SABJD 5 July

OPINION PREPARED BY SENIOR COUNSEL FOR THE SPOUTH AFRICAN BOARD OF JEWISH DEPUTIES ON THE PROTECTION OF INFORMATION BILL[1]

LEGAL OPINION

PROTECTION OF INFORMATION BILL[2]

[1] This opinion for the South African Board of Jewish Deputies deals with the Constitutionality of the Protection of Information Bill ("PIB") published in the Government Gazette of 5 March 2010/ Notice 197/2010. This Bill has led to fierce debates in Parliament, the Press and in the Community. The President has, in his budget debate on 15 June 2011, said that there is no intention to clamp down on information by way of the Act. After an opportunity was given to the public to react to the Bill, a Committee of Parliament has been considering the Bill. From the Minutes of the Committee, which are published on the internet, it is rather difficult to ascertain what amendments have been proposed by the Committee. It would seem, according to the latest press commentaries, that the Bill has already undergone eight reconsiderations by the Committee since it was published in March 2010.

On 25 June the ANC led Committee indicated that only departments involved in state security would be permitted by the Act to classify. Other organs of state would only be permitted to do so if they applied to do so. A retired judge who would be appointed by Parliament to do so, would resolve disputes. The minimum sentence of fifteen years would also be withdrawn. Dene Smuts MP also released a press statement on 24 June 2011 on behalf of the DA.[3]

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[1] As published in the Government Gazette of 5 March 2010/ Notice 197/2010

[2] As published in the Government Gazette of 5 March 2010/ Notice 197/2010

[3] See Addendum at end of opinion.

The opinion which I have already prepared at this stage is still particularly relevant as to several issues and I believe that it would still be useful for the SABJD to be informed, from a legal perspective, what the issues are. Whatever the amendments to the Bill, there are still issues as to the width of the criteria and, it is submitted, of which the SABJD should take cognisance. This would at least provide the necessary background for further interest in the Bill. I have been provided with the following general view of the SABJD on media freedom:

" The South African Jewish Board of Deputies has serious reservations about the proposed introduction of new regulatory measures for the South African media. The proposed Media Tribunal clearly has the potential to become a vehicle through which State interference in the ability of the media to operate freely and without fear of reprisals to become entrenched in our society. This in turn would seriously undermine the basic democratic freedoms on which SA's future well-being depends.

Freedom of the media is one of the fundamental pillars on which any democratic society must rest. State interference in what the media can and cannot report is irreconcilable with democratic practice. Media censorship was an intrinsic feature of the apartheid regime, and in view of this history, South Africans need to be especially aware of the dangers of infringing on media independence.

It is accepted that media freedom is not an absolute right, but one that should be exercised in a fair and responsible manner. There is therefore a definite need for effective regularity bodies to be in place in order to hold the media accountable where necessary. However, it is vital that such bodies (as is the case with the judiciary) be completely independent entities, whose deliberations and decisions will not be unduly influenced by external political or ideological considerations.

The SABJD is concerned about the proposed measures precisely because they anticipate the creation of a regularity body that is not independent but that is instead beholden to the government of the day. As such, it would be a serious restriction on the Constitutional right to freedom of expression and a retrograde step for ensuring accountability."

[3] I have also read late June 2011 opinions by Currie and Wright as well as by Brümmer.

[4] The main criticism is that the Bill empowers government (heads of organs of state or their delegates) to classify material which would not clearly only affect the safety of the State and that the Bill opens the opportunity to classify material which is merely embarrassing to the government or, even worse, which could lead to a cover-up of misdemeanours or corruption by government and its officials. This is said in spite of a provision in the Bill which makes it

an offence to misuse the Act intentionally and also strict rules as to how classification must not go outside the ambit of what is truly meant to protect the safety of the state.[4] This view remains valid in spite of the limitation of criteria to section 15 – thereby excluding national interest and commercial information. The latest version of section 15 is at the end of the Addenda to this opinion. The width and vagueness of the classifying powers opens the opportunity for misuse and even allows the classification of what is *false*.[5] In any case, the perception would not be unreasonable that the Act could be misused to clamp down on embarrassing information which is not related to security at all. What is more, essentially every organ of state will be classifying its own materials, which further creates the reasonable perception that there would be a conflict of interest. This argument remains relevant in spite of the 25 June 2011 statement by the Committee which limits the powers to security organs of state and organs of state which apply to exercise this power. If the criteria remain vague, the problem of uncertainty for the media and the community persists. The inclusion of international relations as such and safety of persons, does not, as such, relate to security of the State. And of course, the classification will be used in criminal cases against people who publish classified material.

This opinion makes out a case that the PIB is Constitutionally fundamentally flawed in that it flouts the Rule of Law, which requires clear and accessible law,[6] unreasonably limits access to information and freedom of expression and ignores the basic principle of an open democracy: transparency.[7] The wide definitions as well as the covering of areas which do not justify classification also make some of the criteria in section 15[8] overbroad and thus, unconstitutional. It is understandable that the State is entitled to classify in the interests of security of the State. However, that process must be managed in a fashion which ensures

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[4] See sections 17 and 42.

[5] See the definition of "information" in section 1.

[6] See the Constitutional Court cases quoted hereunder.

[7] Ngcobo J said the following in *Brümmer v Minister for Social Development and Others* 2009(6) SA 323(CC):"The importance of this right . . . in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the State. Indeed one of the basic values and principles governing public administration is transparency. And the Constitution demands that ***transparency*** must be fostered by providing the public with timely, accessible and accurate information." (emphasis added)

[8] See the last part of the Addenda for section 15 as amended by the Committee.

legality and conforms with the highest norms of trust placed in government to rule in accordance with integrity, which should also reasonably be perceived to be such. The objects of the PIB are set out in section 2 of the Bill.[9]

Approach of the PIB

[4] The **Protection of Information Act 1982**, which will be repealed by the PIA,[10] consists of offences concerning certain crucial aspects of the protection of information concerning security of the State. These offences are not in the main dependent on administrative classification, but place the onus on the prosecution to prove all the elements of the offence concerned in a criminal court. In other words, the prosecution cannot simply rely on a classification by an administrative organ of state as a final arbiter of what is classifiable. It must prove each of the elements, including the state security risk, beyond reasonable doubt to the Court. This approach is also typical of legislation in the **United Kingdom** (Official Secrets Act 1989) and **Canada** (Security of Information Act 1985), to name but two

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[9] The objects of this Act are to—

(a) regulate the manner in which State information may be protected;
(b) promote transparency and accountability in governance while recognising that State information may be protected from disclosure in order to safeguard the national interest of the Republic;
(c) establish general principles in terms of which State information may be handled and protected in a constitutional democracy;
(d) provide for a thorough and methodical approach to the determination of which State information may be protected;
(e) provide a regulatory framework in terms of which protected information is safeguarded in terms of this Act;
(f) define the nature and categories of information that may be protected from destruction, loss or unlawful disclosure;
(g) provide for the classification and declassification of classified information;
(h) create a system for the review of the status of classified information by way of regular reviews and requests for review;
(i) regulate the accessibility of declassified information to the public;
(j) harmonise the implementation of this Act with the Promotion of Access to Information Act and the National Archives and Records Service of South Africa Act, 1996 (Act No. 43 of 1996);
(k) establish a National Declassification Database of declassified information that will be made accessible to members of the public;
(l) criminalise espionage and activities hostile to the Republic and provide for certain other offences and penalties; and
***(m)* repeal the Protection of Information Act, 1982 (Act No. 84 of 1982).**

[10] Except for section 49 Section 83(3)(c) of the Defence Act 2002 is also repealed, The Constitutional Court has said that the 1982 Act is outdated -

examples. The 1982 Act must, however, be amended since it emanates from a time when Apartheid still reigned supreme.

[5] The 1972 Official Secrets Act of **Malaysia**, similar in style to the PIB, was subjected to severe criticism as a result of its lacking in clarity. It was, thereafter, amended in 1986. Similarly the **Delhi** High Court limited the wide application of the 1923 Indian Official Secrets Act in the *Gilani* case of 2002.[11] The **United States** does not have an Official Secrets Act, although the Espionage Act of 1917 has similar components. Much of the Espionage Act remains in force, although some provisions have been struck down by the Supreme Court as unconstitutional because of the First Amendment which guarantees freedom of speech.[12] In **Singapore** the 1935 Act, like many of its equivalents in other countries – faces criticisms of having a "catch-all" nature, the problem of having a definition so broad that almost anything can be construed as a secret. There are also debates as to how such legislation operates in the face of a "justifiable" disclosure, such as whistle blowing. To mark someone with an offence for disclosing such information would seem contradictory to the aim of such an act, which is to best protect the public interest. More pertinent to the press would be the issue of how prosecutions might be used to discourage investigative reporting. The **New Zealand** trial of Bill Sutch in terms of the Official Secrets Act 1951 (now withdrawn) illustrates well how a prosecution in terms of such legislation could detrimentally affect a person's achievements in other spheres of life. In September 1974, Sutch was charged under the Official Secrets Act in relation to some communications with a Dimitri Rasgovorov, an official of the Soviet Union's embassy in Wellington. Sutch holds the unique ordeal of being the only New Zealander ever to stand trial under the espionage provisions of the former Official Secrets Act enacted in

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[11] In June 2002, journalist Iftikhar Gilani was, arrested for violating the OSA 1923. He was charged under the OSA, with a case under the Obscenity Act added to it. The first military report suggested that the information he was accused of holding was "secret" despite being publicly available. The second military intelligence report contradicted this, stating that there was no "official secret". Even after this, the government denied the opinion of the military and was on the verge of challenging it when the contradictions were exposed in the press.The military reported that, "the information contained in the document is easily available" and "the documents carries no security classified information and the information seems to have been gathered from open sources".In January 13, 2003, the government withdrew its case against him to prevent having two of its ministries having to give contradictory opinions. Gilani was released the same month.The Delhi high court greatly reduced the powers of the act by ruling publication of a document merely labelled ``secret`` shall not render the journalist liable under the law.

[12] See *United States v. The Progressive, Brandenburg v. Ohio, New York Times Co. v. United States*

1951, based on the British Act of 1951. He was acquitted. His role in setting up UNICEF was overshadowed by this trial.

The Rule of Law

[6] The Rule of Law, which is a foundational value of our Constitution, requires that legislation must be clear and accessible (which also means that it must be understandable). See *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) at paragraph [17] where Chaskalson P (as he then was) states that the exercise of public power is regulated by the Constitution: "One of the constitutional controls referred to is that flowing from the doctrine of legality."[13] A few quotes from Constitutional Court judgments, illustrate the importance of these norms well.

Deputy Chief Justice Moseneke requires objective **rationality** for *validity* of legislation granting powers and says the following in *Law Society of South Africa & Others v Transport* 2011 (1) SA 400(CC):

"[33] *A decision whether a legislative provision or scheme is rationally related to a given governmental object entails an objective enquiry. The test is objective because:*

Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle.'

[34] It is by now well settled that, where a legislative measure is challenged on the ground that it is not rational, the court must examine the means chosen in order to decide whether they are rationally related to the public good sought to be achieved.

[35] It remains to be said that the requirement of rationality is not directed at testing whether legislation is fair or reasonable or appropriate. Nor is it aimed at deciding whether there are other or even better means that could have been used. *Its use is restricted to the threshold question whether the measure the lawgiver has chosen is properly related to the public good it seeks to realise. If the measure fails on this count, that is indeed the end of the enquiry. The measure falls to be struck down as constitutionally bad.*

[36] Unlike many other written constitutions, our supreme law provides for rigorous judicial scrutiny of statutes which are challenged for the reason that they infringe fundamental rights. That scrutiny is accomplished, not by resorting to the rationality standard, but by means of a proportionality analysis. Our Constitution instructs that no law may limit a fundamental right, except if it is of general application and the limitation is reasonable and justifiable in an open and democratic society. *(emphasis added in italics and/or bold)*

Justice Ackermann said the following in *De Lange v Smuts and Others* 1998(3) SA 785(CC):

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[13] Also see *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) and *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) at para [148] where it was held that the holder of public power must act in good faith and not misconstrue its powers.

[47] It must be borne in mind that we are here dealing with the *rule of law in relation to personal freedom*. In the sphere of personal freedom, particularly, the 1996 Constitution must be seen as a decisive rejection of and reaction against the severe erosion of the rule of law in relation to personal freedom in the apartheid era by a government which fits very closely Dicey's description, quoted in the preceding *paragraph, namely one 'based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of restraint'. The nature and extent of these inroads is detailed by Mathews, who reminds us that as recently as 1988 internal security law made provision for no less than six forms of what may be called administrative detention, three of which fell into the category of preventative detention and three into that of pre-trial detention.* The singular importance of the Judiciary as the protector of constitutional guarantees, seen also as a manifestation of the separation of powers doctrine, is well illustrated by the judgment in Minister of the Interior and Another v Harris and Others. (emphasis added in italics)

In *Dawood and Another v Minister of Home Affairs and Others, Shalabi and Another v Minister of Home Affairs and Others, Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) Justice **O'Regan** states the following at paragraph [47]:

"It is an important principle of the rule of law that rules be stated in a *clear and accessible* manner. It is because of this principle that s 36 requires that limitations of rights may be justifiable only if they are authorised by a law of general application. *Moreover, if broad discretionary powers contain no express constraints, those who are affected by the exercise of the broad discretionary powers will not know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision."* (emphasis added in italics)

In *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2001 (1) SA 545 (CC) *Deputy President* **Langa** (as he then was) states at paragraph [24]:

"On the one hand, it is the duty of a judicial officer to interpret legislation in conformity with the Constitution so far as this is reasonably possible. On the other hand, the Legislature is under a duty to pass legislation that is *reasonably clear and precise, enabling citizens and officials to understand what is expected of them.* A balance will often have to be struck as to how this tension is to be resolved when considering the constitutionality of legislation. There will be occasions when a judicial officer will find that the legislation, though open to a meaning which would be unconstitutional, is reasonably capable of being read 'in conformity with the Constitution'. Such an interpretation should not, however, be unduly strained." (addition in italics)

Also compare what **Chaskalson JP** (as he then was) states as to the **unacceptability of arbitrariness in legislation** in *S v Lawrence; S v Negal; S v Solberg 1*997(4) SA 1176 at para [33].

Also compare as to legislation which is not narrowly tailored, *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002(4) SA 294(CC) at par [51], where Deputy Chief Justice **Langa** (as he then was) required that the Code for Broadcasters should be "appropriately tailored and more narrowly focused", insofar as it prohibited broadcasts which were likely to harm relations between sections of the public. The Court limited the said phrase by way of notional severance to what is prohibited in section 16(2) of the Constitution.

Also see the Court's observations as to certain other (vague) provisions of the Code in par [52] of the judgement.[14]

Vague language in the definition of "child pornography" in the Films and Publications Act 1996 (inserted [15] in the Act in 1999) was also read down substantially in *De Reuck v Director of Public Prosecutions and Others* 2004(1) SA 406(CC). In *Case v Minister of Safety & Security; Curtis v Minister of Safety & Security* 1996 (3) SA 617 (CC) the terms "indecent" and "obscene" in the Indecent or Obscene Photographic Matter Act 1967 were held to be unconstitutional as a result of their being too vague and open to subjective interpretation.

The terminology in the PIB is likely to be subjected to the same finding, in spite of the inbuilt guidelines in section 17 and the offence created in section 42 if a classifier *knowingly* classifies according to norms other than those provided for in the Act. [16] **Whilst whistle-blowing**[17] **would also be permitted where such a section 42 offence has been committed, the clandestine nature of classification would make whistle-blowing in this sphere a mere principle without any practical effect. The whistleblower will only be protected against prosecution if he or she could show that the classifier *intentionally***

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[14] This vagueness was addressed in new Regulations published by ICASA in 2003 and again in 2009.Although the BCCSA added two provisions to the 2003 Code with the permission of ICASA, it ultimately accepted the new 2009 Code in 2010.

[15] And amended the 1996 Act's definition of child pornography into an extremely vague definition excluding context(!). This vagueness was successfully attacked in De Reuck in the sense that the definition was read down to almost what it initially was in the 1996 Act as formulated by the Task Group which advised the Minister of Home Affairs,

[16] **42.** Any person who knowingly classifies information in order to achieve any purpose ulterior to this Act, including the classification of information in order to—
(a) conceal breaches of the law;
(b) promote or further an unlawful act, inefficiency or administrative error;
(c) prevent embarrassment to a person, organisation or agency; or 35
(d) give undue advantage to anyone within a competitive bidding process,
is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding three years.

[17] See the Protected Disclosures Act 26 of 2000. See *Tshwane, City of, Metropolitan Municipality v Engineering Council of South Africa and Another 2010 (2) SA 333 (SCA):* Whistle-blowers - Protected disclosure - What amounts to - Disclosure by public sector employee - Letter by municipal employee to third parties (Department of Labour and professional council) expressing concern about possible incompetence of certain municipal appointees - Disclosure concerned with health and safety of employees and outsiders - Disclosure made in good faith - Disclosure protected - Impermissible for employer to discipline employee for having made disclosure to third parties -- Disclosure - Ambit of concept - Statutory objects of encouraging whistle-blowers and fostering climate of openness demanding that concept be given wide construction..

contravened section 42. An almost impossible task and grave risk for the employee, given the secrecy which surrounds classification and the un-availability of classified materials. I say this in spite of the rules of section 9 of the Protected Disclosures Act.[18]

Constitutional legality cannot be attained by the existence of a criminal offence against intentional unjustified classification or whistle-blowing or even a provision which makes prosecution dependent on authorisation of a Director of Public Prosecutions.[19] **If legal criteria are bad in law,**[20] **they cannot be cured by creating an offense, the possibility of whistle-blowing or permission by the Director of Public Prosecutions to prosecute.**

Furthermore, the inclusion of subject matter which does not relate to security of the state is unconstitutional since, in the terminology of the Constitutional Court, the legislation is overbroad. Within this overbroad category falls the protection of international relations as such and safety of persons. Of course, if these interest are connected to the safety of the State, it would be in order. As they presently stand in the amended section 15, they are overbroad. In so far as security of the State is already covered in section 15, it is unnecessary and thus overbroad to include this additional categories.

The principle countering overbroad legislation is illustrated well by what Mokgoro J states in *Bertie van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others* 2010 (2) SA 181 (CC):

> [22] A contextual or purposive reading of a statute must of course remain faithful to the actual wording of the statute. When confronted with legislation which includes wording not capable of sustaining an interpretation that would render it constitutionally compliant, courts are required, as discussed above, to declare the legislation unconstitutional and invalid. As was noted by the minority judgment in Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and Others :
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> '(t)here is a real danger that, in [reading down] an overbroad statute, we will simply substitute for the vice of overbreadth the equally fatal infirmity of vagueness'. [Footnote omitted.]
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> It is indeed an important principle of the rule of law, which is a foundational value of our Constitution, 26 that rules be articulated clearly and in a manner accessible to those governed by the rules. A contextual interpretation of a statute, therefore, must be sufficiently clear to accord with the rule of law.

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[18] See the addendum at the end of this opinion.

[19] See section 45 of the PIB.

[20] Which means that they can be invalidated by the Constitutional Court,

[23] This court has recognised that the process of determining the constitutionality of legislation requires a resolution of the following inherent tension:

'On the one hand, it is the duty of a judicial officer to interpret legislation in conformity with the Constitution so far as this is reasonably possible. On the other hand, the Legislature is under a duty to pass legislation that is reasonably clear and precise, enabling citizens and officials to understand what is expected of them. A balance will often have to be struck as to how this tension is to be resolved when considering the constitutionality of legislation. There will be occasions when a judicial officer will find that the legislation, though open to a meaning which would be unconstitutional, is reasonably capable of being read in conformity with the Constitution. Such an interpretation should not, however, be unduly strained.' [Footnote omitted.]

Conclusion on Vague and Overbroad

1.There is no doubt that the terminology employed in the PIB, in spite of an attempt at definition, is not **reasonably clear and precise. There is also no objective rationality: the criteria set out in the PIB are seriously open to diverse interpretation and application by the heads of organs of state or their delegates (even if now, after 25 June, limited[21]) who are given the power to classify. Consistency in decision-making is not only unlikely but impossible, whatever the attempts made by the Agency to ensure consistency. The same problem arises when declassification takes place. The advice which the Agency provides on *request in regard to declassification* is not obligatory. In the end it remains *advice* and the final decision remains with the head of the Organ of State.**

The definition of "information" includes *false* information. This is overbroad and unconstitutional. A classification of false information might be in order if the criterion is clear as to perceived state security. However, to include "false" in the definition of "information" could lead to the intentional classification of false information. There might be an argument that our security might justify a false bait for the enemy, but the question remains: should publication of false classified information ever lead to a *prosecution*? The answer must be no. One realises that a debate with security people might make the word "false" more understandable. If, for example, the Protocols of Zion (known to be false) were to be classified and someone were to publish them, would such a person be prosecuted under the PIB? That should not be the case, in spite of the false nature thereof. However, if it also poses a risk to the security of the State, *that* would be the reason for classification and a *factor* would be that it is false. Falseness

[21] Limited to security departments and those organs of State which apply.

should, however, not be the *criterion* and should not be included in the definition of information.[22]

Prosecution Based on Classification

[7] Whilst it is not in principle unconstitutional to base a criminal prosecution on a finding of an administrative organ,[23] there is a particular risk to it where the administrative decision touches upon a crucial value such as the right to access to information as enshrined in section 32 of the Bill of Rights *and* the decision was taken in *secret*, based on *vague* criteria.[24] Add to that the right to freedom of expression and access to information in terms of section 16 and 32 of the Constitution. As the Bill presently stands, the head of the organ of state or his or her delegate takes the decision to classify. Only if there is a significant doubt the matter must be referred to the Minister of State Security for a decision.[25] There is, fortunately, Supreme Court of Appeal authority that if an administrative decision was executed fraudulently, it may be attacked in Court.[26]

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[22] The *Protocols* are, if my information is still correct, however banned for distribution under the Films and Publications Act, which has a clause grandfathering bans under previous legislation. One of the grounds is that it was found to be prejudicial to the safety of the state. See my opinion which I did for the SABJD in August 2003. An application to have the ban set aside may, however, be launched. A possession ban is no longer possible under the 1996 Act. The test would also now be whether the document amounts to hate speech based on race or ethnicity.

[23] See *S v Moroney* 1978(4) SA 389(A).

[24] The Supreme Court of Appeal has held in *RAF v Mongalo; Nkabinde v RAF 2003(3) SA 119(SCA)* that a certification that a certain decision had been taken can be attacked on grounds of fraud, even if the Act provides that such a certificate is "conclusive proof". Fraud would, of course, include *mala fides*. The PIB does not provide for the evidential value of the certificate that a classification had taken place. But the impression which one gets from the Bill is that the intention is that the certificate is unassailable and that it would be conclusive proof. Such a provision would have to be added to the PIB if that is the intention. Nevertheless, such a provision would have to be read in the light of the *RAF* judgment.

[25] See section 17(1)(e) of the Bill. Section 1 defines "Minister" as the President or the Minister to whom the responsibility of state security is entrusted by the President. The intention is clearly that it must be the Minister of State Security, since, elsewhere in the Bill, reference is made to "his or her" Minister.

[26] See *RAF v Mongalo; Nkabinde v RAF 2003(3) SA 119(SCA),* which dealt with a marriage certificate which had been issued falsely and where the Court set it aside for this reason.

Authority to Classify

[8] The Bill grants the head of an organ of state the authority to classify.[27] He or she may, however, in writing, delegate this authority to *any*[28] official. Although it is good news that the Parliamentary Committee on 25 June 2011 decided to limit the powers to the departments which deal with security matters, the *person* who classifies is particularly relevant. And, it should be borne in mind that there is still an opening for other organs of state to apply to classify – question: will it be made known which organ has succeeded in its application? Something to watch for in the final Bill. **If the norms according to which classification takes place are not substantially delineated and classification subjected to a central and independent Regulator the risk to a free and open democracy remains at a serious risk.**

There are at least three crucial matters which affect the Constitutional validity of the provision as to who classifies:

(a) Although there is no indication in the Bill that classification is not an administrative action in terms of the Promotion of Administrative Justice Act ("PAJA") and that the decisions would *not* be subject to review by a Court in terms of that Act,[29] an amendment to PAJA which includes classification in terms of PIB as not amounting to an administrative action will probably be added to PAJA, since decisions denying access in terms of the Promotion of Access to Information Act are explicitly excluded from PAJA's definition of administrative action.[30] It can, accordingly, be accepted,

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[27] **"classification authority"** means the entity or person authorised to classify State information, and includes—

(a) a head of an organ of state; or

(b) any official to whom the authority to classify State information has been delegated in writing by a head of an organ of state;

[28] From the Minutes of the Parliamentary Committee it would seem that the thinking is presently that it should de a Deputy Director-General. The problem is, however, that not all organs of state have such a position.

[29] PAJA sets out the rules according to which administrative action must be taken: hear the parties, given reason on request and reach a decision which is rationally connected to the facts. This is subject to "review" to the courts. Review differs from an "appeal". In the case of an appeal the appeal body usually has the right to look at the facts de novo and not just judge, as on review, whether there is a rational connection to the facts, or whether the administrator was bona fide or applied his or her mind to the facts and heard the parties.

[30] See PAJA section 1 : "administrative action".

that classification decisions in terms of the PIA would *similarly* not be included within the definition of "administrative action" which requires procedures such as the right to be heard (*audi alteram partem)*- a rule which would, naturally, not fit into secret and top secret matters. The decision to classify will, accordingly, not be subject to review by a Court in terms of ***PAJA***. The drafters of PIB have clearly realised the importance of utmost honesty in decision-making: section 42 of the PIB provides for an offence where a person *knowingly* classifies information in order to achieve a purpose ulterior to the PIB. Section 17(1)(b) of the PIB also contains strict rules against abuse of the authority.[31] **All this, nonetheless, leaves the public in the dark in a democracy which has, Constitutionally, been proclaimed to be "open"[32] and transparent. In spite of these measures, there would still be a reasonable suspicion that the secret function is likely to be abused. As the experience in other countries (and the RSA under Apartheid) has shown.**

(b) The second problem is the very real likelihood of **inconsistency** in decision-making. In spite of the guiding role of the Agency as to policies and guidelines (see section 30(1)) and advice on request as to declassification (see section 30(2)(c)) there remains

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[31] **17.** (1) For the purposes of classification, classification decisions must be guided by section 21 and the following:

(a) Secrecy exists to protect the national interest;

(b) classification of information may not under any circumstances be used to— 25 (i) conceal an unlawful act or omission, incompetence, inefficiency or administrative error;

(ii) restrict access to information in order to limit scrutiny and thereby avoid criticism;

(iii) prevent embarrassment to a person, organisation, organ of state or agency; 30 (iv) unlawfully restrain or lessen competition; or

(v) prevent, delay or obstruct the release of information that does not require protection under this Act;

(c) the classification of information is an exceptional measure and should be conducted strictly in accordance with sections 11 and 15; 35

(d) information is classified only when there is—

(i) a clear, justifiable and legitimate need to do so; and

(ii) a demonstrable need to protect the information in the national interests;

(e) if there is significant doubt as to whether information requires protection, the matter must be referred to the Minister for a decision; 40

(f) the decision to classify information must be based solely on the guidelines and criteria set out in this Act, the policies and regulations made in terms of this statutory framework;

(g) State information that does not meet the criteria set out in this Act, the regulations and applicable policies may not be classified;

(h) the decision to classify may not be based on any extraneous or irrelevant reason;

{(i) – (m) contains further rules and guidance.}

[32] See section 36(1) of the Constitution.

a very real likelihood of inconsistency when several persons are involved. The criteria which the Act lays down are indeed open to considerably different perspectives.[33] Even where the organs of state who may classify are limited, as is the plan after 25 June 2011, there is still a very real likelihood that there would be no consistency.

(c) The third criticism is that there is no limit within the ranks of a department to whom the head of the organ of state may **delegate**. This is a serious risk. It would not be unreasonable to be sceptical about this wide authority to delegate. One would hope that the tentative idea of the Committee, as published recently, to limit this delegation to a very senior official, will replace the wide open delegation power.

The Act is also unconstitutional for these reasons. The core of the decision lies with the decision maker and the legitimate expectation is that his or her decisions will be consistent not only in his or her organ of state, but with decisions in other organs of state. Given the many decision makers (see however the 25 June 2011 plan to limit the organs of state) and the vague and/or overbroad criteria there is no reasonable likelihood or even possibility of rational and consistent decision making, even with fewer decision makers.

Authority to Declassify

[9] This authority is granted to the head of the organ of state[34] or, where such organ of state is defunct, the Agency.[35] ["Agency" according to section 1 of the PIB means the State Security Agency established in terms of Proclamation No. 59 of 2009 as published in Government *Gazette* No. 32566 of 11 September 2009, and includes the National Intelligence Agency, the South African Secret Service, Electronic Communications Security (Pty) Ltd (COMSEC), and the South African National Academy for Intelligence." Its function is organizational and advisory (only) at the *request* of the

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[33] Compare the critical observations made by the Constitutional Court as to the terms "indecency" and "obscenity" in *Case v Minister of Safety & Security; Curtis v Minister of Safety & Security* 1996 (3) SA 617 (CC); also see Curtis v Minister of Safety & Security 1996 (3) SA 617 (CC); Islamic Unity Convention v Independent Broadcasting Authority 2002 (4) SA 294 (CC); De Reuck v DPP WLD and Others 2004(1) SA 404(CC).

[34] In this case there is no provision for delegation.

[35] See section 19

heads of organs of state or the Minister.]

[10] Material may not remain classified for longer than 20 years unless the *head* of the organ of state that classified the information certifies to the satisfaction of his or her *Minister* that the continued protection of the information from unlawful disclosure is –

(a) crucial to the safeguarding of the national security of the Republic;

(b) necessary to prevent significant and demonstrable damage to the national interest; or

(c) necessary to prevent demonstrable physical or life-threatening harm to a person or persons.[36]

[11] The further criteria for **declassification** are set out in section 21 of the PIB.[37]The criteria are intended to be narrow and terms such as "*clearly* and *demonstrably* impair" or "*seriously* and *substantially* impair" are employed. Reviews must be carried out at least every ten years by the head of the organ of state. **Once again, these criteria are, in any case, open to widely different and subjective interpretation.**

Legitimate public interest or genuine research interest: request to declassify

[12] Section 23 provides as follows:

(1) A request for the declassification of classified information may be submitted to the head of an organ of state by an interested non-governmental party or person.

(2) Such a request must be in furtherance of a genuine **research** interest or a **legitimate public interest.**

(3) In conducting such a review the head of an organ of state must take into account the considerations for the continued classification of information as contemplated in this Chapter.

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[36] See section 20 PIB.

[37] See section 21 PIB.

(4) Heads of organs of state must, in the departmental standards and procedures—

(a) develop procedures to process requests for the review of the classified status of specified information; and

(b) provide for the notification to the requester of the right to appeal a decision as provided for in section 25.

(5) The procedures referred to in subsection (4)*(a)* must be implemented within 18 months of the date on which this Act takes effect.

(6) In response to a request for the review of the classified status of information in terms of this Act the head of an organ of state may refuse to confirm or deny the existence or non-existence of information whenever the fact of its existence or non-existence is itself classified as top secret.

"Public interest" is defined in section 1. The definition does not contribute to clarity as to this elusive concept. The Courts have developed their own understanding of this concept and it should be left for them to interpret within each set of circumstances, as they have done for many years, without a definition in an Act of Parliament.[38] The definition of public interest in the Act seems very narrow; it is, in any case, not understandable. [39] Of course, public interest does not mean that which is interesting to the public.[40]

[13] When the *head* of the organ of state denies a request for declassification there is an *appeal* to the *Minister* of that organ of state. Section 28 of the PIB provides that in the case of the Promotion of Access to Information Act ("PAIA") the head of the organ of state may decide to declassify. Where there is a refusal, it may be taken on appeal. Section 28 of the PIB only refers to the "appeal authority". However, section 82 of PAIA provides for a **Court** as the final appeal authority. **There is a serious inconsistency here. No *appeal* to a Court**

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[38] See the discussion of "public interest" within the scope of defamation by Hoexter JA in *Neethling v Du Preez; Neethling v The Weekly Mail* 1994 (1) SA 708 (A); also see *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC); *Caxton Ltd v Reeva Forman (Pty) Ltd* 1990 (3) SA 547 (A).

[39] "Public interest" means all those matters that constitute the common good, well-being or general welfare and protection of the people of South Africa, the promotion of which, are required by, or are in accordance with the Constitution.

[40] *Financial Mail (Pty) Ltd v Sage Holdings Ltd 1993 (2) SA 451 (A)*

is provided for in the PIB. The Court under PAIA does not only act as a court of review. It decides on the *merits* and comes to a decision which is just and equitable.[41] I note that the 25 June 2011 press release of the Parliamentary Committee states that a retired Judge would be appointed to resolve disputes in this regard. A Court, as is the case with section 82 of PAIA would, however, be more acceptable. A Judge, appointed in this fashion, would be acting as an arbitrator and his or her decision will not be open to appeal, only to review. **This would be so, unless an appeal structure is also built into the PIA.**

General Observations

[14] The use of the terms "*includes*" and *"but is not limited to"* creates the impression that the decision maker has a choice to use similar criteria or possibly even other criteria. Decision makers in terms of the Act (who are not lawyers) would, generally, not realize that the word "includes" and "not limited to" have a specific legal connotation which does not necessarily include the authority to decide the matter under an undefined additional criterion.[42] This is, most certainly, a further strong indicator of unconstitutionality. The use of these terms makes the criteria even more vague and would probably contribute substantially to a finding of unconstitutionality. I must add that the Constitutional Court[43] has given strict guidelines as to the said phrases, but an official might just believe that he or she even has a wider authority than the criteria set out in the Act. In any case, why add these vague sentences?

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[41] **82. Decision on application**

The court hearing an application may grant any order that is just and equitable, including orders -

(a) confirming, amending or setting aside the decision which is the subject of the application concerned;

(b) requiring from the information officer or relevant authority of a public body or the head of a private body to take such action or to refrain from taking such action as the court considers necessary within a period mentioned in the order;

(c) granting an interdict, interim or specific relief, a declaratory order or compensation; or

(d) as to costs.

[42] See *De Reuck v Director of Public Prosecutions and Others* 2004(1) SA 404(CC) at para [17]-[19].

[43] See previous footnote.

[15] In regard to section 1(3),(4),(5) : it is submitted that the principles as to interpretation of statutes and the concepts of intention (*dolus*) and negligence (*culpa*) set out in these subsections simply repeat existing rules developed by the Courts. **To place them in legislation in this instance is confusing and unnecessary.**

[16] Section 7 PIB grants the power to the Minister to make regulations. Section 7(1) reads as follows:

> The Minister must, within 12 months of the commencement of this Act—*(a)* prescribe broad categories and subcategories of information that may be classified, downgraded and declassified and protected against destruction, alteration and loss;*(b)* prescribe categories and subcategories of information that may not be protected in terms of this Act; and *(c)* prescribe national information security standards and procedures for the categorisation, classification, downgrading and declassification of information.

Although section 7(2) does assist in delineating the subject matter to a certain extent, it is submitted that the powers given to the Minister are likely to be challenged as **too broad** and vague so as to lead to the drafting of regulations in a manner which would not accord with the Legislative intention of Parliament. Parliament cannot simply delegate to an official such a power without clear guidance. **Thus, a further ground for unconstitutionality.**[44]

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[44] The jurisprudence of the Constitutional Court indicates that Parliament must provide adequate guidelines in order to indicate how officials are required to exercise their discretionary powers. In *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) Parliament had conferred an administrative discretion on functionaries without providing any guidelines regarding the circumstances in which the discretion should be issued. The Constitutional Court held that this was constitutionally impermissible since "no attempt has been made by the legislature to give guidance to decision-makers in relation to their power" (para [55]). In *Janse van Rensburg NO v Minster of Trade and Industry* 2001 (1) SA 29 (CC) para [25], Goldstone J held:"[A]s this Court has already held (in the context of a limitation analysis), the constitutional obligation on the Legislature to promote, protect and fulfill the rights entrenched in the Bill of Rights entails that, where a wide discretion is conferred upon a functionary, guidance should be provided as to the manner in which those powers are to be exercised. The absence of such guidance [renders] the procedure provided in s8(5)(a) [of the Consumer Affairs (Unfair Business Practices) Act 71 of 1988] unfair and a violation of the protection afforded by s33(1) [of the Constitution]."

The Constitutional Court reiterated this principle in *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC):"...the delegation must not be so broad or vague that the authority to whom the power is delegated is unable to determine the nature and the scope of the powers conferred. For this may well lead to the arbitrary exercise of the delegated power. Where broad discretionary powers are conferred, there must be some constraints on the exercise of such power so that those who are affected by the exercise of the broad discretionary powers will know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision. These constraints will generally appear from the provisions of the empowering statute as well as the policies and objectives of the empowering statute."]

[17] There is, further, no reason why the following protection should be included: section 15(1)(a), 15(2)(a) and 15(3)(a): "could prejudice the Republic in its international relations", "could jeopardize the international relations of the Republic" and "may cause other states to sever diplomatic relations with the Republic". The mere inclusion of the said criteria grants an opportunity to remove embarrassing material from the public domain and scrutiny by way of classification. Such criteria would also tend to make foreign countries skeptical in their relations with South Africa. **This is overbroad and not constitutional**. The severing of ties with the republic might be a factor contributing to a risk to state security, but on their own, they are not sufficient to make material classifiable.

The conclusion is that the PIB does not stand a reasonable chance of being held by the Constitutional Court as being in harmony with the Constitution. It is vague, irrational, overbroad, opens the path to inconsistency, opens a wide opportunity to classify material that could be politically embarrassing to the government of the day and even to classify that which is false and, ultimately, to withhold facts from the public which it is entitled to have access to. The prosecutions referred to above in the New Zealand and Indian Courts, illustrate how such an Act could be abused to the detriment of the public and the accused, even in democracies. I need only refer to the shocking prosecution of Alfred Dreyfus at the end of the nineteenth century.[45]

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[45] *Wikipedia* summarises this scandal as follows: The **Dreyfus affair** (French: *l'affaire Dreyfus*) was a political scandal that divided France in the 1890s and the early 1900s. It involved the conviction for treason in November 1894 of Captain Alfred Dreyfus, a young French artillery officer of Alsatian Jewish descent. Sentenced to life imprisonment for allegedly having communicated French military secrets to the German Embassy in Paris, Dreyfus was sent to the penal colony at Devil's Island in French Guiana and placed in solitary confinement.

Two years later, in 1896, evidence came to light identifying a French Army major named Ferdinand Walsin Esterhazy as the real culprit. However, high-ranking military officials suppressed this new evidence and Esterhazy was unanimously acquitted after the second day of his trial in military court. Instead of being exonerated, Alfred Dreyfus was further accused by the Army on the basis of false documents fabricated by a French counter-intelligence officer, Hubert-Joseph Henry, seeking to re-confirm Dreyfus's conviction. These fabrications were uncritically accepted by Henry's superiors.[1]

Word of the military court's framing of Alfred Dreyfus and of an attendant cover-up began to spread largely due to *J'accuse*, a vehement public open letter in a Paris newspaper by writer Émile Zola, in January 1898. The case had to be re-opened and Alfred Dreyfus was brought back from Guiana in 1899 to be tried again. The intense political and judicial scandal that ensued divided French society between those who supported Dreyfus (the Dreyfusards[2]), such as Anatole France, Henri Poincaré and Georges Clémenceau, and those who condemned him (the anti-Dreyfusards), such as Edouard Drumont (the director and publisher of the antisemitic newspaper *La Libre Parole*) and Hubert-Joseph Henry.

Ultimately the astounding result of the PIB would be that people could be found guilty by a Court for disclosing classified information and sent to prison for many years based on a classification which was not in accordance with the basic values on which our Constitution is based: the rule of law, transparency and equal justice.

Possible Solutions

1.It must be conceded that exact definition in the area of state security is a most difficult, if not impossible, task. And yet, it must be done to secure the safety of the state. One solution is to have a double check by way of an independent Regulator. There would e.g. then be a check by some independent body consisting of independent experts and chaired by a senior counsel of at least 15 years standing or a retired Judge. All newly classified material would have to be sent to this Regulator. Once classified the material is regarded as classified for all purposes unless set aside by the Regulator within 30 calendar days.

3. As argued earlier, in the case of declassification there should be an appeal to a Court, as is the case in the PAIA (section 82).

4. In so far as prosecutions are concerned a solution would be that the State must prove the validity of the classification and not simply depend on the classification certificate. It would, in any case, always be permissible for the defence to challenge the certificate on grounds that it had been the result of **fraud**.[46] This would mean that if the classifier contravened section 42, this would be a defense.

5. All offences must be limited to **intentional** contraventions. It should be borne in mind that *dolus eventualis* would also suffice. Although the Courts approach *dolus* as a subjective state of mind, it is accepted that persons charged almost always deny intention. To counter this device, the Appellate Division has formulated the following approach to *dolus eventualis* in *S v Beukes* 1988(1) SA 511(A) at 522C. Van Heerden JA states as follows:

Eventually, all the accusations against Alfred Dreyfus were demonstrated to be baseless. Dreyfus was exonerated and reinstated as a major in the French Army in 1906. He later served during the whole of World War I, ending his service with the rank of Lieutenant-Colonel.

[46] See judgment in note 26 above.

"`n Hof maak dus `n afleiding aangaande `n beskuldigde se gemoed uit die feite wat daarop dui dat dit, objektief gesien, *redelik moontlik* was dat die gevolg sou intree. Indien so `n moontlikheid nie bestaan nie, word eenvoudig aanvaar dat die dader nie die gevolg in sy bewussyn opgeneem het nie. Indien wel, word in die reël uit die blote feit dat hy handelend opgetree het, afgelei dat hy die gevolg op die koop toe geneem het."

(beklemtoning in kursief bygevoeg)

In *S v Lungile and Another* 1999(2) SASV 597(AD) at par [17] Olivier JA said the following:

"In the present case, the crucial question therefore is whether the State proved beyond a reasonable doubt that the first appellant in fact did foresee...that the death of a person could result from the armed robbery in which he participated. In this case, as in many others, the question whether an accused in fact foresaw a particular consequence of his acts can only be answered by way of deductive reasoning. Because such reasoning can be misleading, one must be cautious. *Generally speaking, the fact that the first appellant had prior to the robbery made common cause with his co-robbers to execute the crime, well-knowing that at least two of them were armed, would set in motion a logical inferential process leading up to a finding that he did in fact foresee the possibility of a killing during the robbery and that he was reckless as regards that result.*" (emphasis added)

6. There should, with respect, not be a fear of the "public interest defense". It is not a wide defense and the survey of many judgments where it has been considered and applied by the Courts illustrates a circumspect approach. The words must, further, not be defined in the PIA. The Courts know how to apply the concept.

7. Lastly it should be considered whether an unjustified classification will not always be a defense. This means that the Prosecution will commence on the prima facie basis that the classification was justified. It is then open for the defense to attack the justifiability. Guidance will be provided by *S v Moroney* 1978(4) SA 389(A)[47] where the following was said: "Held, further, that the magistrate should have considered that the [publication] committee's decision [in terms of the Publications Act 1974] constituted prima facie proof that the publications were undesirable but that he was nevertheless required to weigh this proof together with such countervailing evidence, if any, adduced on behalf of the appellant or emerging from the publications themselves which were placed before him in evidence by the State in order to arrive at a decision as to whether the State had proved beyond reasonable doubt that appellant had published the publications and whether they fell within the definition of an undesirable publication as set out in s 47 of the Act.

J. C. W. van Rooyen

JCW VAN ROOYEN SC **5 July 2011**

[47] However: NB read this judgment with judgment in note 26 above.

ADDENDA

Section 9 of the Protected Disclosures Act provides as follows:

9. General protected disclosure

(1) Any disclosure made in good faith by an employee-

(a) who reasonably believes that the information disclosed, and any allegation contained in it, are substantially true; and

(b) who does not make the disclosure for purposes of personal gain, excluding any reward payable in terms of any law;

is a protected disclosure if-

(i) one or more of the conditions referred to in subsection (2) apply; and

(ii) in all the circumstances of the case, it is reasonable to make the disclosure.

(2) The conditions referred to in subsection (1)(i) are-

(a) that at the time the employee who makes the disclosure has reason to believe that he or she will be subjected to an occupational detriment if he or she makes a disclosure to his or her employer in accordance with section 6;

(b) that, in a case where no person or body is prescribed for the purposes of section 8 in relation to the relevant impropriety, the employee making the disclosure has reason to believe that it is likely that evidence relating to the impropriety will be concealed or destroyed if he or she makes the disclosure to his or her employer;

(c) that the employee making the disclosure has previously made a disclosure of substantially the same information to-

(i) his or her employer; or

(ii) a person or body referred to in section 8, in respect of which no action was taken within a reasonable period after the disclosure; or

(d) that the impropriety is of an exceptionally serious nature.

(3) In determining for the purposes of subsection (1)(ii) whether it is reasonable for the employee to make the disclosure, consideration must be given to-

(a) the identity of the person to whom the disclosure is made;

(b) the seriousness of the impropriety;

(c) whether the impropriety is continuing or is likely to occur in the future;

(d) whether the disclosure is made in breach of a duty of confidentiality of the employer towards any other person;

(e) in a case falling within subsection (2)(c), any action which the employer or the person or body to whom the disclosure was made, has taken, or might reasonably be expected to have taken, as a result of the previous disclosure;

(f) in a case falling within subsection (2)(c)(i), whether in making the disclosure to the employer the employee complied with any procedure which was authorised by the employer; and

(g) the public interest.

(4) For the purposes of this section a subsequent disclosure may be regarded as a disclosure of substantially the same information referred to in subsection (2)(c) where such subsequent disclosure extends to information concerning an action taken or not taken by any person as a result of the previous disclosure.

Protection of Information Bill: DA welcomes concessions, but some concerns remain

24 June 2011

Release: immediate

The Democratic Alliance (DA) has been arguing, since the first sitting of the first *ad hoc* committee on the Protection of Information Bill in 2008, that a classification law cannot apply to all organs of state. It is a vindication of our position (and also of the Parliamentary legislative process, during which we keep talking until we hear each other, and do the best for our country), that the application clause of the Bill will now be narrowed to the Security and Intelligence departments, as we suggested.

Our proposal that other government departments, instead of automatically being allowed to classify information, be allowed to apply for the right to classify, has been accepted. In this, we have listened to the ANC's arguments and those of the Minister of State Security, who argued that there are classes of information outside of the Security Department which require classification, and cited Science and Technology secrets as one such class of information. Our series of parliamentary questions to government departments revealed that the Department of Science and Technology does indeed engage in copious classification. It goes without saying, however, that any unjustifiable classification in a Department such as Science and Technology, or any other, should not be permitted, and to this end the classification criteria, definition of national security and appeal mechanism remain crucial.

Various civil society initiatives have independently supported us on this particular issue. IDASA undertook a count of the organs of state covered under section 239 of the Constitution (which the State Law Advisor protested would be like counting the grains of sand on a beach), and found 1 001 organs, ranging from the Johannesburg Zoo to the Natal Sharks Board. Advocate Nichola de Havilland of the Centre for Constitutional Rights wrote an authoritative opinion on the unconstitutionality of the broad scope of application, which goes against the requirements for openness that permeate our Constitution, encouraging a culture of opacity and its corollary, the abuse of classification powers.

It is important to note that, although we have now won the battle for narrowing the scope of application, and even though the classification criteria and thresholds have been accepted almost word for word, the definition of national security, which forms the basis for all classification, has yet to be resolved. The Intelligence Services, more than any other organ of state, must not be allowed to classify information safely beyond scrutiny. Rev. Frank Chikane, the former Presidential Director-General, once said that a corrupt intelligence service would present the greatest threat of all to national security, and we will do well to heed his words.

For this reason, it is important that there should be an independent appeal person or body to rule on refusals for access to classified information. We have suggested the judge designated in terms of the Regulation of Interception of Communications Act (RICA), who determines the interception of communications and is versed in security matters. The ANC proposed today any retired judge, who would be equally acceptable.

In the case of security, our Constitution explicitly integrates international law, including the International Convention on Civil and Political Rights, which in Article 19 states that only national security (and public order and morals) may, and only when necessary, limit the right to receive information and the right to free speech.

PROMOTION OF ACCESS TO INFORMATION ACT 2000

46. Mandatory disclosure in public interest

Despite any other provision of this Chapter, the information officer of a public body must grant a request for access to a record of the body contemplated in section 34 (1), 36 (1), 37 (1) (a) or (b), 38 (a) or (b), 39 (1) (a) or (b), 40, 41 (1) (a) or (b), 42 (1) or (3), 43 (1) or (2), 44 (1) or (2) or 45, if -

(a) the disclosure of the record would reveal evidence of -

(i) a substantial contravention of, or failure to comply with, the law; or

(ii) an imminent and serious public safety or environmental risk; and

(a) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question.

PIB as amended by Parliamentary Committee

Classification levels

15 (1) State information may be classified as "Confidential" if the information is [-(a)] sensitive information, the [unlawful] disclosure of which is likely or could reasonably be expected to cause demonstrable harm [may be harmful] to the security or national [interest] security of the Republic or could reasonably be expected to prejudice the Republic in its international relations;

[(b) **[commercial information] the disclosure of which may cause financial clients, competitors, contractors and suppliers.]**

(2) State information may be classified as "Secret" if the information is-

(a) sensitive information, the disclosure of which is likely or could reasonably be expected to cause serious demonstrable harm to **[endanger]** the security or national

[interest] security of the Republic or likely or could reasonably be expected to jeopardize the international relations of the Republic; or

[(b) **commercial information, the disclosure of which may cause serious financial loss to an entity;]**

(c) personal information, the disclosure of which **[may]** is likely or could reasonably be expected to endanger the physical security of a person.

(3) State information may be classified as "Top Secret" if the information is-

(a) sensitive information, the disclosure of which **[may]** is likely or could reasonably be expected to cause serious of irreparable harm to the national [interest] security of the Republic or **[may]** is likely or reasonably be expected to cause other states to sever diplomatic relations with the Republic;

[(b) commercial information, the disclosure of which may-

(i) have disastrous results with regard to the future existence of an entity; or

(ii) cause serious and irreparable harm to the security or interests of the state;]

(d) personal information the disclosure of which [may] is likely or could reasonably be expected to endanger the life of the individual concerned.

(4) The classifying authority must use the guidelines for classification levels as prescribed.