

AMENDED VERSION

ACDP SUBMISSION ON THE PROTECTION OF INFORMATION BILL

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The ACDP would like to make the following submissions on the Protection of Information Bill.

A. Definitions

1. Deletion of definition of commercial information and the chapter dealing with that issue.
2. Amend or delete definition of "file series" – category of classification is too broad.
3. Narrowing of definition of "information" - why in (b) is "conversations, etc. not contained in a material or physical form or format" included.
4. Remove reference to "national interest" in definition of "intelligence", replace with "national security".
5. Deletion of definition of "national interest."
6. Definition of "national security" should be narrowly defined: "national security means the protection of the people of the Republic and the territorial integrity of the Republic against:
 - (a) the use or threat of force;
 - (b) the following acts:
 - (i) hostile acts of foreign intervention;
 - (ii) terrorism;
 - (iii) espionage;
 - (iv) sabotage; and
 - (v) violence;whether directed from, or committed within, the Republic or not, and includes the carrying out of the Republic's responsibilities to any foreign country in relation to any of the matters referred to in this definition."
7. Reconsider whether there is a need for definition of "security" and "state security matter"; if not delete.
8. Delete subparagraph 4 of clause 1 – this clause is too vague and courts will have difficulty in interpreting it.
9. Delete subparagraph 5 of clause 1- references to minimum sentencing, and compelling circumstances to justify the imposition of a lesser sentence. Should the committee decide to retain minimum sentences, then this sub-clause must be reinserted.

10. Clause 2 – reconsider contents of Objects clause – narrow down and remove references to “national interest”.
 - B. Chapter 2 - delete
 - C. Chapters 3 and 4 delete/refer parts thereof to regulations – discussion to be held
 - D. Chapter 5 - delete
 - E. Chapter 6
 1. Clause 14 – delete 14 (2) – broad categorisation too encompassing to classify files, file series etc – individual items must be considered.
 2. Clause 15 - Classification levels - Reconsider threshold test by bringing it in line with threshold test of PAIA. Thus:
 3. (i) subclause (1)(a) to read “sensitive information , the unlawful exposure of which could reasonably be expected to cause harm to the national security of the Republic or could reasonably be expected to prejudice the Republic in its international relations.
(ii)Then delete (b) references to commercial information.
(ii) Subclause 2 (a) to read “sensitive information , the unlawful exposure of which could reasonably be expected to cause serious harm to the national security of the Republic or could reasonably be expected to jeopardise the Republic in its international relations.
(iv) Then delete 2(b) references to commercial information.
(v) Subclause 2(c) to read “personal information the disclosure of which could reasonably be expected to endanger the life of the individual concerned.”
(vi) Subclause 3 (a) to read” “sensitive information , the unlawful exposure of which could reasonably be expected to cause exceptionally serious or irreparable harm to the national security of the Republic or could reasonably be expected to cause other states to sever diplomatic relations with the Republic.”
(vii)Then delete 3(b).
(viii)Subclause 3(c) to read “personal information the disclosure of which could reasonably be expected to endanger the life of the individual concerned.”
 4. Clause 16 amend references to “national interest” to “national security”, as well as references to subclause 5 and 6 – broad categorisation .
 5. Clause 17(1) replace “national interest” with “national security”.
 6. Clause 18 – amend so that mere possession is not punishable – ie subject to public interest override.

F. Chapter 7

1. Clause 21 – amend national interest to national security and add in sub 2 “could reasonably be expected ‘ in place of “may”.
2. Clause 23 – Insert a public interest override compelling declassification under circumstances similar to mandatory disclosure in public interest as set out in section 46 of PAIA, which overrides the refusal to grant access to information regarding defence, security and international relations contained in section 41 of PAIA.
3. Clause 25 - Remove reference to Minister and insert “an independent oversight body” and amend accordingly, as well as clause 30 (c) (i) reference to Minister.

G. Chapter 10. Concerned about wide-ranging responsibility of the State Security Agency set out here – delete.

H. Chapter 11 Offences and penalties

1. Clause 32 - espionage offences –shouldn't this be 25 years and not 15 to 25 years and consider inserting “with the intention of “ to make intent a clear element of the crime, where appropriate.
2. Delete references to minimum sentences in all clauses.
3. Clause 38 – consider inserting the option of a fine for less serious offence. Align this clause with the Protected Disclosures Act and other laws protecting whistleblowers should public interest over-ride (clause 23) and/or public interest defence (clause 43) not be accepted.
4. Clause 39 – mere possession should not be penalised – see comments on clause 18 – amend / delete
5. Clause 43 –prohibition of disclosure of state security matter – Consider deleting clause 43 and insert a public interest defence in its place:
 - (1)“No person shall be guilty of an offence under sections 32, 35, 37, 38, 39 if that person acts in the public interest.
 - (2) A person acts in the public interest if the person has reason to believe that the classified information shows or tends to show one or more of the following;
 - (a)a criminal offence has been or is about to be committed
 - (b) that a person has failed to perform a legal obligation to which that person is subject
 - (c) that a miscarriage of justice has occurred, is occurring or is likely to occur
 - (d) that the health or safety of an individual is being endangered
 - (e) the environment is being or is likely to be damaged

- (f) that a public safety risk exists
- (g) that gross incompetence, mismanagement or impropriety on the part of any person has occurred
- (h) that an unlawful act, inefficiency or administrative error is being promoted
- (i) that an undue advantage is being given to anyone in a competitive bidding process
- (j) that the public is being misled by an action or statement of another person (common law defence to defamation)."

6. New sub-clause to deal with information in public domain: "No person is guilty of an offence under sections 32, 35, 37, 38, 39 if the information or substantially the same information was in the public domain at the time of disclosure"

I. Chapter 12 - Protection of information before the courts

Clause 46 - Reconsider the classification of state information before the courts (refer to *Masetlha* judgement (2008(4) SA 31 CC).

J. Chapter 13 - General Provisions

Clause 48 (1) (f) – remove reference to "commercial information".

Further Consequential amendments may be required should these recommendations be accepted. Our general concern relates to the harmonisation of this bill with PAIA, the Protected Disclosures Act, and relevant section/s of the Companies Act.