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28 June 2010
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Dear Mr. Burgess

ESKOM'S COMMENTARY ON THE PROTECTION OF INFORMATION BILL [B6-2010]

Eskom appreciates the opportunity to comment on the Protection of Information Bill [B6-2010]. Our submission covers a range of matters contained in the bill which we want the Committee to consider and therefore would appreciate an opportunity to make a submission at the public hearings on the bill which are scheduled for the 21 & 22 July 2010.

We trust that our comments have been constructive and that they are of assistance in finalising the Bill. In the event that further clarification or information is required, Eskom would be more than happy to provide same.

We hope our input adds value.



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Eskom Holdings Limited Reg No 2002/015527/06

**PROTECTION OF INFORMATION BILL [B6-
2010]**

COMMENTS BY ESKOM

28 JUNE 2010

COMMENTS BY ESKOM ON THE BILL

1. General Comments

- 1.1 Eskom agrees that there exists a need to protect State information as defined in the Protection of Information Bill and welcomes the fact that this Bill, once enacted, shall repeal the archaic Protection of Information Act 1982.
- 1.2 In the beginning of the bill it refers to the 'former MISS guidelines' (Minimum Information Security Standards) but to our knowledge the MISS is still in place. Is it the intention of the legislature that Protection of Information Bill shall eventually replace and incorporate the MISS since references are made to 'security plans' etc or is it that the MISS is no longer in place and that information has not filtered through to the general users of the MISS ?
- 1.2 While a head of an organ of state may delegate classification and declassification as described in the bill, there is no similar provision for delegation in respect of reviewing the status of all classified information held or possessed by the organ of state. This is a mammoth task. Eskom sees no reason why the head of an organ of state should not be allowed to delegate this function, and retains ultimate accountability, in the same way that the Chief Executive Officer of a Company delegates his functions in the Promotion of Access to Information Act and retaining ultimate accountability thereafter. Is this an omission or is the bill not envisaging such delegation. Eskom believes that it is an omission and such a delegation should be dealt with specifically in s 22 of the Bill.
- 1.3 The issue of seniority in the classifying process, and subsequent access to the classified documents, are officials of a lower status prohibited from working on a classified document, or could they work on them but not be permitted to attend to the classification? Clarification is required in this regard.
- 1.4 We foresee a potential problem emanating from certain foreign nationals who are staff members obtaining security clearances to deal with classified information as envisaged in sections 5(2) and 8(1) of the Bill.

1.5. Section 3 of the Bill provides that this Bill shall apply to all organs of state and further goes on to provide certain provisions of the Bill for which the Minister, on good cause shown, may exempt the application thereof to a particular organ of state. Considering that this Bill provides for exemptions in Section 3, should it not also provide for the total exemption from complying with the Bill where organs of state can show that they have over a period of time created classification of documents in compliance with one or another legislation or guideline. Such could also help with the just cause requirement provided for in the Bill.

1.5 Finally it is not clear from the bill, the stage of classification, namely at what stage a document or information could be classified and the issues practicality regarding this.

2. Definitions

'Valuable Information' this definition is too wide. The definition as it currently stands could have serious implications since something we may not consider to be 'valuable information' could be. This could, impact on our Audit & Forensic's audit plans for the future.

'State information' this definition is too wide. Is Eskom information regarded as "state Information" and if yes how do we determine which should be classified as "secret". Who is the classification authority? Who determines classification level?

3. Chapter 1

Use is made of the term 'screening' rather than 'vetting' under the definition 'Security Clearance'. From NIA's perspective there is a clear difference. No reference is made to the word 'vetting' when it relates to classification of information. Clarity on this is required.

Section 4(4) of the bill provides as follows;

"4. For the purposes of this Act a person is regarded as having knowledge of a fact if—

(a) that person has actual knowledge of the fact; or

(b) the court is satisfied that—

(i) the person believes that there is a reasonable possibility of the existence of that fact; and

(ii) the person has failed to obtain information to confirm the existence of that fact, and\

'knowing' shall be construed accordingly"

As it can not be correct that "person regarded as having knowledge of a fact' is a person that "has failed to obtain information to confirm the existence of that fact" please clarify if this is a typing error as the statement does not seem correct.

4. Clause 6 of Chapter 2 provides as follows:

'Unless restricted by law or by justifiable public or private considerations ,State information should be available and accessible to all persons" and '**State information**'"means information generated, acquired or received by organs of state or in the possession or control of organs of state; Is it really necessary to have this clause which Eskom believes does not provide you with the same protection that PAIA caters for when in essence you have the provisions of PAIA. Rather the Act incorporates the provisions of PAIA by reference to avoid conflict.

4. Chapter 5

In Chapter 5 (11) – reference is made to information of national interest advancement and in (a) and it furthermore refers to public good. This statement is too wide and could be interpreted to mean anything.

4.2 'Security from all forms of crime' - technically speaking in Eskom the organisation provides 'security' with regards to crime vulnerability e.g. conductor theft etc. This needs to be clarified – as it could have serious implications on Eskom.

4.3 Section 16 is just a repeat of what is in PAIA. Is it needed?

4.4 Section 17 (e) provides as follows "'if there's significant doubt in terms of classification"- refer to the Minister. What is envisaged as being significant doubt This is too wide a term or concept unless if we define "significant doubt" and have a floor and a ceiling. (is this section quoted correct?)

4.5 Section 33 deals with the transfer of public records to National Archives. Section 33(1) requires a head to review the classification status of information before it is transferred. As per the view expressed in point 4 above, express provision should be made for delegation of this function. Currently Eskom does not transfer any records to the National Archives. Eskom has its own archive. Clarity is required with regard to whether this status quo shall remain once this legislation is enacted.

4.6 Section 29. What form of reporting is expected?

4.7 Section 30, Section 31 and Section 32, Are these sections necessary as this will form part of the formal PAIA Request process? We foresee that this shall complicate the issue as there is a different amount of days required for these two processes.

4.8 Section 53. What shall the report entail? Clarification in this regard is required.