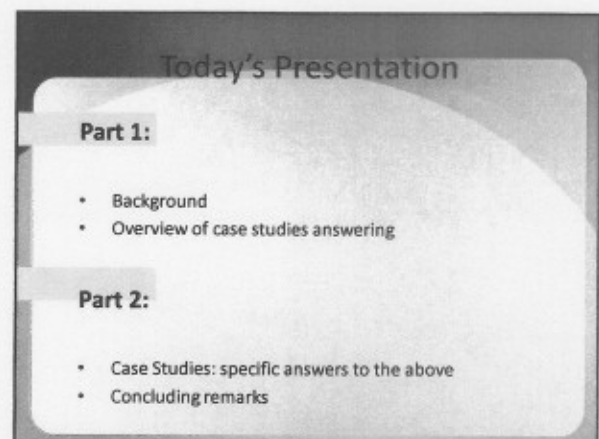
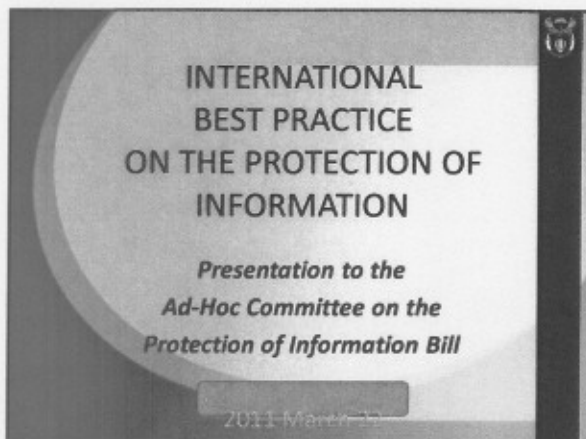


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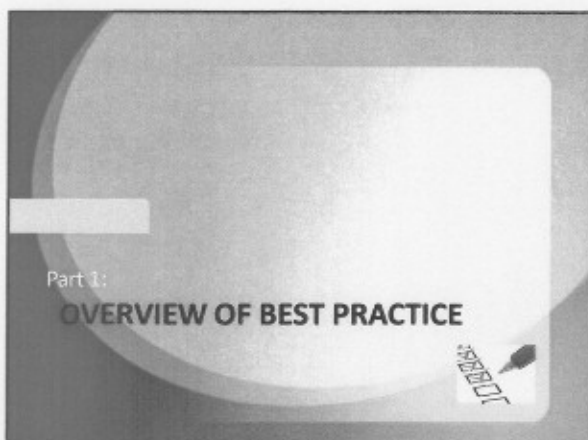


Background to the Briefing

- On 22 October 2010, Minister SC CWELE, MP, briefed the Ad-Hoc Committee
- Offered to present at the pleasure of the Ad-Hoc Committee a study on international best practice
- Ad-Hoc Committee Chairperson, following a decision of the Committee wrote to Minister
- Briefing is being presented in response with the approval of the Minister

Background to the Briefing

- Study was being conducted in response to arguments presented during Public Hearings
- Aim is to see what is substantively correct, incorrect or points to other practices not highlighted during Public Hearings
- More than 86 countries already have Right to Information laws
- Five in Africa are about to legislate on this matter
- Overview reflects on this but only a few case studies would be focused upon for brevity and clarity of message



What is classified?

- Various dispensation classify different things that are associated with the generation, development, storage, transfer, copying, conveying, protecting, processing, and using information.
- The main approaches are:
 - **Narrow definition** of national security
 - **Broad definition** of national security
 - **Third way:** broad definition of national security but limited role of intelligence and security structures whilst bringing non-traditional bodies to assist with the management of national security matters

Why is it classified?

"In every country there is a legitimate public interest in providing a higher level of protection to sensitive information held by public bodies. Inevitably such protection constitutes a restriction on the right of access to information. The protected public interests are enacted as exceptions in the FOI [Freedom of Information] regimes and even if the lists of such exceptions to the 'right to know' may vary, but there are some core elements, such as national security, defence, foreign relations, public safety, public order which are always present".



Why is it classified?

The widely accepted grounds for classification include:

- *Protection of interests of the country;*
- *Public interest;*
- *State interest;*
- *Vital interest;*
- *Permanent interest;*
- *Fundamental interests;*
- *Interests of importance;*
- *state interests; and*
- *essential interests.*

Why is it classified?

"These interests are enlisted both in international... and national legal instruments which provide for the freedom of information and expression. The essence of every secrecy law is that some sets of information have to be protected in the interest of the public/country/nation so as to avoid threats or harms which would be caused by disclosure to unauthorized persons..."

Who classifies?

There are **three main systems** that deal with the classification of information:

- **Prior Classification System:** *the classifying authority determines beforehand categories of information to be classified based on a harm test or on a public interest test*
- **Originator Classification System:** *the originator or author of the document does the classification of information. In some dispensations, this classification needs to be confirmed or rejected by a senior person or the classifying authority; USA.*
- **Classifying Authority System:** *only the classifying authority classifies documents but whether the document has a classification on it or not*

When is it classified?

Different systems adopt different approaches to this issue:

- **Classification Default System:** Some consider all information as classified until it is requested and then the harm or public interest tests are applied and then given or refused (*From creation until declassified*)
- **Multiple-layer Dispensation:** Some dispensation designate categories of information that may, must or must not be refused (*At the point of determining content and its relation to the applicable test(s)*)

The need to protect must be proven in all systems

Where is it classified?

In all the systems, the information is classified at the venue of its creation or receipt

- In the foreign countries or in regions for field agents;
- In the battle field for defence intelligence agents;
- In crime syndicates, in the case of crime intelligence agents; and
- In international organisations (SADC Organ, CISSA, Bilateral Relations and at the AU) where there is transnational collaboration of state parties.

How is it classified?

There are areas that inform the process of classification:

- **International law and jurisprudence;**
 - *Grounds for limitation must be met*
- **Constitutional Provisions;**
- **National Laws and subordinate legislation**
- **Supportive activities and documents**
 - *Training and Advisory Services*
 - *Security Audits*
 - *Manuals*

How is it classified?

International Law provides that:

- **Restrictions must be prescribed by law**
 - *Clearly*
 - *Precisely*
- Meet the test of legal certainty and foresee-ability
- Must be genuinely directed towards achieving one of the legitimate aims specified in the treaties
- Must be necessary in a democratic society
 - *Social need*
 - *Proportionate*

How is it classified?

There are areas that inform the process of classification:

- **International law and jurisprudence;**
 - *Grounds for limitation must be met*
- **Constitutional Provisions;**
 - *National principles must be adhered to; eg, secrecy is in the Constitution in Austria RTI in RSA*
- **National Laws and subordinate legislation**
 - *Set out basis for limitation*
- **Supportive activities and documents**
 - *Training and Advisory Services*
 - *Security Audits*
 - *Manuals*

How is it classified?

International Instruments:

- The Universal Declaration of Human Rights
- The International Covenant on Civil and Political Rights
- African Charter on Human and People's Rights
- American Convention on Human Rights and American Declaration of the Rights and Duties of Man
- European Convention on Human Rights

How is it classified?

Tests that are used for information that needs to be (de)classified:

– Harm test

- Two main aspects: gravity and probability as a result of unauthorised disclosure but not all dispensations apply these two tests
- Justification of the reason for non-disclosure
- Rare cases involve cannot confirm or deny response to requests

How is it classified?

Public interest test: serious concern or benefit

- Does not mean of interest to the public but in the interest of the public
- Arises when access to information is required
- Weigh for and against factors for disclosure
- Provide justification for decision

How is it classified?

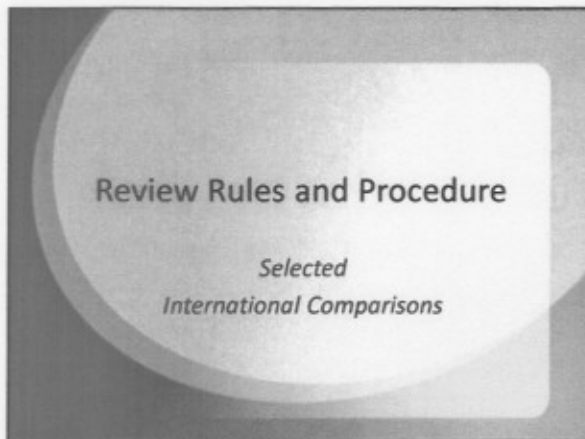
Matters of general public interest:

- Information about activities and possible wrongdoing of the security services (spycatcher)
- Matters, including the status of settlement negotiations, concerning the health risks of legal drugs and the locus of legal and moral responsibility for resulting injuries (The Sunday Times)
- Criticism of the police department (Thorgeirson)
- Published opinion alleging a court's lack of impartiality (Barford)

How is it classified?

RSA Constitutional Provision on limitation

- Law of general application
- Must be reasonable and justifiable in an open and democratic society
- Based on human dignity, equality and freedom
- Take into account relevant factors such as:
 - *The nature of the right;*
 - *The importance of the purpose of the limitation;*
 - *The nature and extent of the limitation;*
 - *The relation between the limitation and its purpose; and*
 - *The less restrictive means to achieve the purpose. (Sect 36 Const)*



Review Systems Elements

- Regular reviews
- Random Checks
- Self-tasking review
- Review on request

Review Outcomes

- Classification level and period of classification may be maintained
- Classification level and period of classification may be reduced
- Information may be classified at a higher level and or the period extended
- The information may be declassified

Post Review Obligations

The originator of the information must following a review:

- Notify all holders of the said information on the outcome of the review

Review Time-frames

- Classification is a restriction of the right of access to information and must be limited to avoid emptying the right
 - *Time lapse*
 - *Probability and gravity of harm lessened*
- Different dispensations have different time frames
- The sensitivity of the information is directly related to the time frame for it being protected
- What follows are selected examples of countries and their applicable review time-frames

Review Time-frames

- Longest time-frame is 95 years: Lithuania;
- 90 years in Hungary;
- 70 years in Sweden;
- 50 years in Estonia and Poland;
- 30 years in maximum of 60 years in Germany;
- 12 years extendedable in Mexico;
- 05 years for "Top Secret";
- 04 years for "Secret";
- 03 years for "Confidential";
- 02 years for "Restricted".

Review Time-frames

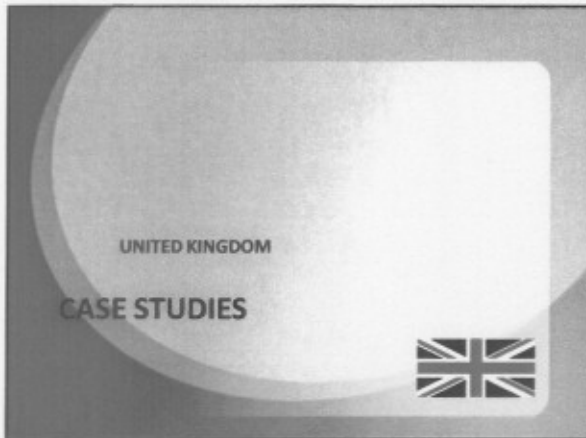
Information protected forever:

- Data identifying the civilian and military state security services staff engaged in operational surveillance tasks;
- Data identifying those who assisted the state bodies or services and institutions authorised to carry out operational surveillance tasks in the execution thereof; and
- Classified information obtained from other states or international organisations which has been supplied subject to condition.

Types of Access

Access is dependent on personnel security (vetting), need-to-know and originator control:

- **Full access: Top Secret**
- **Partial Access: Secret/Confidential/Restricted**
- **Conditional Access: Request for information**



United Kingdom

- No adequate safeguards to protect against the misuse of exemptions by government
- No balance between national security and freedom of expression is properly struck
- Prohibition of the disclosure of a huge range of information by government employees and the media
- Imprisonment and fines for the violators of OSA



United Kingdom

- OSA: punishes intention and actual damage to national security – harm needs not be actual
- Public interest defence is not provided for in OSA any more
- Recipients and publishers of information were not protected under UK law
- A whistleblowers Act has now been enacted in the UK



United Kingdom

Mechanisms for enforcing the provisions of the UK laws are:

- Injunctions
- Production orders
- Confidentiality clauses
- Contempt of court laws
- Search and seizure powers
- No protection of sources of journalists



United Kingdom

• **How is it classified?**

- Guided by legislative provisions
 - Official Secrets Act (OSA) 1911-1989
 - Data Protection Act (DPA) 1998
 - Freedom of Information Act (FOIA) 2000



United Kingdom

• **How is it classified?**

- **HMG Security Policy Framework (SPF)**
 - Creation, storage, transmission and destruction
- Prime Minister and Cabinet have the overall security responsibility
- Delegated to Heads of Department
- However, security is the responsibility of everyone
- Protection focus is on the protection of "government assets"



United Kingdom

• **Four tiers of the SPF:**

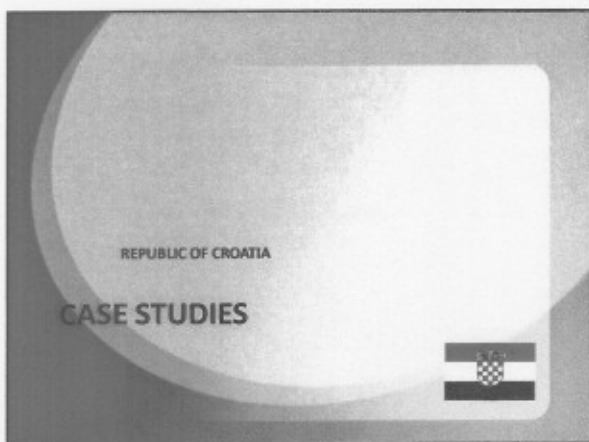
- SECURITY is a business enabler making government work better, safer and more confidently – not just a support function
- Five Core Security Principles highlight accountability at senior levels, collective responsibility of all staff and contractors, and the need to employ trustworthy people
- Concise key security policy documents: minimum standards
- Management of department specific risks over and above the baseline

United Kingdom

- **How is it classified?**

- HMG Security Policy Framework (SPF)
 - **7 Security Policies**
 - Governance, Risk Management and Compliance
 - Protective Marking and Asset Control
 - Personnel Security
 - Information Security and Assurance
 - Physical Security
 - Counter-Terrorism
 - Business Continuity





Croatia

What is classified?

- National security and vital interests of Croatia
- Structure of the state as laid down in the Constitution
- Independence, integrity and security of Croatia
- International relations of Croatia
- Defence capability and security intelligence system

Croatia

- Public security
- Basis of the economic and financial system of Croatia
- Scientific discoveries, inventions and technologies that are of great significance for national security of Croatia

Croatia

Scope of protection:

- Defence;
- Security intelligence system;
- Foreign affairs;
- Public security;
- Criminal proceedings and science, technology, public finances and economy that impact on security interest

