



Open Democracy Advice Centre

15th September 2010

TO: The Honorable, Max Sisulu, MP

The Speaker of the National Assembly,

Parliament of the Republic of South Africa

CC: Mr C V Burgess

Chairperson of the Ad Hoc Committee on the Protection of Information Legislation

Dear Hon. Speaker,

MEMORANDUM ON THE VALIDITY OF CATEGORIZING THE PROTECTION OF INFORMATION BILL AS A SECTION 75 BILL UNDER THE CONSTITUTION

I write in my capacity as the Executive Director of the Open Democracy Advice Centre (ODAC), a non-governmental organization whose mission is to foster a culture of government accountability and responsiveness, and assist people to realize their human rights. We do this by supporting the effective implementation of the right to know. We would like to draw your attention to a flaw in the manner in which the Protection of Information Bill has been introduced to Parliament.

In terms of Clause 3 of the Protection of Information Bill (the Bill), it applies to all organs of state. Organ of state is in turn defined in the definition section of the Bill in terms of S 239 of the constitution which means any department of state in the national, provincial or local sphere of government.

The implication of this is that the Bill affects provinces. Section 35 of the Public Finance Management Act (PFMA) provides that “Draft national legislation that assigns an additional function or power to, or imposes any other obligation on, a provincial government, must, in a memorandum that must be introduced in Parliament with that legislation, give a projection of the financial implications of that function, power or obligation to the province.”

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Members: IDASA, Black Sash Trust, Dean of Law (University of Cape Town), Oupa Bodibe, Richard Calland
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The National Treasury Department has confirmed in a letter addressed to the Open Democracy Advice centre that they are not aware of any report dealing with possible financial implications for Provinces on the Bill.

This means that section 35 of the PFMA has not been complied with, in that the Bill is draft national legislation which imposes an obligation on Provinces in terms of classifying information and therefore has financial implications for Provinces. In terms of section 35, the state law advisor while introducing the Bill failed to provide a memorandum which projects the financial implications of the function, power or obligation to Provinces in terms of the Bill.

The State law advisor has wrongly tagged and introduced the Bill as a Bill not affecting Provinces in terms of section 75 of the Constitution. It is not clear what the consequence of failing to comply with Section 35 is, we submit however, that in the absence of a memorandum prescribed under section 35 not introduced in Parliament along with the Bill, the Bill needs to be withdrawn to for it to be tagged as a Bill affecting Provinces in terms of Section 76 of the Constitution. This is necessary in order for the state law advisor to introduce the Bill to Parliament in a manner that complies with section 35 of the PFMA and for the Bill to be dealt with in the manner prescribed in section 76 of the constitution.

In the Constitutional Court Case of *Tongoane and Others v Minister of Agriculture and Land Affairs and Others* (2010 Case CCT 100/09), the Constitutional Court declared the entire Communal Land Rights Act 11 of 2004 (the Act) invalid because it was not adopted in terms of the correct procedure prescribed in the Constitution. The Court struck off this legislation from the statute books because the Act when it was before Parliament had been incorrectly tagged as a Section 75 Bill not affecting provinces in terms of the Constitution instead of a Section 76 Bill affecting provinces and therefore the Act had not been adopted in terms of the correct procedure prescribed by the constitution.

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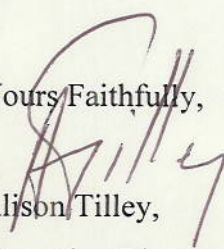


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Given this precedent from the Constitutional Court, it is likely that the Protection of Information Bill will suffer the same fate as the Communal Land Rights Act and declared unconstitutional in its entirety by the Court if passed as a Section 75 Bill. If it is not the intention of the State law advisor to make the Bill applicable to Provinces, then a re-drafting of the Bill would be necessary to remove the application of the Bill to Provinces and local government.

We hope the Parliament will address this situation before proceeding any further with the Bill.

Yours Faithfully,



Alison Tilley,

Executive Director,

Open Democracy Advice Centre

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