Briefing note: What's wrong with the Protection of Information Bill
Aug 2010

Background

The apartheid-era Protection of Information Act (84 of 1982) remains on the statute books, but government acknowledges parts are unconstitutional and unenforceable. Since 1998 a Cabinet policy document, the Minimum Information Security Standards (MISS), has been the main instrument to protect state secrets, but it too lacks enforceability.

These factors – together with what State Security Minister Siyabonga Cwele has said are shortcomings in the Act in that it "does not provide sufficient protection for the State against information peddlers and current trends concerning espionage" – prompted a process to draft new legislation.

After Cabinet assented to the new Protection of Information Bill (2008) in March 2008, Cwele's predecessor, Ronnie Kasrils introduced it to Parliament for consideration by an ad-hoc committee composed of inter alia members of the intelligence and justice portfolio committees.

Civil society and media organisations aired concerns including that the proposed provisions would lead to chronic over-classification and that there was no exemption for whistle-blowing and publication in the public interest – a public interest defence. In short, they feared the Bill would undermine constitutional rights including access to information and media freedom.

The Bill was soon withdrawn for redrafting. Kasrils recently confirmed that he was swayed by the calls for a public interest defence, but he resigned from government later that year when the ANC recalled then-president Thabo Mbeki.

Cwele published the redrafted Protection of Information Bill (2010) for comment in March this year. Although the stated aims of the Bill refer to constitutional values including transparency and the free flow of information, the 2010 draft compounds many of the previous concerns and gives rise to new ones.

A new parliamentary ad-hoc committee, chaired like its predecessor by ANC MP Cecil Burgess, is considering the Bill. Civil society organisations (including ANC alliance partner Cosatu), the media and one constitutionally-mandated Chapter 9 institution, the SA Human Rights Commission, have expressed deep concerns to the committee and in public. Many contend the Bill will not pass constitutional muster. A Constitutional Court challenge is regarded by many as an ultimate remedy.

Common concerns and solutions

Problem	Effect	Proposal	Provision
The power to classify extends to all state entities including government departments, state-owned companies (which compete with private	The veil of secrecy is cast extremely widely, extending hurdles to the free flow of information across the state sector and society	Limit classification to core security sector departments: intelligence, military, police, diplomatic service	Chapter 1 section 3

companies), provincial and local authorities			
"National security" considerations override democratic rights	Classifiers obliged to give precedence to state security over all rights; ignores rights as key component of human security	Remove override to harmonise with constitutional values	Ch 1 s6 and s6(j) in particular
Key consideration in classification decisions is the "national interest" very broadly defined	Chronic and widespread over-classification likely	Use strictly-defined "national security" as key consideration in classification decisions	Ch 5 s11
Commercial info (often 3rd party info) in hands of state is subject to classification if state or 3rd-party interest may be prejudiced by disclosure	Veil of secrecy can be drawn over e.g. public tender processes, undermining clean and accountable government and exposure of corruption	Leave protection of commercial information to existing law. Classify commercial info only if justified under general provisions of Bill relating to national security	Ch 5 s12
Officials can classify en-bloc, and without recording reasons for classification decisions at time of classification	Chronic and widespread over-classification likely	Case-by-case classification decisions with contemporaneous recordal of reasons	Ch 6 s14
Classification levels determined by speculative levels of harm with low thresholds (e.g. "may be harmful")	Further bias towards secrecy, no independent oversight	Firm up test, e.g. "could reasonably be expected to cause demonstrable harm"	Ch 6 s15
Minister of State Security, whose business is secrecy, made arbiter of classification and declassification decisions	Further bias towards secrecy, no independent oversight	Chapter 9 oversight body necessary	Ch 6 s17(e), Ch 7 s21(3), Ch 10 s30 & 31
Extremely heavy penalties of up to 25 years;	Unusually harsh punishment; compounds chilling	Consider international standards	Ch 11

prescribed minimum sentences often without the option of a fine	effect on free flows of info		
"Spying" and "hostile activity" offences do not require an intention on the part of the offender to benefit another state or to prejudice the South African state – they merely require that the offender "ought to have suspected" that the breach of classified info would have that effect "directly or indirectly". Penalties of up to 25 years	Can ensnare whistleblowers or journalists where the state alleges the breach of classified info prejudiced the state or benefited another state – even if it is a by-product of an otherwise well-intentioned action. Chilling effect on civil society and media exposure of corruption etc	At very least require an intention to benefit another state/prejudice the South African state	Ch 11 s32 & 33
Simple possession or disclosure of classified information is criminalised for any person, not just for those on whom there is an original duty to protect classified info	International best practice stems leakage of secrets at source (present and former state officials entrusted with secrets). This Bill places hurdles throughout society, penalising exposure even once the horse has bolted. Free information flows and speech are curbed. Publication appears a bigger concern than exposure to hostile forces	Apply penalties only to those who have an original duty to protect info (but subject to public interest defence in case of whistleblowing – see below)	Ch 11 s37-39
Simple possession or disclosure even of information not formally classified can be penalised by imprisonment of up to 15 years (refer to next 2 entries)	Likely to induce self-censorship and further chill free flows of info due to grave uncertainty what constitutes a crime	Apply penalties only where information is formally classified	Ch 11 s38 & 43

Bill is made contiguous with Promotion of Access to Information Act (PAIA), meaning categories of info the state nominally must refuse in the course of PAIA requests become a criminal offence (3-5 years) for any person to disclose, regardless of whether classified	Catergories including personal info, 3rd-party commercial info and info relating to defence, international relations and public body economic interests (i.e. categories potentially wider than what may be classified under the Bill) are protected from disclosure regardless of whether formally classified. Introduces grave uncertainty over what may be disclosed, on pain of jail. Likely to induce self censorship throughout society. Again places commercial and personal privacies best covered by ordinary law under the operation of national security legislation with harsh penalties. Ignores the wide interpretive and discretionary boundaries of PAIA	Scrap provision	Ch 11 s38 read with ch 5 s(11)(3)(g)
Complete immunity from exposure for State Security Agency (NIA and SASS). Disclosure of any "state security matter" – i.e. any matter "dealt with"	Public oversight over the agency effectively banned; potential censorship of any other matter where the agency claims it is a matter within its remit; induces	Scrap provision	Ch 11 s43 read with definition of "state security matter"

by it or "relating to its functioning" – attracts penalties up to 15 years, regardless of whether the info is in material form or not, classified or not	grave uncertainty and self-censorship as extremely harsh penalties apply to the disclosure of information not necessarily formally classified or even in material form		
Provisions forcing new protections when classified information is submitted as evidence in court. Hearings regarding whether info to be disclosed in court are to be held in secret	Ordinary discretion of courts and principles of open justice undermined; justice cannot be seen to be done	Restore judicial discretion including whether to have any portion of a hearing in camera	Ch 12 s46
Bill is not synchronised with whistleblower legislation (Protected Disclosures Act) and public interest overrides in the Promotion of Access to Information Act. The Bill trumps the protection these Acts afford to the disclosure of crime, abuse of power, threats to public safety, etc	Possession and disclosure of classified (and potentially some unclassified) info is penalised by the same heavy penalties of up to 25 years even where the intention is to expose e.g. corruption or environmental threats. Serious disincentive to whistleblowing and investigative journalism	Include a public interest defence, consistent with existing law, where unauthorised possession and disclosure is intended to serve the public interest	General