

**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

20 June 2008

Background

The South African History Archive

The South African History Archive (SAHA) is an independent human rights Non-Governmental Organisation (NGO) dedicated to documenting and supporting past and contemporary struggles for justice in South Africa. It is a registered trust, governed by a Board of Trustees that appoints dedicated professionals to achieve its mission. SAHA's founding mission is to strive to recapture our lost and neglected history and to record history in the making. This informs a focus on documenting the struggles against Apartheid, as well as those that accompany the making of democracy.

In early 2001 SAHA repositioned itself as a human rights archive dedicated to documenting and contributing to continuing struggles for justice in South Africa, with a strong focus on freedom of information. In 2002, SAHA launched its Freedom of Information Programme, and since then has been at the forefront of efforts to utilise the Promotion of Access to Information Act (PAIA), often focusing specifically on issues relating to intelligence, security and other matters that might be deemed sensitive. SAHA is committed to developing civil society access to public and private information through laws that affect the constitutional rights of access to information. (Further information about SAHA's work with access to information can be found on our website: www.saha.org.za)

The Nelson Mandela Foundation

The Nelson Mandela Foundation Trust (NMF) was established on 6 September 1999 by Notarial Deed of Trust with the Master of the Supreme Court (IT Number 9259/99) and is a registered Public Benefit Organisation (Number 034-681-NPO) with the South African Revenue Services.

The NMF, through its *Centre of Memory and Dialogue*, promotes the vision, values and work of its Founder (Mr Nelson Mandela) by convening dialogue around critical social issues, and establishing a world-class archival resource on the life and work of its Founder, while continuing to provide professional support to Mr Mandela.

The NMF has a direct and material interest in legislation governing the management and provision of access to archival records, particularly those documenting the life and work of Nelson Mandela and his close associates.

The Protection of Information Bill 2008

The following are comments relating to specific aspects of the Bill in its current draft form as they arise sequentially. We begin, however, with a series of general observations.

(a) General Observations

(i) SAHA and the NMF welcome this legislative initiative to bring in line the legislative framework around protection and classification of certain information and related access considerations with South Africa's constitutional commitments to open, transparent and accountable governance. This spirit is aptly captured in the 'Principles of Classification', set out in Section 22 of the Bill. We believe this legislation is an important complement to existing access to information laws developed under our constitutional dispensation.

(ii) SAHA and the NMF believe that more attention should be given to ensuring effective coherence between the existing Bill and the Promotion of Access to Information Act. At present, we do not believe that this has been given adequate attention, raising concerns that whilst PAIA already provides an existing framework of access to information and related exemptions, the Bill seeks to establish a parallel framework for refusing access to information that is not necessarily consistent with PAIA. We believe that the harmonizing of these two pieces of legislation, in a manner that indisputably recognises the primacy of the principles of access to information, is therefore essential. Consequently, even if a record is classified as 'Top Secret' in terms of this Bill, it can in theory still be accessed in terms of PAIA. As will be seen, this position on the primacy of PAIA guides a number of our recommendations as set out below.

(iii) SAHA and the NMF is concerned about the very broad definitions contained in the Bill, especially with respect to what constitutes the 'national interest of the Republic' and the mandatory protection from disclosure of anything that is deemed to be 'sensitive information' in that regard. Whilst the intentions of the drafters of the Bill are not questioned, we are concerned that this can provide too wide a discretion in terms of classification that cannot be tempered by existing provisions for review and adjudication.

(iv) SAHA and the NMF is concerned that the Bill does not provide for an adequate adjudication body in terms of refusals to access records in the first instance, but rather provides for the matter to be referred to the Minister when there is a dispute. The matter can be taken on review to the High Court, but this effectively restricts access to information to those who can afford to take the matter through a legal process, which is neither efficient nor expeditious. A similar process is currently provided for in terms of PAIA, and experience has clearly demonstrated that the absence of an independent adjudication process has severely hampered the efficacy and utility of the legislation by the vast majority of South Africans. In this regard, it is worth mentioning that the Ad Hoc Committee on the Review of Chapter Nine and Associated Institutions highlighted its concerns about the existing limitations in terms of managing disputes about the release of records in terms of PAIA and recommended the establishment of a dedicated Information Commissioner to facilitate this process. Such a position could provide both a Ministerial and legal review process with advice and recommendations that would allow for a more consistent application of the law in terms of constitutional principles of transparency and openness, whilst at the same time not compromising the security of the Republic.

(v) We have a concern that many of the mechanisms and procedures proposed by the Bill are not implementable. For instance, we don't believe that the National Archives is in a position (and won't be in the foreseeable future) to fulfill the requirements of section 41. Experience with PAIA has shown that resource constraints and lack of capacity (especially in structures of the state) make many of that Act's provisions unrealizable in practice. The practical implications of the Bill need to be thoroughly assessed.

(b) The Preamble

The preamble of the Bill "*affirms the constitutional framework of the protection and regulation of access to information.*"

Whilst Section 32 of the Constitution affirms the right of 'access to information', which is limited by a law of general application (which in turn must be reasonable and justifiable), the Constitution does not provide a specific constitutional provision for 'the protection of information'.

The Promotion of Access to Information Act provides for a wide range of exemptions and it could be argued that records exempted in terms of PAIA could be deemed as 'sensitive' and should therefore be classified. However, because of the primacy of the constitutional imperative of access to information, records that are classified through the classification process envisaged in this Bill, are not automatically exempted in terms of PAIA and can therefore be subject to the access regime set out in PAIA. ***We believe that an affirmation of PAIA should be explicitly set out in the preamble of the Bill.*** This in no way detracts from a core objective of this proposed legislation to protect the security of the Republic, but will reinforce the principle of the primacy of access to information.

(c) Definitions

Intelligence

The current definition of 'intelligence' is unnecessarily broad and consequently ambiguous. ***It is recommended that 'intelligence' be redefined to mean any information obtained by a national intelligence structure.***

National Interest

Section 15 of the Bill fleshes out in considerable detail the definition of the 'national interest of the Republic'. The Bill stipulates that records *must* be protected if disclosure of information endangers the national interest of the state. PAIA, however, stipulates national interest as a possible grounds for refusal. ***SAHA and the NMF believe that the Bill should afford this level of flexibility in terms of decision making, which in turn would also ensure coherence with PAIA provisions in this regard.***

Public Interest Override

As with PAIA, ***the Bill should contain a specific provision for a ‘public interest override’*** that should be taken into account in relation to any request for a review of classification.

(d) Application of the Bill

Section 3(2) currently empowers the Minister to exempt an organ of state from the duty of reporting to Parliament (in terms of Section 59). Section 3(2) (d) in particular provides for the Minister to exempt an organ of state from automatically declassifying all information formerly classified as restricted (in terms of Section 26(c)). SAHA and the NMF believe that this provides unnecessary room for undermining the constitutional right of access to information, and ***recommends that such exemptions at the very least be subject to parliamentary comment.***

(e) Classification of Information

SAHA and the NMF concur with the concerns raised by journalists and other groupings relating to Sections 19(2), 21(6) and 21(7) which could allow for the classification of entire categories of information which might contain only minimal amounts of information that would warrant classification. This would undermine the intentions and objective of the Bill as set out in the Preamble. We believe that there are adequate existing provisions in the Bill to deal with such potentially harmful information, and ***recommend that these sections be removed.***

In terms of Section 20, the current formulation of the subsections allows for classification of materials as either confidential, secret or top secret, if disclosure of this information “may be harmful to the security or interests of the state or could prejudice the Republic in its international relations.” ***SAHA and the NMF believe that this provides too wide a discretion for purposes of classification, and recommends that the word ‘may’ should be replaced by “which is likely to”.***

Section 23 stipulates that classified materials that come into the possession of an individual not authorised to have such information must be reported to the SAPS and the NIA and that failure to do so is an offence in terms of Section 51. SAHA and the NMF believe that there are circumstances where such reporting to intelligence structures would be unnecessarily onerous and consideration should be given to a reporting process to the National Archivist in terms of efforts to ensure relevant state documents are preserved in terms of the Archives Act. This is particularly important in relation to apartheid-era intelligence and security records that were removed by former state employees and that organizations such as SAHA and the NMF are attempting to retrieve (and/or facilitate the retrieval of) in terms of both organizations’ commitment to building the national memory and related resources. ***SAHA and the NMF recommend the existing provision be made an offence but should be subject to a public interest exemption. Particular attention should also be given to ensuring effective media protection in this regard.***

(f) Criteria for the Continued Classification or Designation of Information

SAHA and the NMF recommend that a public interest override be included in this Section.

In terms of the Appeal procedure set out in Section 37, SAHA and the NMF are worried that existing provisions do not allow for an independent appeal process, or independent body, to make recommendations that would constructively inform the Minister's and applicants' understanding of the decisions and related recommendations, and taken to the next level, the Court's decision making processes.

(g) Release of Declassified Information to the Public

Sections 39 to 41 are critical to establishing the relationship between the Bill and the Promotion of Access to Information Act. We believe that these sections need to be more robust in establishing the primacy of PAIA in relation to public access. In particular, there needs to be absolute clarity that if no grounds for refusal (as determined by PAIA) can be found in relation to a request for public access to a classified record, then that record must be declassified and made available.

(h) Implementation and Monitoring

The current provisions for the NIA's oversight and monitoring responsibilities (as set out in Section 42) do not provide for independent oversight. As one of NIA's core functions is the protection of information, it is evident that the Agency is not automatically orientated towards the promotion of access to information.

SAHA and the NMF recommend that an independent oversight mechanism be established. The development of such a mechanism should incorporate recommendations to develop an information commissioner as set out by the Ad Hoc Committee on the Review of Chapter Nine and Associated Institutions.

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