write you may appear in person before the administrator to present your response.
3. **If the deadline has already expired**, and it could be considered an unreasonably short deadline from the time the letter was received, then write a letter to protest the unreasonable deadline, and **include your representations** to challenge the administrator's intended decision.

a. Empowering provisions

If your client is trying to secure a pensions – she is over 60, and earns less than R500 per month as a domestic worker – but is in fact not a South African citizen, nothing you can do or say to the administrator will secure her a pension.



ASSISTANCE

An important role of NGOs, advice offices and para-legals is to assist members of the public in drawing up written responses to notices and requests for reasons.



WRITTEN RECORDS

When you are dealing with a problem under the AJA, use all the methods available to you. Phone the administrator to discuss the problem, and ask a lawyer you know to give you legal advice on what to do.

But it is very important that you keep a written record of absolutely everything that you do. If the administrator says anything to you ask them for it in writing, and keep copies of all letters, faxes and emails which you send to the administration on behalf of your client.

This is why we have raised the issue of empowering provisions. The administrator in this case will have a very specific mandate – they can only issue a pension to a South African citizen (a **mandatory provision**). It is your job as an NGO to know the law if you are going to assist someone, and to know where you have room to manoeuvre – i.e. where the administrator has a **discretionary provision** that allows them to use their judgement on a particular matter.

Try not to see yourself in an adversarial relationship with the administrator unless absolutely necessary – work with them to get the problem solved. This may include asking them for advice about the law and regulations, and asking them what they can and cannot do under their empowering provisions.

On the following page there is an exercise for you to practice responding to a first notice.

EXERCISE 4 – RESPONDING TO A FIRST NOTICE

Below, there is a letter from the Orlando West Local Council about an intended decision to withdraw Ms Mchunu's restaurant license. You are a para-legal at the Orlando West advice office, and have been approached by Ms Mchunu who feels she has been dealt with unfairly and wishes to challenge the decision of the Local Council. Listen to her reasons, and then write a response to the notice in the space provided.

The Administrator's address, telephone number, fax number and email (usually be on their letterhead).

Orlando West Local Council Private Bag X 61
Soweto
2045
Tel: 011-377-8790
Fax: 011-377-8700
Email: amkhize@dspd.gov.gau.za

Date

1 September 2002

Reference number

Reference: 12345/02

Mailing instruction

CERTIFIED MAIL

Applicants name and address

Ms Mchunu
PO Box 978
Soweto, 0123

Greeting / salutation

Dear Ms Mchunu

Subject

RE: Withdrawal of your licence

The problem and the nature of the decision the administrator intends to take

You have a licence to operate a restaurant in Orlando West.

It has come to our attention that you are serving liquor at your restaurant. In fact, it seems that you were recently arrested by the police for doing so. As you know, your licence to run a restaurant does not allow you to serve liquor. As a result, you are acting illegally and we are therefore considering withdrawing your licence.

Reasonable opportunity to make representations

If you do not agree with this, you may write to me at the above address explaining why you do not agree. **Please make sure that you do so before 30 September 2002.** If I have not heard from you by then, I will have to withdraw your licence.

Complimentary closing

Sincerely

Signature



Administrator's name, job title and department

A Mkhize

Administrator's initials

Orlando West Local Council
AM

