DA Provisional amendments Protection of Information Bill

Name of Bill: Classification of State Information Bill

Long title: in first line replace "or" with "and"

In second line insert "such" before "information"

Preamble: redraft later and if necessary incorporate portions of clause 6

Definitions

Categories

On p 5 lines 11 to 16

Delete (subject to discussion whether the principle of severability of sections of information is compatible with categorisation)

Commercial information

On p 5 lines 30,31 delete

File series

On p 5 lines 45 – 52

See "categories"
 above

Information principles

On p 6 line 23 delete (subject to discussion)

Intelligence

P 6,7 lines 41 – 14

Definitions need amendment to delete reference to national interest, line 44 ;"threats to constitutional order"' line 60 ;"advancement of public good and all things owned or maintained"lines 62,63;national interest lines 5 and 7

National interest

P 7 line 30 delete

National security

P 7 delete line 31,32 and 33 from "resolve" up to "includes"

Organ of State

P 7 line 42 (a) delete; insert "an executive organ of state as described in s 238 of the Constitution

Public interest

P 8 not usually define – discuss

Sensitive information

P8 line 18 omit "must" insert "may"

P 8 line 19 delete "interest" insert "security"

Valuable information

P 8 line 33 delete

Clause 1 (2) Delete – subject to discussion of utility of clause 6

Clause 1 (4) delete (inexplicable)

Clause 1 (6) delete

OBJECTS

Clause 2 p 9 lines 4 – 14 delete

APPLICATION

Clause 3 p 9 line 29

   (a) Government departments charged with intelligence or divisions of
       departments dealing with security and intelligence related thereto,
       including Foreign Affairs

Clause 3 (2) delete (once the application clause is narrowed down the
exemptions become unnecessary)

Clause 3 (3) delete as above

CHAPTER 2

Delete

CHAPTER 3

Clause 7 (1) p 10

Delete (a) and (b)

P 11 in line 3 add "held by intelligence structures"

In line 4 replace 1 (b) with 1 (c) (error)

In line 6 delete "at organs of state"

Clause 7 (3) delete

Clause 7 (4) delete

Clause 8 p11 line 27 after "each" insert "executive"; after "state" insert "dealing with security matters other than intelligence"

CHAPTER 4

Delete

CHAPTER 5

Delete

CHAPTER 6

P 13 (a) line 9 after "sensitive" delete "commercial or personal"

(b) in line 11 deleete "must" and insert "may"

(d) in line 17 delete "is considered to be valuable information that"

Clause 14 (2) delete

Clause 14 (3) in line 32 delete "directions" and insert "conditions"

Clause 15

Sub (1) should read:

(a) Sensitive information the unlawful disclosure of which is likely to/could reasonably be expected to cause demonstrable harm to the national security or is likely/could reasonably be expected to prejudice the Republic in its international relations
(b) Delete

Sub (2)

(a)sensitive information the disclosure of which is likely to/could reasonably be expected to cause serious and demonstrable harm to the national security or is likely/could reasonably be expected to jeopardise the international relations of the Republic

(b) delete

(c) delete

Sub 3

(a) Sensitive information the disclosure of which is likely to/could reasonably be expected demonstrably to cause exceptionally serious/grave and 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

(b) Delete

(c) Delete NOTE it is assumed persons needing classification as intelligence operatives/sources are covered by security and don't need "personal" protection

Clause 16 p 14

Delete subsections 5 and 6

P 14 Directions for classification: delete "Directions" and insert "Conditions"

In line 24 (a) substitute with "secrecy is justifiable only when necessary to protect the national security"

In line 31 delete (b) (iv)

In line 35 delete "section 11"

In line 38 delete "in the national interest"

In line 48 after "benefits of" insert "openness and"

In line 52 delete (classification is not needed against loss)

In line 57 delete "and the national interest"

P 15 clause (2) line 6 delete "principles" insert "conditions"

P 15 clause 18 delete, alternatively make subject to provisions of the Bill which allow a public interest override

P 15 clause 20 in line42 delete "interest" insert "security"

CHAPTER 7

P 15 clause 21 in line 51 delete "interest" insert "security"

P 16 clause 21 (2) in line 1 delete "may" at end of line and add " is likely to /could reasonably be expected to"

P16 clause 22 (2) add "provided that a review of all material classified under the MISS must be conducted at the commencement of this Act"

P16 clause 23 in line 39 delete all words after "by" and insert "any person" (NOTE s 32 does not impose any conditions or limitation on access to state information)

P16 clause 23 (2) delete, see above

P 16 clause 23 (6) only if application is limited to matters dealt with in s 41 of PAIA. And add subclause equivalent to PAIA s 41 (4) (b) .

New subclause (7)(equivalent of PAIA s 46)

The head of an organ of state must grant a request for declassification if the disclosure of the information would reveal evidence of (i) a contravention of, or failure to comply with, the law (ii) an imminent and serious public safety or environmental risk and the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question

P17 clause 25

(1) Delete and insert: "Any person denied a request for declassification may appeal to a judge designated by the Minister of Justice under the Regulation of Interception of Communications and Provision of Communication-Related Information Act no. 70 of 2002 (and add appropriate definition in clause 1)

(2) Delete and insert:" the designated judge must make a finding and in the case of refusal provide reasons within 90 days of the date of receipt of such request."

CHAPTER 8

P 17 clause 26 (1) delete and insert: "The classification of information must be reviewed before it is transferred to the National Archives or other archives established by law provided that information that has been classified for 20 years shall be declassified"

CHAPTER 9

Move clause 28 to follow clause 23

CHAPTER 10

Delete

CHAPTER 11

P 19 Clause 32 should read

(1) It is an offence punishable on conviction by imprisonment for a
    period not exceeding 25 years
    (a) to unlawfully communicate, deliver or make available State
    information classified top secret with the intention of directly
    benefiting another state; or
    (b) to unlawfully make, obtain, collect, capture or copy a record
    containing State information classified top secret with the intention
    of directly or indirectly benefiting another state.

(2) It is an offence punishable on conviction by imprisonment for a
    period not exceeding 15 years
    (a) to unlawfully communicate, deliver or make available State
        information classified secret with the intention of directly or
        indirectly benefiting another state; or

(b) to unlawfully make, obtain, collect capture or copy a record containing State information classified secret with the intention of directly benefiting another state.

(3) It is an offence punishable on conviction by imprisonment for a period not exceeding five years

    (a) To unlawfully communicate, deliver or make available State information classified confidential with the intention of directlry or indirectly benefiting another state; or

    (b) To unlawfully make, obtain, collect, capture or copy a record containing State information classified confidential with the intention of directly or indirectly benefiting another state

Clause 33 and as above, delete minimum sentences and reasonable knowledge and insert intention

Clause 35 compare with Electronic Communications and Transactions Act

Clause 36 delete (not credible)

Clause 38 reference to 11 (3) (g) inexplicable ; remove minimum sentence and introduce option of a fine

Clause 39 Delete. We oppose a possession clause (18) and its offence provision

Clause 41 omkit "valuable" and insert "sensitive"

Clause 42 omit (d) – consequential on removal of commercial categories

Clause 43 this is the Frank Chikane clause and requires discussion against the Rev Chikane's assertions that operatives freely share classified information with comrades inside the ANC who are not authorised to receive state security information: as he says, "corrupt

intelligence services are the most dangerous threat to security and intergrity of the state". As with improper classification, aggravated maximum sentences light be considered for operatives who breach their own secrecy undertakings; but precisely because they are freely divulging information, it is unfair to impose imprisonment on others who disclose

New clause – discussion supported of MPSA public interest and public domain defences

Clause 46 to be brought into line with Constitutional Court Masethla judgement

General and transitional provisions - later