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the doj & cd
Department:
Justice and Constitutional Development
REPUBLIC OF SOUTH AFRICA

Ref B6 - 2010
Mr C Burgess MP
The Chairperson
Ad Hoc Committee on Protection of Information Bill
Parliament of the Republic of South Africa
CAPE TOWN
8001

Dear Mr Burgess

Opinion on time periods in the Protection of Information Bill and Access to Information Act

1. Background:

We were asked to comment on the time periods prescribed in the Promotion of Access to Information Act, 2000 (Act No 2 of 2000), ("PAIA") and Protection of Information Bill ("PIB").

2. Clauses within Protection of Information Bill and Access to Information Act that deals with time periods:

In terms of clause 2 of PIB, the objects of the Bill are to harmonise the implementation of PIB with PAIA and the National Archives and Records Services of South Africa Act, 1996 (Act No 3 of 1996).¹

The PIB provides in clause 24(2) that "head of an organ of state receiving a request in the prescribed manner for a review of the status of classified information must make a determination and in the case of a refusal provide reasons within **90 days** of the date of receipt of such request.

Under clause 25 (2) that relates to the appeal procedure in PIB, an appeal must be lodged within **30 days** of receipt of the decision and reasons therefore (decision refers to the decision to deny the request for declassification or lifting of the status of information).

¹ Clause 2 (j) of PIB

Clause 25(3) of PIB provides that the Minister of an organ of state must make a finding upon receipt of an appeal and in the event of refusing such a request, must provide reasons within **90 days** of receipt of such request.

PAIA provides for different time periods for:

- The decision of a request (section 25 (1)) where the information officer must within **30 days** of receipt of a request decide grant or deny the request.
- Under section 26(1) of PAIA, the information officer may extend the period contemplated under section 25 for a **further period of 30 days**. The period may only be extended once and only under certain conditions as provided for in section 26 (1) (a) – (e).
- Section 47 provides that the information officer must within **21 days** after a request for access to a record is made under sections 34(1), 35(1), 36(1), 37(1) or 43(1) is received inform a third party of such receipt.
- Under section 47(3)(e) the information officer must state that the third party may within **21 days** after being so informed make representation why the request should be refused or give written consent to allow disclosure of the documents (see also section 48 (1) in this regard).
- Under section 49 (1) an information officer must within **30 days** after a third party is informed as required under section 47 decide whether to grant access.
- Under section 49(3) (b), a third party may within **30 days** lodge an internal appeal or an application against the decision if the request for access is granted.
- In terms of section 75 (1) (a) (i) a requester may lodge an internal appeal against the decision of an information officer within **60 days** after refusal for a request for access.
- Where notice to a third party as contemplated in section 49(1)(b) is required, an internal appeal must be filed within **30 days** after notice is given to the appellant of the decision appealed against or where notice is not required, within **30 days** after the decision was taken.
- On receipt of an internal appeal, the information officer must, within **10 working days** submit to the relevant authority the appeal together with his or her written reasons.
- Under section 76, on receipt of an internal appeal, the relevant authority must within **30 days** of receipt of such an appeal, inform the third party to whom or which the record relates of that appeal.
- Under section 76 (3)(d), the relevant authority must inform the third party having being informed, that the third party has **21 days** within which to make written representation to that authority regarding the reasons why access should not be granted.
- Under section 76(8)(a), the relevant authority must notify the requester within **30 days** after receipt of the internal appeal of the notice.

- Under section 76(8)(b) the relevant authority must state in its notice to the requestor that within **21 days** after notice is given that the requestor may make written representations.
- Section 77(3)(a) provides that the relevant authority must decide on the internal appeal within **30 days** after the appeal has been filed.
- Section 77(3)(b) provides that the relevant authority must decide in the event where a third party is informed within **30 days** regarding the internal appeal.
- Under section 77(3) (c)(i) the relevant authority must make a decision within **five working days** after the requester concerned has made written representations in terms of section 76(9).
- Under section 77(3)(c)(ii) the relevant authority must make a decision in any other case within **30 days** after notice is so given.
- Under section 77 ((5) (c)(i) the notice must state that the appellant, requester or third party may lodge an appeal with the court against a decision on internal appeal within **60 days**.
- Section 77 (5)(c)(ii) provides that if notice is given to a third party the third party is required within **30 days** after notice to lodge an application with the court.
- Section 77 (6)(b) provides that the information officer must after the expiry of **30 days** after notice is given to a third party give access to a requester unless an application is lodged with a court for a decision on an internal appeal.
- Under section 78 (2) a requester may by way of an application, within **30 days** apply to a court for appropriate relief in terms of section 82.
- Similarly, a third party may, by way of an application, within **30 days**, apply to a court for appropriate relief in terms of section 82.

3. Relevant case law:

In *Brunner v Minister for Social Development and others* SA 323 (6) 2009 (CC) the Constitutional Court considered the question whether the 30 day time period as prescribed under section 78(2) is consistent with section 32² and 34³ of the Constitution.

The Court in assessing whether there was an infringement of the said rights considered the provisions in PAIA that govern applications to court, namely sections 77 and 78 and the scheme that emerges there from. In the Court's analysis of the scheme under PAIA it had regard to the scheme as contained in Part 4 of PAIA that deals with internal appeals and applications to court. The Court remarked that the confusion in the scheme emanates from the requirement in section 77(5)(c)(i) that provides that " the notice must state that the appellant may lodge an application with a court against the decision on internal appeal within 60 days.⁴" The Court having regard to section 77(5)(c)(i) and section 78(2) concluded that there is a conflict between the provisions and as such they are incapable of being harmonised⁵. The question whether the challenge to section 78(2) that is directed to the time period , namely 30 days to lodge an application to court, is limiting the rights of access to

² Section 32 of the Constitution relates to the right of access to information

³³ Section 34 of the Constitution relates to the right of access to court

⁴ *Brunner* case paragraph 44

⁵ *Brunner* case paragraph 45

court and access to information. In its assessment the Court referred to its previous decisions on time limits⁶ and indicated that the principle derived there from is that: "Time bars limit the right to seek judicial redress but that they serve an important purpose in that they prevent inordinate delays which may be detrimental to the interests of justice⁷".

The Court in providing guidelines regarding time periods in legislation and whether or not a provision will pass constitutional muster remarked that "the provision must afford a potential litigant an adequate and fair opportunity to seek judicial redress for a wrong allegedly committed. It must allow sufficient or adequate time between the cause of action coming to the knowledge of the claimant and the time during which the litigation may be launched and finally the existence of the power to condone non-compliance with the time bar is not necessarily decisive.⁸"

In assessing the justification for the time period in PAIA the court remarked that section 78(2) had a dual limitation in that it not only "limits the right to seek judicial redress, but in effect also the right of access to information by imposing a very short time period within which a person seeking information must launch litigation"⁹ However, having said that the Court also pointed out that time bars are important as they ensure that there is no delay that hampers the interest of justice, or serve to prevent the loss of documents or witnesses to disappear¹⁰.

Importantly, the Court remarked that "one cannot overlook the time limits provided for in other statutes these provisions¹¹ show what Parliament considers as an adequate and a fair opportunity to institute proceedings against the state¹².

In considering the appropriate remedy having found that section 78 (2) is unconstitutional the Court indicated that it deemed it appropriate to suspend the order of invalidity in order to allow Parliament to fulfil its constitutional mandate to cure the defect. However the Court pointed out that although it prescribed an interim regime, namely a time period of 180 days that will regulate applications to court, that regime must be consistent with the scheme in PAIA¹³.

⁶ Barkhuizen v Napier; Engelbrecht v Road Accident Fund; Moise v Greater Germiston Transitional Local Council; Mohlomi v Minister of Defence

⁷ Brummer paragraph 50

⁸ Brummer paragraph 50

⁹ Brummer paragraph 62

¹⁰ Brummer paragraph 64

¹¹ The Court referred to a number of statutes

¹² Brummer paragraph 68

¹³ Brummer

4. Discussion:

The Constitution confers on the National Assembly the power to pass legislation with regard to any matter, including a matter within a functional area listed in Schedule 4 but excluding, subject to subsection (2), a matter within a functional area listed in schedule 5¹⁴.

Although the PIB provides that harmonisation with PAIA is one of its objects, these are two different pieces of legislation. Parliament may therefore prescribe different time frames regarding the provisions of PIB. The provisions of PIB that relate to time frames are contained in clauses 24 and 25 respectively. These clauses prescribe different periods namely:

- 90 days to provide reasons under clause 24 (2) where the head of an organ of state refuses a review of the status of classified information;
- 30 days to lodge an appeal to the Minister of the organ of State in question in terms of clause 25(2);
- 90 days to provide reasons in the event of refusing the appeal contemplated in clause 25(2).

In line with the Brummer case and Parliament's legislative authority these provisions need to be evaluated to determine whether or not they infringe the right to access to information or the right to access to courts.

Having regard to the relevant case law it is clear that the legislative scheme provided for in PIB must not infringe any constitutional right. In this instance the time frames mentioned do not address the right of access to court but merely provides for a time frame within which reasons for refusal must be given (clauses 24(2), and 25 (3)) and the time bar within which an internal appeal must be lodged (under clause 25(2)). The Constitutional Court has remarked in this regard that the purpose for having time bars in legislation is to ensure that there is no inordinate delay which may be detrimental to the interests of justice.

5. Conclusion:

Parliament is empowered to legislate on such time frames it considers appropriate having regard to the scheme of the legislation in question. In this instance the classification of information as provided for in the Protection of Information Bill. We are of the view that these provisions do not impact on the right of access to courts nor on the right to access to information as the provision merely stipulates the time within which:

- reasons for refusal must be given; and
- an internal appeal must be filed.

CHIEF STATE LAW ADVISER

¹⁴ Section 44 (2) of the Constitution of the Republic of South Africa, 1996.