EVALUATING THE INFORMATION BILLS

A briefing paper on the Protection of Information Bill

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ABOUT THIS PAPER

1. The Protection of Information Bill currently before Parliament has provoked unprecedented controversy and alarm. In June 2011, the Nelson Mandela Foundation ("NMF") convened a focus group with the intention of bringing together role-players from Parliament, government and civil society to encourage conversation and dialogue about the Bill. It is intended that the focus group meetings should be followed by a public event. The Foundation's intervention is in accordance with its mission to convene dialogue around critical social issues.

2. This paper was commissioned by the Foundation to provide a background to the Bill. A draft of the paper was discussed at the first meeting of the focus group held on 8 June 2011.

3. The first draft of the paper was intended to brief focus group participants on the current status of and on the background to the Protection of Information Bill. It also considered a related legislative development that has received little attention, particularly when compared to the heat that the controversy over the Protection of Information Bill has generated. This is the Protection of *Personal* Information Bill also

under consideration in Parliament. After the meeting of the group it was decided that the paper should be revised in the light of the discussions and made available on the Foundation's website.

4. The paper aims to situate the Bills in context so as to enable a properly informed discussion of their content. The context discussed here includes the legislative history of the Bills and their legal context, in particular the interaction between the two Bills and their interaction with the Promotion of Access to Information Act 2 of 2000 (the "PAIA"). In brief, the following are the main themes of the paper:

4.1. *Background to the State Information Bill*. Contrary to popular belief, the Bill is not an offshoot of the ANC's Polokwane resolutions on the media and does not contain provisions for a media tribunal. Its origins are far more anodyne and bureaucratic but a proper understanding of them is essential. The Bill is the result of a law-reform process commenced in the mid-2000s that had the principal aim of replacing the existing state information security law. An information security law regulates the secure processing of valuable state information. It is not principally concerned with "state secrets" (often called "official secrets") in the narrow sense. The old law is unconstitutional and has to be replaced. It is over-inclusive and inconsistent with the right to freedom of information and with the constitutional principles of governmental openness and transparency. It is also burdensome, expensive and out of date.

4.2. *Fundamental design assumptions*. Because the old law, for better or worse, traversed a far wider scope than is conventionally covered by an official secrets law, the State Information Bill was drafted with the intention of regulating the same scope of government information. It did so by identifying a wide range of state information that was considered worthy of secure treatment. "Secure" does not necessarily mean that the information must be kept secret, but means that the information has to be looked after and not,

without good reason, disclosed. Someone seeking disclosure of such information would do so via the request mechanism of the Promotion of Access to Information Act. The whole of the Bill was subject to the PAIA. Even information that had been classified "top secret" could be requested in terms of the PAIA and had to be disclosed if the PAIA required it.

4.3. *The relevance of the Protection of Personal Information Bill.* Because the State Information Bill is subject to the PAIA, this makes the concurrent legislative process concerning the Protection of Personal Information Bill highly relevant. The Personal Information Bill proposes a number of consequential amendments to the PAIA, including amendments to its dispute-resolution process. Principally, what is entailed is the creation of an independent authority – the Information Regulator -- with oversight and dispute-resolution powers over the Personal Information Bill, the PAIA and (indirectly) the State Information Bill.

4.4. *The current amendments to the State Information Bill are at odds with its fundamental design.* The re-introduction of the Bill in 2010, at a time when relations between the government on the one hand and the press and civil society on the other were at a low point, has occasioned considerable suspicion about its purpose. In such an atmosphere, the Bill was bound to be controversial. First, it is a legislative measure of considerable breadth (regulating information security across the whole spectrum of government) and depth (intending to regulate the secure processing of valuable government information, widely defined). Second, it is a Bill emanating from the state security sector and takes the form of an official secrets law with the attendant measures of classification and the criminalisation of espionage. The conclusion drawn by the Bill's opponents was therefore inevitable: that the Bill was intended to make most of the state's information an official secret and to criminalise the possession of such secrets. This would shut

down the press, much of civil society and, for good measure, even academic research.

4.5. The government's reaction to this criticism has been to make far-reaching amendments to the Bill. These entail carving off the information-security aspects of the Bill (principally its chapter 5) and leaving behind a more or less conventional official secrets law. Though this has remedied some of the Bill's defects, it is unclear however whether this sort of emergency surgery will result in a workable law. The Bill, as the paper shows, was simply not designed this way.

4.6. A related question is raised by the paper: what becomes of the deleted parts of the Bill? It is certainly desirable, indeed necessary, to have some form of regulation of state information security. The intended repeal of the old information law with nothing to replace it will leave much state information (outside national security information) unregulated, a legal lacuna.

A NOTE ON THE BILLS AND THEIR MODE OF CITATION

5. This paper is concerned with two Bills currently before Parliament. In both cases, the committee process of consideration of the two Bills is currently under way and has already resulted in considerable changes to the Bills when compared with the versions that were first introduced. The effect is that both Bills are a moving target as far as their analysis and the compilation of this document has been concerned. We have consulted the following draft documents which are the most recent publicly available versions that we have been able to obtain. Readers should note that these may very well be replaced by subsequent drafts and that the final versions of the laws may differ in important details from the versions that are discussed here.

5.1. The Protection of Personal Information Bill Working Draft 4 (24 February 2011) ("Personal Information Bill").

5.2. The Protection of Information Bill, working document 7, 1 June 2011 ("State Information Bill", "Working draft"[1]).

6. As detailed below, the Protection of Information Bill was first introduced in Parliament in 2008, then withdrawn and reintroduced in 2010. There are significant differences between these two versions of the Bill. The Bills are cited as follows:

6.1. The Protection of Information Bill 28 of 2008 ("2008 Bill");

6.2. The Protection of Information Bill 6 of 2010 ("2010 Bill").

[1] At its meeting of 1 April 2011 the Ad Hoc Committee on the Protection of Information Bill recommended that the Bill be renamed the "Protection of State Information Bill". This is a good idea; the title more accurately captures the principal concern of the Bill and helps to prevent it being confused with the Personal Information Bill. The change is not however reflected in the most recent working draft of the Bill.

ABOUT THE NMF'S INFORMATION BILLS PROJECT

7. The Protection of Information Bill is an important legislative reform effort that has been in progress since 2006-7 when a drafting team led by the Ministry of Intelligence, with representatives from the departments of Defence and Justice, the SAPS and the SANDF set about the task of overhauling South Africa's existing state information law, a legal regime that dates from the 1980s. The drafting task team was chaired by the Legal Advisor to the Minister of Intelligence and included three lawyers or legal academics with human rights background as well as numerous officials from the security sector. This drafting committee engaged in a relatively limited process of consultation. As former Intelligence Minister Kasrils has stated: "Prior to the submission of the Bill to Parliament in 2008 my technical drafting committee obtained extensive inputs from public sector departments and legal experts. They did not however have an opportunity to sit down with civil society experts."[2]

8. Among its other aims, the new law was principally intended to replace the old information-security regime with a new-era information security law that is constitutionally compliant. The result of this drafting process was the Protection of Information Bill, introduced in Parliament as Bill 28 of 2008.

9. The Nelson Mandela Foundation ("NMF") has followed and provided input on this law-reform project since its inception. It has done so from the perspective that its mission requires it to take an interest in legislation governing the management and provision of access to archival records.

10. In a joint submission to Parliament on Bill 28, the NMF and the South African History Archive set out from the premise that reform of the state information security law was both necessary and desirable. The organizations accordingly endorsed "this legislative initiative to bring in line the legislative framework around protection and classification

[2] R Kasrils 'Defend Democracy; Don't Gag It' *Pretoria News* 20 October 2010.

of certain information and related access considerations with South Africa's constitutional commitments to open, transparent and accountable governance".[3]

11. This remains the viewpoint of the NMF. The reform of South Africa's antiquated and paranoid information-security law is a necessity. This entails designing a legal framework to regulate the identification and processing of state information that merits protection against destruction, amendment and disclosure. This framework must be consonant with the Constitution, in particular the right to freedom of information as it is given effect to by the Promotion of Access to Information Act 2 of 2000 ("PAIA"). It must, in addition, be aligned with an important contemporaneous legislative development. This is the Protection of *Personal* Information Bill, currently before Parliament. The interaction of the two Bills with each other, and with the PAIA, is an important consideration. The NMF's concern is that it is a consideration that has been neglected in the current public debate on the Bills, and particularly the reaction to the State Information Bill. The purpose of the Information Bills Project is therefore to seek to analyse and explore the issue, with a view to making a properly informed contribution to the public debate on both Bills in the forthcoming months.

THE STATE INFORMATION BILL: A LEGISLATIVE HISTORY

Origins and objects of the Bill

12. The 2008 draft of the Protection of Information Bill had as its principal aim the repeal and replacement of the existing state information classification law. It therefore provided, in clause 56 for the repeal in its entirety of the Protection of Information Act 84 of 1982. This Act is currently South Africa's official secrets legislation. A tenacious survivor of the old order, it creates broad and absolute prohibitions on the disclosure of information the secrecy of which "[the discloser] knows or reasonably should know

[3] Submission on Behalf of the South African History Archive and the Nelson Mandela Foundation on the Protection of Information Bill (March 2008) to the Ad hoc Committee on Intelligence Legislation; n.p.. Available at http://pmg.org.za

to be required by the security or the other interests of the Republic".[4] There is also a prohibition on the receipt of information in contravention of the Act.[5]

13. The detailed regulation of the process of classification of information is not found in the Act but rather in a document known as the MISS – the Minimum Information Security Standards (1996). The legal status of the MISS is not entirely clear. It is not delegated legislation, but is instead a Cabinet document setting out the "national information security policy"; elsewhere it describes itself as "an official government policy document on information security".[6] The policy applies to "all institutions who handle sensitive/classified material of the Republic".[7]

14. According to the MISS all "matters requiring the application of [information] security measures" to prevent disclosure must be classified in one of the following categories: "restricted", "confidential", "secret" or "top secret".[8] A fifth classification, "personnel confidential", is not a security classification but documents with this classification are handled in the same way as "restricted" documents.[9] The MISS was never intended to provide long-term national security information policy for the nation and is severely

[4] Section 4(1)(b)(iv) of the Protection of Information Act. The maximum penalties are a fine of R10 000 and/or imprisonment of ten years for disclosure other than to a 'foreign State or hostile organization'. For disclosure to such a state or organization the maximum penalty is 20 years imprisonment. Section 4(1) read with s 2.

[5] Section 4(2).

[6] See Jonathan Klaaren "National Information Insecurity: Constitutional Issues Regarding the Protection and Disclosure of Information by Public Officials" (2002) 119 *SALJ* 721.

[7] MISS "Preface". This means, presumably, public bodies and any private body contracted to handle such information (see Klaaren (above) 724). It does not apply to the Defence Force, which has a separate information security regime (ibid). Note the criterion of "sensitive" information. The MISS is a guideline for the secure treatment not only of state security information in the classic sense of the term (ie, "state secrets") but also a far wider category of records.

[8] Chapter 2, para 3.1.

[9] Chapter 2, para 25.

limited by the unconstitutionality of its empowering legislation, the 1982 Protection of Information Act.[10]

15. Another principal object of the State Information Bill was to reconcile the necessity for a classification and information security regime with the constitutional principles of transparency and accountability in governance, as well as with individual rights. In regard to the latter, the Bill declared that it was one of its objects to "harmonise the implementation of this Act with the Promotion of Access to Information Act, 2000". It gave effect to this object by providing in essence that the Bill was subject to the PAIA:

> ***Request for classified information in terms of Promotion of Access to Information Act***
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> **28.**(1)[11] A request for access to a classified record that is made in terms of the Promotion of Access to Information Act must be dealt with in terms of that Act.
>
> (2) A head of an organ of state considering a request for a record which contains classified information must consider the classification and may declassify such information.
>
> (3) If the head of an organ of state decides to grant access to the requested record then he or she must declassify the classified information before releasing the information.
>
> (4) If the refusal to grant access to a classified record is taken on appeal in terms of the Promotion of Access to Information Act, 2000, the relevant appeal authority must consider the classification and may declassify such information.

16. As drafted, the Bill intended to put into law a government duty to process important information in a secure manner that went far beyond the conventionally narrow protection of national security information. In this sense, the Bill was understood as a

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[10] Klaaren "Well Kept Secrets", forthcoming in *South African Law Journal*. Though the MISS is not delegated legislation any attempt to enforce it would have to rely on the prohibition in section 4 of the Protection of Information Act.

[11] Renumbered clause 28 in the 2010 Bill.

statutory mirror of the PAIA, imposing general duties on government to secure information that was identified by the PAIA as meriting protection against disclosure.[12] But the PAIA only stipulates rules for information processing by government *after receipt of a request* made in terms of the Act. The Information Bill was therefore intended to be an information-processing law: to provide general rules for the proper treatment and non-disclosure of important (the Bill used the term "sensitive") government information, consistent with the PAIA.[13]

17. The other objects of the Bill were to effect important administrative reforms which would reduce the burden imposed by the continued use of a paranoid and defensive state information security regime, a regime that had, moreover, been developed for a paper era. As the Explanatory Notes to the 2008 Bill stated: "[t]he aim of the current reforms is to significantly reduce the volume of information classified but at the same time to strengthen the protection of state information that truly requires protection. A comprehensive statutory foundation for the classification and declassification of information is likely to result in a more stable and cost-effective set of policies and a more consistent application of rules and procedures."[14]

18. The Ministry also noted that there was no statutory crime of espionage and only a weak regime of common-law criminalization (due in part to constraints placed on such

[12] In relation to records in the hands of public bodies, the PAIA requires non-disclosure of records that have been requested in terms of the Act that contain: the personal information of third parties; SARS records; third-party commercial information; confidential information; information posing a threat to the safety and security of individuals and property; certain law enforcement information; documents subject to privilege; defence and security information; certain information pertaining to the economic interests, financial welfare and commercial activities of public bodies; sensitive research information and internal discussion documents. (Sections 34 to 42 of the PAIA.) But the PAIA is freedom of information legislation; it is not information-processing legislation. This means that, unless a request has been made for such information, the PAIA does not impose obligations to treat the information securely, to prevent it from being destroyed or lost. Unless triggered by a request, there is no obligation not to disclose or even disseminate records containing information subject to mandatory refusal.

[13] The addition of a new clause 11(g) in the 2010 version of the Bill – subjecting "all matters that are subject to mandatory protection in terms of sections 34 to 42 of the Promotion of Access to Information Act, whether in classified form or not" to the Bill – was therefore entirely consistent with this understanding; though the addition appeared to dramatically increase the scope of the Bill.

[14] 2008 Explanatory Notes, paras 8-9.

criminalization by courts during the operation of the apartheid regime) and thus the Bill has the purpose of providing for an appropriate statutory scheme of criminal offences and penalties.

Introduction of the 2008 Bill

19. The 2008 version of the Bill met with a mixed reaction from the handful of organisations that took an interest in it and that made submissions to Parliament. The reaction could be summarised as "yes …but"; the necessity for reform of the existing state information law was endorsed as were the broad parameters of the Bill, but the detailed provisions of the Bill were criticised. In particular, media and freedom of expression advocates expressed concern over the absence of a public-interest defence to the crime, created by the Bill, of disclosure of classified information and the vague and wide criteria mandating classification.[15]

20. In June 2008, the Ministry issued a set of explanatory notes on the Bill, responding in particular to civil society criticisms of the Bill. These explanatory notes mooted significant adjustments in the Bill including the inclusion of an explicit public-interest defence and the establishment of an independent Information Protection Oversight body.[16]

21. The 2008 Bill, one of three pieces of intelligence-related legislation considered by an ad hoc Parliamentary Committee on Intelligence Legislation, was withdrawn towards the end of 2008 after the Committee had voiced serious difficulties with aspects of it.[17] Whatever the reasons behind the withdrawal, tumultuous political events were

[15] 'Deluge of protest over "national interest" in secrets bill' *Business Day* 30 July 2008.

[16] Explanatory Notes, para 117.3-117.4: "As an implicit public interest defence can be construed from the principles that underpin the Bill, and since it cannot be in the national interest to penalize those conducting genuine investigations into illegality, it makes sense to provide an explicit exclusion for acts that further the public interest. The following formulation of a public interest exemption is proposed: "Notwithstanding any other provision in this Act, any act which constitutes a genuine and bona fide act in furtherance or promotion of the public interest shall not constitute an offence in terms of sections 45, 50 and 51 and section 49 to the extent that section 49 applies to sections 45, 50 and 51 of this Act."

[17] 'Time-pressed MPs shelve secrecy legislation' *Business Day* 16 October 2008.

to follow. The withdrawal of the Bill coincided with the resignation of President Mbeki, the interim Presidency of Kgalema Molanthe, the general election and subsequent election of Jacob Zuma as President. With these events came the replacement of Ronnie Kasrils, the initiator of the 2008 Bill, as Minister of Intelligence Services.

22. With the Ministry of Intelligence, renamed the Ministry of State Security and under the new political leadership of Minister Siyabonga Cwele, a revised version of the Bill was introduced into a newly-elected Parliament as the Protection of Information Bill 6 of 2010.

Bill reintroduced in 2010

23. The 2010 version of the Bill, which differed in important details from its predecessor,[18] attracted and continues to attract unprecedented criticism. The same organisations that had opposed parts of the 2008 Bill renewed their objections to the new version. These included the perspective from media institutions that the Bill if enacted would inhibit media freedom.[19] But these criticisms, which had received only minor public attention in 2008, soon generated a level of public concern and outrage that no other legislative development had merited since the democratic transition. A scan of newspaper headlines from 2010 give a sense of the tenor of this reaction: "Assault on democracy", "Zimbabwe-like", "War on the press", "Censorship reminiscent of the apartheid era". The widespread apprehension that the Bill was part of a concerted

[18] See annexure A, a comparative table of the differences between the two versions of the Bill. The most significant changes are the deletion of the automatic declassification provisions in clause 25 and 26 of the 2008 Bill; the introduction of severe minimum sentences to the already stiff penalties provided for in the criminal penalties provisions; the reformulation of the criminal penalties as turning on the fact of classification of a record rather than on its intrinsic classifiability (see, further [30.6] below); the introduction of a new offence of disclosure of a "state security matter"; the introduction of a new general principle of state information to the effect that all the other principles are subordinate "to the security of the Republic, in that the national security of the Republic may not be compromised"; the removal of the 2008 requirement that each classification decision have a written justification.

[19] "Revived media 'gag' bill faces criticism" *Business Day* 1 July 2010.

government assault on media freedom is encapsulated by an opinion piece by Andre Brink, published in the *New York Times*:

> *"South Africa faces its starkest challenge yet in the form of two pieces of anti-press legislation that would make even the most authoritarian government proud. One, cynically named the Protection of Information bill, would give the government excessively broad powers to classify information in the 'national interest'; the other, which would create a media appeals tribunal" to regulate the printed and electronic press, is written in language chillingly reminiscent of that used by the apartheid regime to defend censorship in the 70s."*[20]

24. The media appeals "legislation" mentioned by Brink was a reference to the calls for the establishment of an alternative to the press self-regulation mechanisms, calls stemming from a resolution of the ANC's 2007 Polokwane conference. Since its passage, the 2007 resolution on the media had languished somewhat, with suggestions made from time to time that the ANC had reconsidered and softened its position. However in July 2010, a speech by ANC Secretary-General Gwede Mantashe indicated that the idea of a media tribunal was back on the agenda.[21] The coincidence that the 2010 version of the State Information Bill was reintroduced in Parliament at more or less the same time saw these two, quite unrelated, issues conflated in the eyes of many: the Bill and the tribunal proposals were twin "censorship measures", as Brink put it.[22] The conflation is exemplified by a cartoon by Zapiro published in the *Sunday Times* of 1 August 2010. The cartoon shows a distant figure wearing a banner "Press Freedom" menaced by two rifle-bearing assassins, one wearing a jacket saying "Protection of Information Bill" and the other "Media Tribunal".[23]

25. Setting the confusion with the media tribunal proposals aside, the civil society reaction to the details of the Bill could be characterised as principally concerned with

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[20] Andre Brink "A long way from Mandela's kitchen" *New York Times* 11 September 2010.

[21] "Media 'resents' SA's successes" *Business Day* 7 July 2010.

[22] Some commentators, who evidently felt that reading the Information Bill before opining on it was an unnecessary inconvenience, went as far as to declare that the Bill actually contained provisions establishing a media tribunal. See "Contralesa supports new Bills" *Daily Dispatch online* 1 September 2010.

[23] Available at http://www.zapiro.com/cartoon/126721-100801st

the broad scope of the Bill. The Bill was certainly broad in scope, particularly if compared to official secrets laws in other jurisdiction. But as we have seen, its scope was principally a product of its legislative history and its intention not only to provide for the protection of state secrets in the narrow sense but also to provide for a comprehensive regime of government confidentiality that would replace the existing regime. The Bill was a state information processing law in the broad sense, in addition to being an official secrets law. But the ambitions of the Bill were difficult to reconcile with its provenance in the intelligence ministry and with its overall categorisation as state security legislation, providing as it did for a classification regime and for the prohibition of offences such as espionage and sabotage. Put another way, an official secrets law seemed a disconcertingly odd place to find provisions relating to the secure treatment of valuable information and general prohibitions on disclosure of sensitive information. The broad scope of the Bill, when combined with widespread suspicion about government's motives in introducing it, made plausible the frightening prospect that any piece of government information, no matter how innocuous, could be treated as if it were the most closely guarded secret of, for instance, nuclear weapon technology or the vulnerabilities of the National Defence Force. It also resulted in an intensely criticized aspect of the Bill, the inclusion of parastatal commercial information within the scope of the Bill, again raising the prospect that such entities would be empowered to refuse to share any information (and to hide corrupt practices) rather than engaging in more market-friendly information disclosure policies. Moreover, the imposition of the Bill's information processing duties and powers across the whole reach of government raised the prospect that diligent (or cynical) government officials from the Department of Defence down to rural municipalities would soon be classifying every document in sight with the remotest connection to the "national interest".

26. The government initially defended the Bill against its opponents, whom it derided as "hysterical".[24] Despite this, the degree of condemnation of the Bill and the mobilisation of a wide range of civil society organisations against it, led the Minister of State Security to intervene. In a public statement released after briefing the Parliamentary committee at its meeting of 22 October 2010, Minister Cwele promised that the Bill would be amended in light of the objections raised to it. The amendments would "make this bill better in terms of content, organization and application". "With all the fundamental amendments we have proposed and are still proposing", he added, "this bill will take a new shape and will not be passed in its present form".[25]

27. The Bill, in its "new shape" is currently still before the ad hoc Committee.[26] It retains its original title and numbering but the text of the Bill as introduced has been replaced by a "working draft" that is currently under consideration. The draft remains controversial and there have been concerns raised about the Committee's timetable for dealing with the legislation prior to the expiry of its mandate in June 2011.[27] There were complaints that the ANC intended to use its majority to "railroad" the Bill in its current form through the Parliamentary process by means of clause by clause voting.[28] At the time of writing, however, the Committee had resolved to seek from Parliament

[24] "Objections to info bill 'emotional and hysterical'" *Mail & Guardian* 5 June 2011.

[25] Ministry of State Security "Statement on the second appearance by the Minister of State Security to the ad hoc Committee on the Protection of Information Bill" 22 October 2010.

[26] The ad hoc Committee on the Protection of Information Bill was appointed in September 2010. The members are Mr C Burgess (ANC, chairperson); Mr NB Fihla (ANC), Mr LT Landers (ANC), Ms A Dlodlo (ANC), Ms TB Sunduza (ANC), Mr ZL Madasa (ANC), Ms HC Mgabadeli (ANC), Ms MP Mentor (ANC), Ms A Van Wyk (ANC), Mr JH De Lange (ANC), Mr TW Coetzee (DA), Mr DJ Maynier (DA), Mr MS Shilowa (COPE), Mr MG Oriani-Ambrosini (IFP).

[27] See "Concern raised over Secrecy Bill rush" *The Mercury* 12 April 2011. Unlike standing committees, ad hoc committees of Parliament have a defined lifespan.

[28] "Cosatu vows to challenge a railroaded Info Bill in court" *Mail & Guardian* 31 May 2011.

an extension of its lifespan and to continue to consider the Bill during the Parliamentary recess.[29]

28. In the event that the Parliamentary process comes to a conclusion without a consensus text emerging, there are further avenues for an approved Bill to be subject to further consideration. First, it is possible that President Zuma could refer the Bill to Parliament for its reconsideration. Section 79(1) of the Constitution allows the President to refer a Bill back to the National Assembly for reconsideration if he or she "has reservations about the Constitutionality of the Bill". Likewise, after reconsideration, the President under section 79(4) may refer a Bill to the Constitutional Court for its opinion. Second, it is possible that members of Parliament could themselves petition for the Bill (once it has become an Act) to be examined by the Constitutional Court. Section 80 provides for one third of the members of the National Assembly to apply to the Constitutional Court, an application which must be done within 30 days of the passage of the Act. The ANC majority in the National Assembly is currently just under two-thirds. It is thus legally feasible for the non-ANC members of Parliament to bring together the required one-third vote, assuming that the ANC would oppose such a referral. (It is of course possible that the ANC would not oppose such a referral). Third, in an option close to the second option above, it is possible that an abstract review of the legislation could be commenced by private litigants nearly immediately upon passage of the Bill as an Act. The *Glenister* litigation clarified the point at which a review of legislation for lack of constitutionality could be mounted. *Glenister* made it clear that such a challenge would be seen as premature during Parliamentary consideration of a Bill, but that such a challenge would be entertained by the courts after enactment.[30] Such a review can be mounted by non-governmental organizations in the public interest in terms of section 38 of the Constitution. Of course, given the different perspectives on the Information Bill, the

[29] Minutes of the Ad hoc committee on the Protection of Information Bill meeting of 3 June 2011.

[30] *Glenister v President of the Republic of South Africa* 2009 (1) SA 287 (CC).

complexity of the legislation, and the politicized nature of its consideration thus far, it is likely that a variety of parties may make use of the option to litigate the Bill.

The principal changes in the working draft

29. The principal changes between the 2010 Bill and the current working draft are the following:

29.1. Chapter 5 of the 2008 and 2010 Bills has been deleted. The chapter, in accordance with the broad aims of the Bill to regulate a broad range of processing of valuable state information, provided for the protection against disclosure and, in some cases, the classification of two categories of information – "sensitive information" and "commercial information".[31]

29.2. The removal of chapter 5 removes with it the possibility of classification of material on grounds of the "national interest", a particularly widely defined and controversial concept in the Bill.[32] The principal criterion for classification is now "national security". The definition of this criterion remains the same as it was in the 2008 and 2010 Bills and is relatively narrowly defined, in terms borrowed from section 198 of the Constitution, as: "the resolve of South Africans as individuals and as a nation, to live as equals,

[31] The removal of the chapter addresses one of the key concerns of the civil society coalition that has mobilized to oppose the Bill – the Right to Know Campaign. See the R2K "Founding Statement" at www.r2k.org.za: "Exclude commercial information from this Bill". The Campaign's other key "demands" are a useful compilation of the principal objections to the 2010 version of the Bill: they are "limit secrecy to core state bodies in the security sector such as the police, defence and intelligence agencies" (see, further, paragraph [30.1] below; "limit secrecy to strictly defined national security matters and no more. Officials must give reasons for making information secret"; "do not exempt the intelligence agencies from public scrutiny"; "do not apply penalties for unauthorised disclosure to society at large, only those responsible for keeping secrets" (see, further, paragraphs [30.3] and [30.9] below); "do not criminalise the legitimate disclosure of secrets in the public interest"; "an independent body appointed by Parliament, and not the Minister of Intelligence, should be the arbiter of decisions about what may be made secret" (see, further, paragraph [30.10] below).

[32] In terms of both the 2008 and 2010 Bill, "sensitive information" was information that should be protected from disclosure to prevent the "national interest of the Republic" from being harmed. The latter phrase was then extensively defined. In terms of the phrasing in clause 11 of the 2010 Bill it "includes, but is not limited to … all matters relating to the advancement of the public good …". Sensitive information was the subject to classification in one of the three levels specified in clause 15, depending on the severity of harm likely to be caused by its unlawful disclosure.

to live in peace and harmony, to be free from fear and want and to seek a better life and includes protection of the people and occupants of the Republic from hostile acts of foreign intervention, terrorist and related activities, espionage, and violence whether directed from, or committed within the Republic or not, and includes the carrying out of the Republic's responsibilities to any foreign country in relation to any of the matters referred to in this definition".

29.3. The removal of chapter 5 means that the Bill no longer serves the broad purpose of regulating the secure processing of valuable state information. It now is more narrowly official secrets legislation in the conventional sense. As was argued above, the broad information security aspects of the original Bill were always out of place in legislation of this type. It follows that their excision from the Bill is a welcome development. However, if the Bill, once enacted, repeals the Protection of Information Act and the MISS most state information unrelated to national security will be simply unregulated by law. This is undesirable and consideration should be given to what becomes of the deleted parts of the Bill.

29.4. The key provision of the Act describing the criteria for classification in the three security levels (Confidential, Secret and Top Secret) has been redrafted with the aim of redressing criticism that it was vague and set the threshold of classifiability too low and that it would accordingly lead to over-classification and was vulnerable to cynical classification.[33] These changes are indicated in the following marked-up version of the relevant clause:

Classification levels

15. (1) State information may be classified as "Confidential" if the information is **[—(a)]** sensitive information, the **[unlawful]** disclosure of which

[33] The classic unintended consequence of official secrets legislation: the misuse of classification by state officials to avoid disclosure of embarrassing material or to cover up malfeasance.

is likely or could reasonably be expected to cause demonstrable harm **[may be harmful]** to the security or national [**interest**] security of the Republic or could reasonably be expected to prejudice the Republic in its international relations;

[(b) **[commercial information] the disclosure of which may cause financial clients, competitors, contractors and suppliers.]**

(2) State information may be classified as "Secret" if the information is—

(a) sensitive information, the disclosure of which is likely or could reasonably be expected to cause serious demonstrable harm to **[endanger]** the security or national [**interest**] security of the Republic or likely or could reasonably be expected to jeopardise the international relations of the Republic; or

[*(b)* **commercial information**, **the disclosure of which may cause serious financial loss to an entity;]**

(c) personal information, the disclosure of which **[may]** is likely or could reasonably be expected to endanger the physical security of a person .

(3) State information may be classified as "Top Secret" if the information is—

(a) sensitive information, the disclosure of which **[may]** is likely or could reasonably be expected to cause serious or irreparable harm to the national [**interest**] security of the Republic or **[may]** is likely or reasonably be expected to cause other states to sever diplomatic relations with the Republic;

[(b) **commercial information, the disclosure of which may—**

(i) have disastrous results with regard to the future existence of an entity; or

(ii) cause serious and irreparable harm to the security or interests of the state;]

(d) personal information the disclosure of which **[may]** is likely or could reasonably be expected to endanger the life of the individual concerned.

(4) The classifying authority must use the guidelines for classification levels as prescribed.

The principal remaining areas of controversy and concern

30. The following areas in the working draft remain issues of contention between the political parties represented on the ad hoc committee and concerns raised by civil society observers of the legislative process:

30.1. **Scope of application**: The Minister accepted during the 2010 reconsideration that the Bill should cover information of significance to national security rather than information that is in the national interest. As detailed in [29.2] above, this fundamental shift of emphasis has been largely effected in the current draft Bill through the removal of chapter 5 (and, with it, the categories of "commercial information" and "sensitive information") and by more clearly specifying the threshold of harm necessary for protecting other state information. However, the scope of the Bill remains extremely broad, , purporting to regulate all state information (clause 1), allowing classification at a non-secret level of "confidential" (clause 15(1)) and applying (unless exempted) to all organs of state (clause 3). This may reflect a continuing desire to have a law that regulates confidentiality of state information – that the Bill is an information security law rather than merely an official secrets law.[34] If so, this is largely at odds with the Bill in its current form. As indicated above, the deletion of chapter 5 removes the heart of the Bill's original information-security scope of application.

30.2. While this briefing paper cannot give final answers or even a detailed analysis, we three questions about the fundamental reorientation that the Bill has undergone since its original drafting: from a government information security law to an official secrets law. First, is it possible to sever the parts of the current draft Bill that serve the purpose of an information security law from the parts of the current draft Bill that serve the purpose of an official secrets law? Second, would the purpose of an information security law be better served not as part of an official secrets law but rather as an extension to the PAIA or even as a separate piece of legislation? Third, would the purpose of an official secrets law be better served without the statutorily joint pursuit of the purpose of a governmental information security law?

[34] See clause 2(c) of the current draft which continues to describe as one of the objects of the Bill "to establish general principles in which state information may be handled and protected in a constitutional democracy").

30.3. **Public-interest defence**. There is no provision for a public-interest defence in the working draft and this remains one of the most serious areas of disagreement among the political parties in the ad hoc Committee. Before proceeding however, we should first offer a terminological and technical clarification.

30.3.1. Because it is subject to the PAIA, the Bill in effect incorporates the PAIA's *public-interest override* (section 46 of the PAIA). Notwithstanding classification, a record in the hands of a public body may be the subject of a PAIA request. This request must be considered in terms of PAIA – in other words the record must be disclosed unless one or more of the mandatory or discretionary grounds for refusal of access applies to it. Should disclosure be mandated by PAIA, the record must be declassified and disclosed. Even if there is a ground of refusal applicable to a particular record, the record must be disclosed if, disclosure "would reveal evidence of … a substantial contravention of, or failure to comply with the law; or … an imminent and serious public safety or environmental risk" and the public interest in disclosure outweighs the reasons for non-disclosure.

30.3.2. Although an important source of flexibility in the Bill, the effectiveness of this public-interest override is limited by the unreasonably high threshold that it imposes. This is a major and longstanding flaw in the PAIA. The wording of the Act's override is the product of changes introduced during the Parliamentary committee process in early 2000 that were intended to restrict the scope of the override but that did so in a manner that has rendered it largely nugatory and arguably unconstitutional.[35]

[35] See Currie & Klaaren *The Promotion of Access to Information Act Commentary* (2002) [7.10]—[7.13].

Consideration should be given to effecting a consequential amendment to the PAIA that would have the effect of correcting this flaw.[36]

30.3.3. A *public-interest defence* is a quite distinct concept: it would operate as a defence to some or all of the criminal penalties for disclosure of a classified record if that disclosure was done bona fide in the public interest. Former Minister Kasrils has supported the inclusion of such a defence in the Bill in the following terms: "In my view the public interest defence, which my 2008 drafting team had taken on board, is a vital requirement and if not included would certainly generate the impression of a government and ruling party wishing to conceal its own misdemeanours by obstructing investigative journalism."[37]

30.4. The call for a public interest defence is linked to the current controversy over the criminal offences in the Bill. The current draft criminalizes a number of actions or omissions by members of the public in addition to actions or omissions by state officials or even more narrowly security-sector officials. Through criminalization of the use or possession by members of the public of information that has been classified[38] confidential, secret or top-secret[39] as

[36] This would entail deleting subparagraph (a) of section 46. Ideally, the equivalent provision in the private-body Chapter of the Act (section 70) should get the same treatment, but it admittedly not possible to accommodate this under the rubric of a "consequential amendment" to the State Information Bill.

[37] Kasrils "Defend Democracy" (above).

[38] As opposed, in the 2008 version of the Bill, to possession of information that is inherently classifiable. See, for example, the original version of the "Hostile activity offence' (s 40 of the 2008 Bill): "It is an offence punishable on conviction by imprisonment for a period not exceeding 25 years … to communicate, deliver or make available State information with the intention to prejudice the State … if the information … is sensitive information and the disclosure of that information may cause serious or irreparable harm to the national interests of the Republic or may cause other states to sever diplomatic relations with the Republic". By contrast, in terms of the reformulated penalty provisions of the 2010 Bill, the offence turns on the fact of classification of the information. Compare the "Hostile activity offence" provision in the working draft (clause 33): "It is an offence punishable on conviction by imprisonment for a period not less than 15 years but not exceeding 25 years, subject to section 1(6) … unlawfully communicate, deliver or make available state

well as criminalizing the failure to report possession of classified information[40] and the disclosure of information that is the subject of a mandatory ground of refusal in terms of the PAIA,[41] the Bill will also criminalize such use or possession by journalists without creating any exemption for journalists. This has been one of the most controversial points in the debate over the Bill. The ANC remains adamant that such criminal offences should remain and should not explicitly include a public interest defence. Moreover, taking into account the extent of the changes to the rest of the Bills, it is unlikely that an implicit public interest defence could be constructed from the principles of the Bill as the Explanatory Notes to the 2008 Bill had suggested could be possible with that Bill.

30.5. As we have indicated above, and as Annexure A to this paper makes clear, there are significant drafting changes between the 2008 and 2010 versions of the espionage and hostile activity offences as well as some of the other offences in the Bill. Further, the offence of disclosure of a state security matter (clause 43) is new feature of the 2010 Bill.

30.6. Even apart from the significant differences between the two Bills regarding mens rea (the necessary state of mind for committing the offence), the drafting changes reflect two fundamental different approaches to the criminalization of the use and disclosure of classified information. In terms of the current law (ie, the Protection of Information Act 1982 and the MISS), the criminal offences relating to the use and possession of classified information

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information classified top secret which the person knows or ought reasonably to have known or suspected would directly or indirectly prejudice the state…".

[39] See clauses 32 (espionage), 33 (hostile activities) and 43 (criminalizing in certain circumstances disclosure, publishing, retention or failure to take care of information relating to a matter which is dealt with by the State Security Agency) of the Working Draft.

[40] Clause 39.

[41] Clause 38. This offence no longer makes sense in the light of the deletion of clause 11 (part of the deleted Chapter 5) and its continued presence in the Working Draft is clearly an oversight.

are regulatory offences. This means that criminalization attaches to the disclosure, or use, or possession of the particular information that has been classified, without more. It is essentially the action of accessing the information that is criminalized. The 2008 Bill took a different approach to criminalization. Its approach was to criminalize the harm caused by disclosure of classified information rather than the fact that classified information had been disclosed. Thus, for instance, the action of communicating information which may cause serious harm to the Republic was criminalized. Essentially, the drafting style of the 2008 Bill incorporated a harm test within the substance of the criminal offences. The 2010 version of the Information Bill has reverted to the pre-2008 drafting style, ie to the definition of the offences as regulatory offences. However, this regulatory offence drafting style is appropriate for relatively minor (e.g. "regulatory" or "non-compliance") offences[42] against government information security rather than for major criminal offences against the security of the state, such as espionage.

30.7. In our view, a return to the 2008 drafting style of the offences – directly incorporating the various formulations of the harm tests specified elsewhere in the current draft of the 2010 – would represent a significant improvement upon the current draft Bill. This use of this substantive drafting style would allow accused persons to argue and attempt to demonstrate that they have in fact acted in a manner that protected rather than harmed the security of the state. This substantive drafting style puts the focus thus not on the mere access to classified information but rather on the actual and potential consequences of use of that classified information.[43] The benefit of returning to the 2008 drafting style for the criminal offences would obtain with or without reverting to the 2008 levels of mens rea for the various offences.

[42] See paragraphs 114-116 of the 2008 Explanatory Notes.

[43] See the discussion in paragraph 112.3 of the Explanatory Notes to the 2008 Bill.

30.8. While we cannot fully explore the issue here, it appears to us that one could easily argue that a return to the substantive drafting style of the 2008 Bill would have much the same benefits as the express inclusion of a public interest defence,[44] without risking some of the dangers of misuse of an explicit public interest defence. As identified by security sector officials, some of the risks of a public interest defence lie in the ambiguity of the concept of the public interest (indeed, in some ways, it suffers from much the same ambiguity as the contested concept of "national interest"). Unlike the inclusion of an explicit public interest defence, a return to the substantive drafting style would not allow an accused person who had caused serious harm to the Republic to argue that this harm was offset by a public interest in disclosure. A return to the 2008 substantive drafting style thus may represent a middle way between the exclusion and the inclusion of a public interest defence in relation to the criminal offences of the current draft Bill.

30.9. **Proportionality of penalties**: As noted above, the Bill has very stiff maximum penalties and also (in a departure from the approach of the 2008 Bill) sets minimum penalties, taking away the sentencing discretion of the courts unless "substantial and compelling circumstances" justify the imposition of a lesser penalty.[45] The Bill's critics argue that these penalties are disproportionate. This issue clearly interacts with the issue of the lack of a public interest defence.

30.10. **Independent appeals mechanism**. As noted above, the Explanatory Notes mooted the notion of an independent appeals mechanism. Some sort of such mechanism may be necessary to comply with constitutional guarantees of

[44] Such as the one proposed by the Explanatory Notes to the 2008 Bill, see paragraph [20] above.

[45] The minimum penalties are subject to clause 1(6) which permits a court to impose a lesser penalty if "satisfied that substantial and compelling circumstances exist" that justify it. The language derives from the minimum sentence provisions of the Criminal Law Amendment Act 105 of 1997, provisions upheld as constitutionally valid in *S v Dodo* 2001 (3) SA 382 (CC).

oversight of the security sector. Recent press reports suggest that the government will consider putting into place such a mechanism.[46]

30.11. The 2008 Explanatory Notes specifically mooted the concept of an independent oversight and appellate body within the security establishment with jurisdiction over the official secrets matters. As paragraphs 101 & 102 introduced the idea: "Civil society groups have motivated for the establishment of an independent body or ombudsman to carry out oversight of protection of information practices and also to decide on the appeals provided for in chapter 8. The drafters of the Bill had originally proposed the establishment of an independent Information Protection Oversight Centre (IPOC) to carry out the oversight of protection of information practices and programs in terms of the law in all government entities. This suggestion did not find favour as it would have necessitated the creation of a further bureaucratic structure. Concerns were expressed in relation to skills, capacity and budget for the purposes of setting up a new independent body."

30.12. The appeals referred to are contained in the current draft Bill in Chapter 7, clause 25. Currently, section 25 provides for an appeal to the Minister of the organ of State in question. In this respect, the current draft Bill is in line with the PAIA. While the current draft Bill may be in line with the current PAIA, it is out of line with the proposals now receiving attention in Parliament, in the context of the Personal Information Bill, to create an Information Regulator. As detailed further below, the creation of an Information Regulator would also entail a number of substantive amendments to the PAIA.

30.13. **Harmonization with PAIA**. The current working draft of the Bill retains, in clause 28, the parallel provision to the old clause 35 of the 2008 Bill which made provision for requesting classified information in terms of PAIA and

[46] "ANC blinks on Secrecy Bill" *Sunday Times* 12 June 2011 (retired judge to head a classification appeal body).

effectively gave declassification authority to the state officials considering such PAIA requests. The retention of this provision in future versions of the Bill is essential. It is crucial to any determination of the constitutionality of the Bill because, without it, the Bill clearly infringes the right to freedom of information. Clause 28 of the current draft has the effect that a PAIA request for classified information must, notwithstanding the level of classification of the information that is sought, be dealt with in terms of the PAIA. *This means that the dispute-resolution provisions of PAIA will be applicable to such a request for classified information if it is refused.* Dispute-resolution under the public-body provisions of PAIA currently entails an internal appeal against the refusal. This may be followed by an application to the High Court in what it is, in effect, a wide appeal against the refusal of the request. The matter of dispute-resolution in terms of the PAIA is however currently under reconsideration by the Protection of Personal Information Bill. This is therefore an area of considerable and important overlap between the two pieces of legislation.[47]

30.14. **Accountability of the intelligence agencies.** A core demand of the R2K Coalition is that the Bill should not "exempt the intelligence agencies from public scrutiny". There is nothing in the current draft of the Bill that would have the effect of exempting organs of state implementing the Bill (including the responsibilities identified for the State Security Agency in clause 30) from public scrutiny in terms of the existing statutory and Constitutional regime (including that of Chapter 11 of the Constitution). The exemptions the Minister may grant in terms of clause 3(2) in some instances restrict the authority to classify,[48] are transitional,[49] would keep information classified

[47] The working draft of the State Information Bill proposes the deletion of clause 2(j), one of the objects of the Act: "~~(j) harmonise the implementation of this Act with the Promotion of Access to Information Act, 2000, and the National Archives and Records Service of South Africa Act, 1996 (Act No. 43 of 1996)~~". This is not, in our view, desirable but it will not have any effect on the crucial clause 28.

[48] Clause 3(2)(b) of the Working Draft.

even while in the National Archives,[50] or would serve merely to confirm existing arrangements between security services.[51] There is one instance where the power of exemption does in principle run counter to public scrutiny. This is clause 3(2)(a) which empowers the Minister to exempt organs of state from the duty to establish departmental standards and procedures. Arguably, this provides for administrative flexibility and does not reach the level of exempting the intelligence agencies from scrutiny. Insofar as the lack of provision of an independent appeals mechanism in the Bill can be construed as a form of exemption of intelligence agencies from public scrutiny, this issue has been dealt with above.

THE PROTECTION OF PERSONAL INFORMATION BILL: PARTICULARLY ITS SUPERVISION

31. In the period between the withdrawal of the 2008 State Information Bill and the reintroduction of the 2010 version of the Bill, Parliament began its consideration of another important piece of information legislation. This is the Personal Information Bill, currently still under consideration by the Standing Committee on Justice.

32. As we have seen, some of the difficulty of the State Information Bill is the result of its ambition to regulate a broader range of state information processing than is customarily the case with official secrets legislation. The original design of the Bill envisaged a broad information security law, regulating information security practices across a range of records that are not considered the usual candidates for a classification regime. These included "valuable information" – information that should be protected from loss, alteration or destruction – and commercial information. The point of this aspect of the State Information Bill was not to create a full-blown classification regime for such information, but rather to regulate its processing in a

[49] Clause 3(2)(c).

[50] Clause 3(2)(d).

[51] Clause 3(2)(e).

manner that recognised its value to the state and accordingly imposed duties on organs of state to protect it.

33. To this extent, the State Information Bill, at least in its original conception, overlapped considerably with the Protection of Personal Information Bill, which is general information processing legislation applicable to both the private and state sectors. The newest iterations of the State Information Bill have removed a great deal, but not all, of these broader, non-state security related provisions. Except in relation to one aspect (the protection of personal information that could endanger the life or security of an individual), this will have the effect that the regulation of state information processing is left to other legislation, including the Personal Information Bill.[52]

34. The origins of the Personal Information Bill lie in a process of research and drafting that dates back to the 1990s and the publication of the Open Democracy Draft Bill of 1995. The Open Democracy Bill contained a chapter proposing data privacy legislation that would provide for the correction of and protection against unauthorised use of personal information held by both government and private bodies.[53]

35. In early 2000, the South African Law Reform Commission was requested by Parliament to investigate the introduction of privacy and data protection legislation. The Law Reform Commission (the Commission), concluded a length process of research and consultation on the matter with the publication of its Report on Privacy and Data Protection in August 2009.

36. The legislative recommendations of the Commission were introduced by the Department of Justice into Parliament as Bill 9 of 2009. Since then the Bill has been

[52] See the definition of "personal information" ("any information concerning an identifiable natural person which, if disclosed, could reasonably be expected to endanger the life or physical safety or general welfare of an individual") and clause 15, quoted above.

[53] Part IV of the Open Democracy Draft Bill, 1996. The Bill is available at http://www.polity.org.za/html/govdocs/bills/1995/odb9/toc.htm.

the subject of protracted consideration by the Standing Committee on Justice, a process that has seen extensive redrafting of a number of provisions of the Bill.

37. Though this process of consideration, still underway, has seen parts of the Bill change considerably, broadly speaking, the original conception of the Bill remains intact. The Bill is general legislation to regulate the processing of personal information by public and private bodies. It follows the European model for data-protection regimes in that it centres on a set of 'information protection principles'. These principles have been renamed "Conditions for lawful processing of personal information" in the latest working draft of the Bill but retain their original purpose, which is to flesh out a higher-level requirement that personal information must be processed lawfully and reasonably. The principles create a framework of general rules for the processing of personal information, leaving the subsequent development of more detailed regulatory norms to an independent regulator.

38. The Bill accordingly proposes the establishment of an Information Protection Regulator, an office that has in the most recent working draft been renamed the "Information Regulator".

39. One of the most important recommendations of the Law Reform Commission in its *Report* was that the Information Regulator should have supervisory powers in respect of both the Bill and PAIA. With the aim of creating a single statutory regulatory authority that would administer both the access to information as well as privacy and information protection legislation. In particular, the Regulator would be specifically empowered to resolve disputes under provisions of both PAIA and privacy legislation. The Regulator would be accessible as a dispute-resolution mechanism intermediate between internal appeal against decisions of public or private bodies and recourse to the courts and would be empowered to make binding orders to resolve disputes'. This reform would cure a longstanding deficiency in PAIA: the absence of a specialised supervision body and the lack of an independent dispute-resolution mechanism intermediate between the internal appeal process and High Court litigation.

40. At the time of writing, the enforcement provisions of the Bill and the issue of consequential amendments to PAIA were under direct consideration by the Committee. Among the proposals is a recommendation that the current provision for internal appeals in relation to public bodies be removed and replaced by a direct complaint to the Regulator.[54] As a consequence of the current state of flux it is difficult to draw any conclusions at this stage about these provisions of the Bill. But they are, in obvious ways, directly relevant to the evaluation of the State Information Bill.

[54] This would have an indirect impact on the current clause 28 of the State Information Bill which envisages the application of the current PAIA dispute–resolution procedures to a refusal of a request for classified information. These procedures currently entail an internal appeal in terms of section 74 of the PAIA.