The FW de Klerk Foundation
CENTRE FOR CONSTITUTIONAL RIGHTS
Upholding South Africa's Constitutional Accord
Patron: The Hon Mr Justice Ian G Farlam

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25 June 2010

Dear Sir

Re: Submissions on the Protection of Information Bill [B6 – 2010].

1. The Centre for Constitutional Rights (the Centre) is a non-profit organization dedicated to upholding the Constitution[1]. To this end, the Centre seeks to promote the values, rights and principles in the Constitution; monitor developments, including draft legislation that might affect the Constitution; inform people and organizations of their constitutional rights; and assist people and organizations to claim their rights. The Centre accordingly welcomes the opportunity to make submissions on the Protection of Information Bill (the Bill) as the Centre is concerned about the bearing that certain provisions in the Bill have on the Constitution.

2. With the advent of our constitutional democracy, where parliamentary rule made way for constitutional supremacy, the point of departure for the analysis of any draft legislation must be the Constitution.

3. In these premises, the relevant constitutional imperatives that should inform the debate on the Bill are those that are enshrined in sections 1, 2, 7, 8, 16, 32, 33, 34, 36, 41(c), 199(8) and 231.

[1] Act 108 of 1996

Constitutional Imperatives

4. Section 1 provides that South Africa is founded on the values of constitutional supremacy and the rule of law. Both of these values are anchored in the principle of legality, which mandates legislation to be clear and unambiguous. In addition, section 1(*d*), read in conjunction with sections 41(c) and 199(8) and section establishes the principles of transparency and accountability as fundamental tenets of good governance.

5. Section 7, read with section 8, enjoins the Ad Hoc Committee on the Protection of Information Legislation (the Committee) to "respect, protect, promote and fulfil the rights in the Bill of Rights".

6. Section 16 enshrines the right to freedom of expression, which expressly includes, *inter alia*, the freedom of the press and other media, as well as the freedom to receive or impart information or ideas.

7. Section 32 guarantees the right of access to any information held by the state or by another person, to the extent that such information is required for the exercise or protection of any right.

8. Section 33 provides for the right to just administrative action, which includes the right to be given written reasons for an adverse decision, and the review of administrative action by a court of law.

9. Section 34 entrenches the right to have any dispute adjudicated by a court of law.

10. Section 36 permits the limitation of any right, provided that such a limitation is in terms of a law of general application, and it is reasonable and justifiable in an open and democratic society.

11. Section 231(2) binds the Republic to its international agreements that are duly entered into.

General Submissions

12. The Centre is concerned that the Bill transgresses the underpinning constitutional values of accountability, transparency and open governance.

12.1 The Centre believes that there is an inconsistency between the stated purpose of the Bill on the one hand, and the purpose that it serves in actuality on the other hand. The purported purpose of the Bill reads thus: "… to- … promote the free flow of information within an open and democratic society…" The inconsistency lies in that, read as a whole, the Bill broadly restricts access to information. In so doing, the Bill facilitates a culture of opacity and its corollary, the abuse of power. It therefore has the effect of undermining the founding values of accountability and transparency.

13. The Centre is also concerned about the violation of specific constitutionally guaranteed rights, namely: the right of access to information[2], the right to freedom of expression[3], specifically the freedom of the press and the right to have disputes adjudicated by a court of law[4].

13.1 The right to freedom of expression and the right of access to information are integral to our democratic order, because it is through the free flow of information and ideas that citizens can: (a) participate in public life, (b) take part in decisions that affect their lives and (c) hold the government of the day accountable.

13.1.1 This sentiment was recognized in the recent judgment of *M & G Limited and Others v 2010 FIFA World Cup Organising Committee South Africa Limited and Another*. [5]*In casu*, the court echoed the Constitutional Court's assertion that: '… access to information is fundamental to the realisation of the rights guaranteed in the Bill of Rights. For example, access to

[2] Section 32 of the Constitution
[3] Section 16 of the Constitution
[4] Section 34 of the Constitution
[5] (09/51422) [2010] ZAGPJHC 43 (8 June 2010)

information is crucial to the right to freedom of expression which includes freedom of the press and other media and freedom to receive or impart information or ideas'.[6]

13.1.1.1 The court in that case recognised the media as the watchdog that needs to fulfil its role in keeping the public informed.[7] It noted further that:

'The role of the media in a democratic society cannot be gainsaid. Its role includes informing the public about how our government is run, and this information may very well have a bearing on elections. The media therefore has a significant influence in a democratic state. This carries with it the responsibility to report accurately. The consequences of inaccurate reporting may be devastating. Access to information is crucial to accurate reporting and thus to imparting accurate information to the public'.[8]

14. As the primary agents of the dissemination of information and ideas, the mass media have an important role to play in fostering that right. This principle was forcefully affirmed by our Constitutional Court when it acknowledged that:

> "In a democratic society … the mass media play a role of undeniable importance. They bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture."[9]

The limitation of the mass media's right of access to information should, in these premises, be in exceptional circumstances.

15. The Centre acknowledges that there may be a need for secrecy with respect to sensitive documents whose disclosure would have a bearing on national security.

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[6] *Ibid.* at para 341.
[7] *Ibid.* at para 340.
[8] *Ibid.* at para 341.
[9] *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC) at para 22

15.1 The Centre submits, however, that any legislation protecting the disclosure of such documents should strenuously aim to strike a balance between ensuring national security and the constitutional imperatives of open and accountable governance that is based on the free flow of information. In its present form, with overbroad definitions and speculative thresholds for the classification of information and severe criminal sanctions without affording a public interest defense in respect of the criminal prohibitions, the Bill would severely hamper the free flow of information.

Specific Submissions

16. In addition to these general concerns, the Centre is also concerned about specific clauses in the Bill. For ease of reference, these clauses will be dealt with *in seriatum*.

17. *Ad Clause 1*:

17.1.1 "Classification authority": The extent to which secrecy is fostered and access to information hampered is largely determined by the classification of documents. The role played by the classification authority is thus pivotal to the reach of this Bill. In addition, the authority is tasked with taking into consideration a plethora of regulations, guidelines and legislation when determining a classification. This will require a high degree of skill and experience.. In its present form, where the authority to classify may be delegated to *any* official, there is no guarantee that the functionary will possess the requisite level of competence. The Centre thus proposes that the power to delegate be restricted to the level of deputy head of a state organ and no lower.

17.1.2 "Commercial information": The definition in its present form encompasses all information held by the state that has a commercial bearing, including commercial information about private individuals and corporate entities. Since the internationally accepted purpose of protecting certain information is to ensure that information that is harmful to the security of the state is not disclosed, the Centre is of the view that commercial information has no place in this Bill. In the extreme case, were disclosure of commercial information

concerning the state could potentially harm national security, prohibition of disclosure would be covered by the Promotion of the Access to Information Act (PAIA)[10]. In the alternate, the Centre proposes that restrictions on disclosure of commercial information should be restricted to state information and that the definition should be linked to the effect of the disclosure. The definition should thus be qualified by the phrase: "the disclosure of which *would* cause significant and demonstrable harm to national security."

17.1.3 "Information": The Centre proposes that the definition be restricted to information that is strictly related to matters of state security, and not information of "any kind".

17.1.4 "Intelligence": this definition is so broad that it covers all information held by the state. Given the over-broad definition of "national interest", (which, likewise virtually covers all information held by the state), reference to "intelligence" in the Bill is redundant. The Centre proposes therefore that it be deleted from the Bill

17.1.5 "Public interest": As with "national interest", this definition is so over-broad that it fails to add clarity or certainty as to its full ambit. In addition, the phrase "or are in accordance with the Constitution" is redundant, as any promotion would have to be in accordance with the Constitution. The Centre therefore suggests that this phrase be deleted. In the alternative, the Centre submits that "or" should be replaced with "and"; so the clause would read: "and are in accordance with the Constitution".

17.1.6 "Sensitive information": In order to ensure the least restrictive inroads into the free-flow of information, the Centre is of the view that "sensitive information" should be limited to information that has bearing on national security.

[10] Act 2 of 2000

17.1.7 "State information": This definition is a catch-all phrase, which includes all forms of information. In the Centre's view, it should be limited by reference to the potential harm that would result in disclosure.

18. *Ad Clause 3:*

18.1.1 The Centre is generally concerned with the undefined power given to the Minister in terms of which s/he can exempt certain organs of state from the application of the Bill. In addition, since the exemptions relate to checks and balances which aim to guarantee good governance and accountability, the degree of "good cause" should be defined in the Bill.

18.1.2 The clause also leaves unclear the issue of whether the Minister's discretion to regulate the implementation of the Bill is to be exercised *mero motu* or on application by an interested party.

18.1.3 With respect to clause 3(2)(*a*) – (*e*): The constitutional principles that inform good governance require the setting of standards and procedures. In the absence of an explanation as to why exceptions should be permitted, any such provisions are unconstitutional.

19. *Ad Clause 4:*

Given the overly broad definition of "state information', which includes all information held by the state, this clause provides a sweeping blanket for unrestricted censorship. The Centre proposes that the definition of state information be amended with the proviso: "disclosure of which would cause prejudice to national security, the defence of the Republic, the international relations of the Republic or materially affect the economic interests and financial welfare of the Republic."

20. *Ad Clause 7:*

20.1 The Minister is well qualified to prescribe categories of information that should and should not be protected and standards and procedures for classifying and declassifying the information. However, as noted in the Ministry for Intelligence Services' 1994 white paper on Intelligence, it is

essential that there be legal limits on secrecy, both in respect of criteria and time frames for classification and declassification, so as to avert the danger of the intelligence system becoming self-serving, as was the case under the apartheid regime. The Centre would thus propose that sub-clause 7(1)(*c*) be amended to include the phrase "and time frames" after the phrase "national information security standards and procedures".

20.2 Sub-clause 7(2) should be amended to refer to subsection (1)(*c*), and since standards cannot include the subject matter referred to, the clause should be altered to read:

"The national information security standards referred to in subsection (1)(*c*) shall include standards relating to, but not limited to …"

20.2.1 It is not clear why the Minister should only consult with the Minister of Police on issues of physical security for the protection of information. In any event, Clause 7(2)(*d*) would have to be amended to read: "physical security for the protection of information, as decided upon in consultation with the Minister of Police." The Centre would suggest that input from the Minister of Police also be obtained in respect of security of personnel.

20.3 The Centre notes that clause 7(3)(*a*) may have been intended to curtail the Minister's discretion that is accorded to him in terms of 7(1). However, the Centre is of the view that sub-clause (3)(*b*) detracts from the provision in sub-clause (3)(*a*) to the extent that it reads that the Minister "may", and does not *have* to take into account comments received in terms of sub-clause (3)(*a*). It should be peremptory for the Minister to take into account comments received, failing which public and other state participation is rendered nugatory. In these premises, the Centre suggests that "may" be replaced with "must" in sub-clause (3)(*b*).

21. *Ad Clause 8*:

21.1 Clause 8(1) directs the head of each organ of state to establish departmental policies, directives and categories for classifying information. While that is, clause 8(2) provides that the policies and directives should not be inconsistent with the national information security standards. The Centre is of the view that the two sections could potentially be inconsistent with each other, since the starting point for determining national information security standards is to protect information the disclosure of which is deemed adverse to national security, whilst the starting point for other heads of state is the constitutional imperative to promote access to information. The Centre accordingly suggests that in order to promote uniformity and consistency at the national level, there should be an independent body established that prescribes such standards and procedures. In the alternative, the Centre suggests that they be drafted by the Minister, and approved by an independent body. A precedent is to be found in sections 83 and 84 of PAIA, in terms of which the participation of the Human rights commission is mandated.

22. *Ad Clause 11*:

22.1 This clause, together with clauses 12 and 15, are the most problematic clauses in the Bill. Given the all encompassing scope of the definitions of information, combined with the complex, imprecise procedure set for classification, these clauses offend against the Rule of Law, and specifically the principle of legality, and thus do not pass constitutional muster. The Rule of Law requires that the law must, on its face, be clear and ascertainable. This requires precise and careful drafting. It also requires that in exercising any administrative function, state officials should be bound by and should apply clearly expressed law, as opposed to acting on a whim. As such, the rule of law augurs against state functionaries being granted wide discretionary powers. The definition of "national interest" is so broad that it is difficult to conceive of anything which would not fall within its ambit. Not only does this make it impossible to ascertain the exact scope of the term, but its application will also vary in practice, depending on varying interpretations by different functionaries. Thus, the clause also fails to facilitate consistent decision making by

government officials and thereby enable optimal efficiency, as is required in terms of section 195 of the Constitution. In addition, the infinite scope will inevitably lead to over-classification of state information. It is noted that sub-clause 11(4) requires that the determination of what is in the national interest is to be guided by the founding values of our Constitution. However, as stated earlier, this is not possible since these values are essentially incompatible with the notion of secrecy, on which the Bill is premised.

23. *Ad Clause 12:*

23.1 Virtually all National governments employ a system of classifying information so as to protect information which would damage or endanger national security from being used or being placed in the hands of wrong parties. The classification of such information depends on the extent of the potential damage which disclosure of the information might cause. This approach to classifying information inevitably warrants implementing different levels of protection. Although the classification systems may differ from country to country, most have levels which varyingly correspond to the British system. This is premised upon two broad categories of information: (a) information that has the potential of being harmful to national security if released, and (b) sensitive information, the release of which would cause possible injury to particular public or private interests. Generally, information in the latter category is not classified and restrictions on disclosure depend on the degree of sensitivity.

23.1.1 With the two categories in mind, the Centre submits that the information that this Bill should seek to protect is that whose release could result in harm being done to national security. PAIA adequately governs the release of sensitive information. Accordingly, the Centre would propose that commercial information be excluded from the ambit of classification. The Centre is mindful of the fact that certain commercial information could be harmful to state security, but

disclosure of such information is protected in terms of section 42 of PAIA.

23.2 In the event of the Committee deciding to retain commercial information as information requiring protection against disclosure in terms of this Bill, the Centre is of the view that the clause is far too broad generally, but specifically, sub-clause 12(1)(*a*) and (*b*). The Centre is of the view that sub-clause 12(1) unduly traverses on various rights contained in the Bill of Rights, including the right of access to information, all the rights enjoyed by the media and the principle of accountability.

23.2.1 With respect to clause 12(2), the Centre is of the view that the phrase "information which may" is over broad. The Centre suggests that the intensity and proximity of the harm be quantified and that the threshold be set at "grave damage to national security".

24. *Ad clause 13:*

24.1 This clause is unduly restrictive. The preamble of our Constitution lays the foundation for an open and democratic society, in which the government is based on the will of the people. It thus asserts the right of all citizens to know about the activities of the Government and to hold the government accountable. This the citizens can only do if they have access to information, as has been confirmed by our courts (*supra*). In contrast, the purpose of classification is to protect disclosure of certain information. In order to pass constitutional muster, the policy informing the process must be founded on sound constitutional principles. These principles should include the promotion of:

- Accountability through enabling access to information, wherever possible, and restricting classification to that which is strictly necessary;
- The rule of law, through providing a clear and unambiguous understanding of what must be classified; and

- Good governance through ensuring consistency of application by minimising discretionary powers.

In contrast, the procedure envisaged in the Bill is extremely complex, is expressed in imprecise terminology and is not conducive to consistent or uniform decision making. The tests to classify information as confidential or secret are set at unacceptably low thresholds of harm, are vague, and involve subjective judgments. Although the degree of harm required for 'top secret' classification is identified, the nature of the harm itself is nonetheless unclear owing to the overly broad definition of 'national interest'.

25. *Ad Clause 16:*

Clause 16(1) permits the head of an organ of state to classify his or her organ's information. It also permits delegation of this authority. The Centre is concerned that this provision compromises the values of accountability and transparency. As with the case of de-classification, the Centre would propose that the head of the organ of state retains accountability for any decisions taken in terms of sub-delegated authority.

26. *Ad Clause 21*:

26.1 The test set for the declassification of information is substantially higher and more precise than that set for classification. The Centre would propose that the same test should apply to both classification and de-classification.

26.1.1 The clause itemises various criteria which might be taken into consideration. In contrast, clause 22, which provides for the review of the classified status by the head of the organ of a state, makes consideration of the specified criteria obligatory. In order to avoid the inconsistency, the Centre proposes that clause 22(2)(a) be amended to read:

"Specific consideration must include, but need not be limited to…"

27. *Ad Clause 25*:

27.1 This clause provides for an appeal procedure if the organ of state denies a request for declassification or for lifting the status of information. The clause provides that the person requesting the information may appeal to the Minister.

27.2 A foundational tenet of the rule of law requires that "*in propria causa nemo iudex"* [11], which means that no one can be a judge in his or her own cause. The Centre accordingly proposes that an appeal should be to a court of law.

27.3 Alternatively, alive to the value of transparency, the Centre proposes that an independent body should be established to deal with appeals, not the Minister.

28. *Ad Clause 30:*

The mission of the Agency is to manage information pertaining to the stability and security of the State with a view to promoting the interrelated elements of security, stability, cooperation and development, both within South Africa and in relation to Southern Africa and the world at large. The Agency is thus well placed to manage and monitor the protection of information, the disclosure of which would impact negatively on the interrelated elements of security, stability, cooperation and development. The Centre is of the view that by its very nature, the Agency is accordingly not well placed to simultaneously promote access to information. The centre would thus suggest that the South African Human Rights Commission should accordingly be involved with the implementation and monitoring of the protection of information practices and programmes and providing support.

29. *Ad clause 31.*

This clause provides for the Minister to act as adjudicator in the event of a dispute arising between the agency and any organ of state. This provision offends against the well established Rule of Law maxim that "nemo potest esse simul actor et iudex" (no-one can be at once both suitor and judge) since the Executive responsible is being asked to determine a dispute between its agency and another organ of state. The Centre would propose that an independent adjudicator such as the Minister of Justice and Constitutional Development, be substituted for the Minister.

[11] Cod. Theod. 2.2.1

30. *Ad clause 46(11):*

The Centre is of the view that the insistence on a minimum of three judicial officers is overly cumbersome and will result in further over burdening the courts and in unnecessary delays. Invariably (?) requests for information are, by their very nature, urgent. Any point taken *in limine*, will require that the main matter be postponed and that at least three judges (who could each be hearing another matter) be found. In terms of the Supreme Court Act [12]and the Rules of Court, the Judge President of any division has the discretion to allocate three judges to hear a matter, depending on its complexity.[13] The Centre thus proposes that this clause be amended to require one judge. In any event, no corresponding provision exists in PAIA.

31. *Ad clause 48*:

31.1 Ad clause 84(1)(*f*):

As stated supra, the Centre is of the view that commercial information should be excluded from the ambit of this Bill. Should protection of commercial information pertaining to an organ of state be deemed necessary, the Centre is of the view that this protection should not be extended to commercial information pertaining to private individuals and entities which may be in the possession of the State. Sufficient safeguards exist under PAIA and in terms of the law of delict and the law of contract.

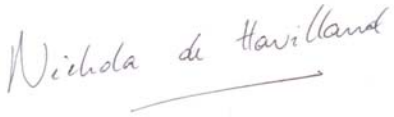
32. The Centre submits that an integral part of an open and accountable democracy is that the media has access to public records. Given the centrality of the media's role in the facilitation of an open and accountable democracy, the Centre is of the view that at the very least, the defense of "public interest" should be available to the media.

33. The Centre would like to contribute constructively to the enactment of this Bill. Should oral submissions be felt to be useful, please do not hesitate to call upon us.

[12] Act 59 of 1959

[13] A similar provision is contained in clauses 19(1)(a) and 19(1)(*c*) of the Superior courts Bill 2010

Yours faithfully



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