Mr. G Dixon

The Select Committee on Security and Justice

National Council of Provinces

By Email: gdixon@parliament.gov.za

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22 November 2019

Dear Sir

**AmaBhungane comment on the Promotion of Access to Information Amendment Bill, 2019**

Kindly find herewith a submission from the amaBhungane Centre for Investigative Journalism on the Promotion of Access to Information Amendment Bill, 2019.

Our submission follows.

Yours faithfully,

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Advocacy coordinator,

AmaBhungane Centre for Investigative Journalism

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**AMABHUNGANE COMMENT ON THE PROMOTION OF ACCESS TO INFORMATION AMENDMENT BILL , 2019**

**Introduction**

1. The amaBhungane Centre for Investigative Journalism NPC (amaBhungane) is a non-profit mandated to develop investigative journalism in the service of open, accountable and just democracy. This includes advocacy for the information rights that are the lifeblood of our field.
2. We applaud the steps taken by Parliament to give effect to the My Vote Counts constitutional court judgment.
3. AmaBhungane previously made submission on the Promotion of Access to Information Amendment Bill of 2019 during the National Assembly portfolio committee public hearings. Following the revisions to the Bill consequent on those hearings, we now limit our submission to narrow set of issues relating to the duty to create, record and disclose records in cl 1(a) and (b) of the Bill. We submit that not only are there loopholes in the current formulation, but that this was not the intention of National Assembly portfolio committee.
4. We trust this brief submission will assist the NCOP in finalising the Bill in compliance with its constitutional obligations and to adequately advance the public’s right to information on private donors to political parties and independent candidates.

**The crux of the problem**

1. The crux of our submission is that the qualification of the duty to keep records *only above the prescribed disclosure* threshold creates loopholes with regard to the proper operation of the disclosure requirements. The relevant clauses are provided below for ease of reference.

 *‘‘52A. (1) The head of a political party must—*

 *(a) create and keep records of—*

 *(i) any donation* ***exceeding theprescribed threshold****(emphasis added) that has been made to*

 *that political party in any given financial year; and*

 *(ii) the identity of the persons or entities who made such donations;*

 *(b) make the records available on a quarterly basis, as prescribed; …”*

1. The formulation has significant unintended consequences. We discuss these below:
	1. The Political Party Funding Act of 2018 (PPFA) at section 12(2) places a general duty on accounting officers of political parties to *“account* ***for all income*** *(emphasis added)received by the political party”*. It could be argued that it is therefore altogether unnecessary for the PAIA Amendment Bill to impose any duty to keep records. There are, however, two counter-arguments: The first is that the PPFA refers to *income* whereas the Bill, quite appropriately for its purpose relevant to disclosure, refers to records of *donations* and *the identity of the persons or entities who made such donations.* The Bill, therefore, rightly goes further than the PPFA in ensuring not only that income is recorded, but that where that income consists of donations, the identity of the donor is also recorded. The second counter-argument is that the PPFA does not apply to independent candidates. This means that if the Bill falls short by not requiring the recordal of donations below the threshold, the PPFA will provide no cure.
	2. It is crucial for political parties and independent candidates to keep records not only above the prescribed threshold but also below, for a number of reasons:
		1. The prescribed threshold applies not only to individual donations, but also where donations from the same donor within a year are cumulatively above the threshold. If parties and candidates do not keep records of donations below the threshold, there will be no way for them to know when donations cumulatively form a donor exceed the threshold. Equally, it will be very difficult for the proper authorities, or any person with a right to do so, to investigate whether cumulative donations have been properly disclosed. Put differently, the absence of such records renders oversight weak if not meaningless.
		2. The express intention of the revising of the original version of the Bill to include a definition of a political party in section 1 of PAIA, was to ensure that PAIA as a whole applies to political parties (including independent candidate). These intentions are contained in the commentaries provided for by the drafters (see annexure A).The implication is that the standard provisions of PAIA can be applied for requests both above and below the threshold (even though requests for records below the threshold will be subject to possible exemptions from disclosure).If PAIA doesn’t expressly place an obligation to keep records below the threshold, it renders nugatory any attempt to apply for records under the threshold, even where such an attempt should by PAIA’s own standards succeed. (For example, it might be that PAIA’s s 46 public interest override would mean in a specific instance that an application for records below the threshold should succeed. If there are no records to disclose, however, the applicant would be deprived of what should properly have been disclosed.)

**Recommendations**

1. The remedies to the abovementioned problems are easily solved by small adjustments to the Bill.
2. The prescribed threshold should be removed from cl 1(b)(i), and placed correctly with the duty to disclose quarterly. This will both close the loophole created by its inclusion at the duty to keep records, while also addressing any potential gap created by direct reference to the PPFA for independent candidates.

**#ENDS**