



**Notes from the Democracy Development Programme political forum of 10 September 2008:
'Striking a balance: Political expression vs. national security'**

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Nic Dawes, Associate Deputy Editor: Mail & Guardian

Moderator: Judge Denis Davis

Background

Creating a system for the classification and declassification of state information has been a challenge for South Africa since the end of the apartheid era. The Protection of Information Bill seeks to regulate the manner in which state information is protected, by setting up a new system of classification of information as well as a system for punishing unauthorised disclosure.

Whilst there is little argument about the right of the state to classify certain information in the interests of national security, a number of concerns have been raised about the Bill in its current form. Critics say that the Bill does not strike the right balance between freedom of political expression and the interests of national security. For example, should the media get hold of a classified document that reveals gross misconduct or illegality by, for instance, a high-ranking government official, the journalist is obliged to return the information to the National Intelligence Agency (NIA) or South African Police Service or face a possible five year prison term. And should the newspaper publish the information, the journalist and his or her editors could again face a possible five years in prison.

The growth of democracy has shifted the focus of intelligence from the Draconian measures of the apartheid regime to an awareness of the need for a more democratic form of control. And this democratic governance of the intelligence sector is all about finding the middle ground. What kind of information should be secret and what kind of information should be made public? How much openness and transparency can be granted before national security is compromised? We need to grapple with creating the right balance between these two needs.

Introductory comments

Barry Gilder

I enter this discussion from the perspective of having worked in government [in the Department of Home Affairs and in various intelligence capacities]. I believe the current discourse about the Protection of Information Bill is imbalanced in number of areas. I am not here to defend the Bill and I have no power to bring any possible amendments to the attention of the parliamentary portfolio committee.

The current law that governs the protection of information¹ does not meet the letter and spirit of our constitutional democracy. Very few people seem to challenge government to protect information – to distinguish between what can and cannot be protected, and what should and should not be protected. Many countries have tried to resolve this debate. This is an issue we will not resolve tonight or any time in the near future. We must understand this debate from this moment in our history. The Bill is a genuine attempt by government to make right what has been wrong with the apartheid-era legislation. It should not be seen as access to information legislation.²

This Bill seeks to govern the way in which government manages its information. It is an attempt to create some certainty and structure within our Constitution and law and values to assist public servants tasked with managing information to know when, how to classify it, and on what grounds to classify it. It also introduces something new – a process to de-classify information which forces government through a number of mechanisms, either through application or after a certain time, to consider whether information should remain classified or be re-classified. The default position is de-classification. This provision will make civil servants think carefully about why information was classified, on what criteria, and whether those criteria still apply.

Part of the concerns about the Bill expressed in the media and during public hearings is that it criminalises certain acts of wrongly acquiring, distributing and publishing information. This has made many journalists unhappy or worried. Having been a journalist myself, I believe these concerns are misplaced. Journalists want to know that if they come into

possession of leaked information that shows some possible misdeed, they should surely have the moral and legal right to publish such information in the public interest.

I sympathise with this concern and principle but the question that jumps to my mind is: who takes that decision? Is a journalist in a position to assess whether a document has been wrongly classified to hide corruption or decide that the information it contains evidence of corruption? Even if it does, the document may contain other information whose disclosure may jeopardise national security. We have experience of journalists getting hold of a document, jumping to certain conclusions (rightly or wrongly) about what the document reveals, wanting to publish the salient contents of the document, but being stopped by the courts. Trying to publish such information may be justified in the minds of journalists as being in public interest, but the Bill provides for a court to decide whether something has been wrongly classified.

My four key points are:

1. This proposed legislation is a huge advance on what we have had before; one which will force civil servants with the power to classify documents to think carefully about what they are doing, and one which will put checks and balances in place.
2. The Bill is not directed at journalists or at anyone else – nobody is a target.
3. The Bill provides a framework for the protection of information and it provides certainty for those who wish to challenge a classification to do so.
4. The Bill puts decisions about whether or not a document was correctly classified into the hands of a court of law.

Nic Dawes

We at the *Mail & Guardian* have taken an unusual approach to this Bill in that we have campaigned around it, not just in the paper, or in meetings like this one, but we actually made submissions to Parliament. I have concerns about some other intelligence-related legislation, but will not focus on those now. I have been trying to understand why we and so many others in civil society are so opposed to the Bill and why those in intelligence (or formerly in intelligence) are so in favour of it.

I worked for some months on a piece about whether the Democratic Alliance had legally or illegally engaged in spying. It was based on some verified information, some unverified, some true, some not true, but the piece was never published because I was not able to get it into a form that would satisfy my editor or the ethical standards of my profession. Since then two KwaZulu-Natal judges found the Erasmus Commission was a political exercise designed to damage Helen Zille. This story illustrates the seductive power of believing one has privileged access to secret knowledge.

Short of assuming the drafters of the legislation are completely expedient (and I know they weren't) the only way I can understand the result is that they believe they have glimpsed workings of a world that the rest of us cannot understand. I agree with Barry (and we said this in our presentation to the parliamentary portfolio committee) that it is critical to overhaul the classification regime; to replace it with something that would provide better guidance for bureaucrats; something more coherently implementable in terms of a security standard. I agree too that the provision to de-classify information over time is important, although the time frames in the Bill can be debated. So what is at stake and why does it matter so much to us?

Minister for Intelligence Ronnie Kasrils has argued the Bill aims to strike a balance between constitutional provision for open government and the need for secrecy. Obviously there is a need for secrecy. But the trouble is the Bill is far from balanced in its current form, whatever its very good intentions might have been. Just about everyone outside the intelligence establishment agrees it is unbalanced and they agree on the reasons why. It is so broad in its terms as to justify the classification of just about anything.

Sensitive information is defined as 'information which must be protected from disclosure in order to prevent the national interest of the Republic from being harmed'.³ The definition of national interest includes 'the survival and security of the State and people of South Africa' and 'the pursuit of justice, democracy, economic growth, free trade, a stable monetary system and sound international relations'.⁴ That is a long list of things.

The Minister's own review commission said it would be very difficult for officials to decide when the threshold for classification has been crossed. Far from making it easier for them, the Bill proposes to make classification insuperably difficult. Civil servants would be afraid that they might accidentally *not* classify something that ought to be classified,

which means there is a great risk of chronic over-classification. The commission said: 'it is not secrecy but rather transparency and access to information that protect the national interest'. We agree whole-heartedly with that sentiment.

We have argued for a much narrower definition of the national interest to address some of the concerns of the security establishment and to help us to decide what we can and cannot publish; what we should and should not publish. Even the post 9/11 US legislation which has been much criticised by civil liberties activists in that country contains a very clear definition of sensitive information. In essence, the American law deals with such things as military activity, covert intelligence-gathering activities and strategic capabilities of weapons systems. Narrowing the definition of what constitutes the national interest in the South African Bill would make this debate less contentious.

Another concern is that the Bill criminalises the whole chain of possession of classified material, punishable with prison terms. If I am handed a document that has to do with state plans, diplomatic issues or information about state tenders, the person who has leaked the information is not the only guilty person, so am I unless I turn over the information to the authorities immediately. This discourages robust public oversight of state institutions.

The problem is compounded because the Bill throws the classification net over the entire state system all the way through to parastatals, Chapter 9 institutions and others. It also provides a mechanism for keeping secret 'sensitive commercial information',⁵ something which would stifle investigations into patronage and corruption – both of which are key concerns at the moment.

Dario Milo, representing the Avusa Group⁶ at the parliamentary hearings, said the Bill criminalises a large area of political speech. As an aside, the Southern African Catholic Bishops' Conference pointed out that equating 'free trade' with the national interest was an ideologically loaded statement.

We hear the concern about protecting confidential information which is not the normal domain of spies or intelligence, such as staff records, health records, salary advice, even certain aspects of tenders and diplomatic dealings. But confidentiality in such areas could very readily be dealt with by a series of robust departmental regulations and procedures that are far less all-encompassing than the provisions proposed in the Bill.

The idea that this will all be monitored and implemented by the NIA, an organisation so terribly fraught with problems at the moment, makes it doubly concerning. We would be concerned about the provisions of the Bill even in an environment where we thought we had a highly functional overall intelligence community. But this is not the case.

Essentially you cannot legislate on the basis that some people may know some secret things about some terrible threats we are under from internal or external quarters. All our legislation must be guided by the Constitution, and the Constitution is very clear about what our duty is in respect of transparency and open democracy.

Discussion

Dennis Davis (DD): This definition of the national interest reminded me of the old Terrorism Act as to what constituted a terrorist. Anthony Matthews gave the example that opposition politician De Villiers Graaff going across the road to serve a cake to an old woman on the other side of Adderley St, blocking the traffic as he did so, was terrorism because he blocked the traffic with a political objective. How can this Bill really guide the bureaucrats about what should be classified?

Barry Gilder (BG): When I was DG of Home Affairs and we were preparing amendments to the Immigration Act we tried to imagine ourselves into all the circumstances in which that Act would need to apply. The lesson I learned from an official's point of view is that you can never imagine all the circumstances. That is why there are legislative amendments and, later, regulations to provide more precise prescripts of what an Act entails. I imagine the drafters of the Bill tried to imagine themselves into every situation where an official might need to classify information. There are many situations where information is legitimately kept secret. It is easier to call what is at stake the national interest than national security. In any negotiation, your bargaining power depends on the other side not knowing what you would be willing to settle on. When, for example, South Africa was in negotiations with the EU over a free trade deal, information about its negotiating position was legitimately confidential. Another example is the negotiating positions of the parties to the Zimbabwe conflict.

DD: Regulations can be struck down unless the provision for such regulations is very wide. When the Billy Masetla case was before the Constitutional Court, the government vigorously opposed an application by newspapers to publish certain information relevant to the case, even though it was already in the public domain on websites. It seems government's default position in respect of information is to oppose public access. How are we as a public supposed to reconcile national security with transparency or accountability; values that are still fragile?

- BG: The reality at the moment is that the intelligence community tends to over-classify information and other government officials tend to under-classify or not classify (because they do not realise how sensitive information can be). This Bill is trying to strike a balance by creating a framework in which civil servants can understand when information should be classified. The classification process is open to review, and bureaucrats will have to think about any decisions they take.
- DD: Will need to interpret this legislation in the spirit of the Constitution. Over a period of time through legal action, we will reach a point where some more clear understanding is reached of what the parameters are.
- ND: We might give the impression that we are good at litigation, but litigation is potentially crippling for us. For the Mail & Guardian to have to take legal action or defend itself in court can literally make the difference between profit and loss in any given year. Various kinds of confidentiality should apply, depending on the matter at hand. It is relatively straightforward to separate legitimate matters of national security from other government matters, as is done in many jurisdictions without unmanageable complications. The current formulation of the Bill puts nuclear secrets and tendering for a new carport for the mayor within a continuum of what constitutes the national interest, thereby exposing the media to all kinds of risk. In New Zealand, for example, disclosure of classified information is only subject to a penalty if a court decides it was done with the intent to harm national security. That's high bar indeed; it may be too high for the South African situation.
- DD: The Sunday Times report that accused Transnet of selling Table Bay and certain reporting in various media around the Jacob Zuma case could easily lend support to government agencies describing the media as being guilty of seriously irresponsible reporting. Government may say it should err on the side of extravagance, given what is going on.
- ND: There is no doubt that there is irresponsible reporting and silly reporting. The report about selling the seashore is an egregious mistake, but this provides no basis for criminalising a journalist receiving a leaked document.
- DD: What about the example of intricate trade negotiations where a newspaper wishing to boost its circulation reveals what the government's bargaining position is, resulting in a less favourable trade agreement than would otherwise have been possible?
- ND: The onus should be on the state to show why something should be secret.
- BD: It is not fair to say the onus should be on government or the intelligence services to protect information, so if the media gets it is government's fault. Where is the line of pure patriotism? In older democracies like UK there is a line that the media will not cross in recognition that reporting certain things would be against the national interest. Firstly, the media is actively looking for such information. Secondly, there are cases of people with personal gripes leaking information, sometimes false information, to get back at their employers. Just as it is irresponsible to publish false information, it is irresponsible to report on something if doing so is against the national interest. The legislation is asking that they consult with the bodies concerned before they publish such information. It should not be up to the media to decision about whether certain information should be in the public domain.
- ND: The obvious example here is the New York Times publishing that the fact that US Intelligence was conducting a domestic wiretapping programme. The Bush administration felt strongly that making this information public potentially damaged national security, the New York Times felt strongly that the programme was a critical story about how civil liberties were being infringed in the 'war on terror'. Frankly, this is not the kind of decision I would leave up to government to make. The media makes mistakes, sometimes very bad mistakes, but it should be understood that reporting is an iterative process. The Sunday Times has published an apology for the seashore story. We need to ask at what point the risks that the media are stupid and useless sometimes (which we are), or that we will fall victim to people's agendas at times (which no doubt we do) outweigh the risks of non-disclosure. A line can more readily be drawn under questions of national security than under questions of national interest.
- Laurie Nathan (LN): The Constitution is the supreme law and it says any citizen is entitled to any information held by the state – this is the point of departure. The Constitution has numerous references to openness and transparency as fundamental precepts of democratic governance. This creates a presumption in favour of openness, but the Bill does not reflect that. The Bill reflects a presumption in favour of closed-ness because national interest is defined so broadly as to throw everything under its umbrella. The Constitution requires secrecy to be an exception that is justified clearly, precisely and on specified grounds; on compelling grounds. Ironically, the Bill does this. It reads as if it were prepared by a drafting team that included human rights lawyers and government officials who worked in intelligence services. That is in fact what happened. Some

provisions are strongly in favour of openness, and some provisions that are reminiscent of apartheid-era secrecy legislation. In the criteria for continued classification of information, we find the solution to the problem of vagueness. We cannot identify every possible scenario. It is not as if we need broad catch-alls because it is difficult to pin down with precision what needs to be protected from disclosure. The Bill does it beautifully in respect of continued classification of information you may classify information, for example, if disclosure clearly and demonstrably impairs the ability of government to protect officials; or seriously and substantially impairs national security, defence or intelligence systems, plans or activities; or seriously or demonstrably impairs South Africa's relations with a foreign government. In one section we have the precision and specificity that is required in terms of the Constitution. The question that has come up now about irresponsible media is a complete and total red herring; it is completely irrelevant. The Constitution provides for freedom of expression and freedom of the media. It does not say you have that freedom if you are accurate or if you are responsible. That the media get it wrong sometimes, and are irresponsible sometimes, is hardly a basis for as vague and imprecise new piece of official secrets legislation as we have before us.

DD: Is it such a red herring? Because if you open things up too much you render yourself vulnerable to huge potential damage.

LN: In a democracy we have to tolerate a great deal of the damage that may result from the rights we as citizens have. There may be prejudice to government in a number of ways, but government has to put up with this because the greater value in favour of democracy and in protection of citizen's rights is openness and transparency. The Constitution makes the connection between democracy and openness so tight that if you don't have openness, you don't have a democracy.

DD: In a sense the Constitution wanted us to have the maximum access, therefore the Bill should be as minimalist as possible.

BG: The Constitution provides for limitations to the rights to openness; ultimately limitations on openness are a balancing act and a judgement call.

DD: There are limitations on limitations. Limitations are only allowed if they are reasonable and justifiable in an open and democratic society based on freedom, not just any grounds.

Mike Morris (MM): Barry's position seems to be there is a range of different kinds of activities that can be problematic if they leak. The problem is that if a law tries to cover too much, it becomes a blunt instrument that can affect a lot of people who should not be affected. It may be a problem if South Africa's position in the Doha Round of World Trade Organisation negotiations is leaked, but this is not of the same order as real issues of state security. It is the state's problem if information is leaked. We all know there is a real problem of capacity in the state. Even if senior people have the requisite capacity and capabilities and skills, it cannot be assumed that those lower down are competent to make decisions about classification. This is compounded by the extreme factionalism in the state and in the ANC [African National Congress] at the moment. If the Bill were enacted in its current form, a lot of government officials would be running around with blunt instruments that can be used for all sorts of purposes.

BG: I don't think we are talking about a blunt instrument and I don't think we are equating information about weapons systems or sources of intelligence information with information on trade negotiations. The proposed system is not a continuum. There are different levels and processes and criteria for every level of classification. There are rules for when something can be classified as confidential, when it can be classified as secret, and when it can be classified as top secret. There are lots of idiots in the media, the judiciary, academia and the state, but we cannot legislate on the assumption that we are dealing with idiots. We are trying to enact a piece of legislation to put in place a classification system; then we must train people to understand the system. We cannot hold back on legislation simply because there are different factions in the ANC.

DD: If the people who have to implement something are idiots, you have to make the system narrow, not broad.

Fiona Ross (FR): The media has an incentive to reveal secrets, while the government afraid of letting the cat out of the bag. If the Bill were enacted, what is the backlog of information that has to be revealed to the public; given all the layers of government required to process and classify all this material? How long could it take?

ND: This piece of legislation provides for certain facts to only come to light after 30 years. We will see the result of the declassification process in 30 years' time only if the capacity to do the declassification work is in place to do it in time, and only if parliamentary and other oversight mechanisms are in place to ensure that it happens. But intelligence oversight is so secret we don't know about it. It may eventually work. The point was made that judicial review of classification decisions would have to be tested and refined in our jurisprudence. But there is

no public interest provision in the Bill at all. We could not go to a judge and say we were justified in making certain information available in the public interest. We would have to go to the Constitutional Court.

DD: It depends on who the judges are. In the Masetla case, the majority of judges were very deferential to the executive.

Paul Hoffman (PH): I am deeply troubled at the breadth of the definitions of national interest and national security in the Bill. This piece of proposed legislation is vulnerable to constitutional attack on the basis that four basic tenets of the Constitution – openness, transparency, accountability and responsiveness to the needs of the people – are all flouted in the Bill by the way the definitions are set out. There is no correct oversight mechanism in the Bill either. There should be some way of dealing with the kinds of problems journalists will have administratively rather than burdening the courts. If this Bill is passed in its present form, the media will have to club together and challenge the law on constitutional grounds.

DD: The courts will ultimately have an influence on what comes out as legislation.

PH: I am deeply concerned that the Constitutional Court is becoming extremely deferential. It is preferable to get it right the first time rather than do a fix-up job later. The Scorpions issue was a clear case of the Court gerrymandering the issue, creating a question that could only be answered in one way. Litigation is a long and dark process, the outcome of which is always uncertain.

DD: Are there better comparative laws?

LN: There is better law, and some of that better law is contained in the Bill itself.

Participant: If the transparency issue is constitutionalised, and media is allowed to dig up others' dirt, who will be the mediator to ensure this is not just done to one side? At the moment, all the media focus on the leading party and what it is doing; all the dirt that is being dug up is about the ANC. Who will ensure there is a balance between media freedom and making sure that the media does not simply attack the majority party? Even the story about the Scorpions being dissolved is put across as being motivated by the ANC feeling it was being targeted by the unit.

Participant: Any party that has almost 70% of the vote has to accept the criticism that goes with it.

ND: There are lots of ways in which potential damage by the media is limited and controlled. Grossly improper media ends up in court, and the threat of court action concentrates the minds of the media like nothing else. This is the ultimate check. Others include being exposed to criticism from within the profession, from our own ombud, our peers and readers. Whether these checks are working optimally is open to debate. The media's primary interest in the ANC is simply because it is the party in power. The ANC is what matters most.

Participant: A rugby metaphor has it that you can only drop the ball once you have it in hand. The ANC has the ball in hand in South Africa at the moment. If power changes, the media will focus on the new party in power.

MM: Circulation of power within the state provides an incentive for civil servants to be careful about what they are doing because the next party that may be elected will exercise power over them. Our current situation is overwhelming power concentrated in one political party, as was the case in South Africa under the National Party. There is no risk of power being shifted in the near future, so giving civil servants a lot of power is a serious risk. The idea of checks and balances within the civil service only works when power is circulated.

BG: According to our constitutional democracy, the majority of the people elect a particular party into power. We cannot fashion our laws to remove the power of the party that has won the election to rule effectively. The ANC happens to be in power with a 66% majority which may or may not change next year. It is duly elected into power and has the right and the duty to govern and to make legislation. We are not the UK or the US where power changes every few administrations; we are a country that has just emerged from centuries of colonialism and oppression. We are trying to completely turn around our society from that heritage. The Bill is attempting to codify something that every organisation does. Even in the media, when a journalist is working on a sensitive story, that information is kept confidential until it is published to protect it from competitors.

DD: The question is not so much that we are different; nobody will deny we are different. The real issue is whether we, in the current situation, can use the model of a civil service like that of the UK where power changes from time to time? Civil servants in a country where the same government remains in power for a long time do not behave in the same independent fashion as those in the UK do.

BG: My approach to this debate is from real world. Our civil service is not made of a majority of ANC hacks. The majority of our civil service is some old order hacks, some Bantustan hacks, some liberation hacks and a

growing smattering of new generation hacks. That is the reality. We do not have a civil service that kowtows to the ANC. This legislation is the best attempt possible to fix something that has been broken. I sat on the TRC⁷ subcommittee that dealt with the destruction by the apartheid regime of truckloads and truckloads of documents. This legislation seeks to provide to declassify all apartheid security records. It is a big step in a real world. It will make it a habit to declassify records, and not just every 30 years. Thirty years is the proposed statutory limit. It is a huge step forward, although it may be an imperfect piece of proposed legislation for an imperfect world.

LN: In the Masetla case, the Constitutional Court was divided – there were two minority judgements. The eleven judges of the court, highly intellectual, coming from similar traditions, deeply steeped in an understanding of the Constitution and the law, could not reach agreement on the disclosure or otherwise about information that was by any standards sensitive. It had to do with the names of operatives and intelligence methods. If eleven like-minded judges could not reach agreement about a matter of national security, how will state officials find a uniform approach to classification? This Bill will have to be applied by every organ of state in the country and organ of state is defined to include municipalities. So we are not talking about hundreds, we are talking about thousands of organs of state that have to try to make sense of this. Barry said you can't legislate for idiots, but I think this Bill will make idiots of us. State officials will have to look at the criteria for classifying state information. These criteria are not bad, but they could be stronger. Then they will have to look at the definition of sensitive information which refers to the national interest (Section 14). Then they will have to look at Section 15 to see how the national interest is defined. It is defined in a way that covers everything: 'the national interest of the Republic includes all matters relating to the advancement of the public good'. Then the state official has to look at the constitutional values that guide the national interest (Section 1 of the Constitution). Then he or she has to read the general principles of classification (Section 22), the general principles of state information (Section 7), and the various elements of what the Bill refers to as the 'intrinsic value approach' which I read several times but still cannot understand. The official would then have to refer to any standards that are issued by the Minister (Section 9), plus departmental policies that might be issued by the head of that organ of state, plus ministerial regulations. You are going to get the most massive inconsistency from one state organ to another because state officials will not conceivably be able to apply all these criteria in a consistent fashion. What do we do when we have to err? Are we going to err on the side of openness? No, we will get into trouble because we might make a mistake. We will err on the side of closed-ness. That's the reality.

Participant: The fundamental question is what values we celebrate. If we celebrate the value of openness vs. trying to legislate for idiots and for individuals of the old order, then we need to put the precepts of the Constitution first. We also need to back it up with a procedure that could be contested in court. If we define it too narrowly we lose too much, if we define it too broadly we lose as much. It has to go to court. We have a lot of good legislation that is not being implemented and has constantly to be challenged by a range of civil society organisations. Civil society has in part abdicated this fight to the media.

FR: A pocket guide might make the classification of information simpler. A pocket guide pamphlet to what fish can be eaten codes different species as green (eat as much as you want to), yellow (rare) and red (endangered). A similar guide could be produced for the application of the law: green (confidential), yellow (secret) and red (top secret).

MM: I'm not saying the ANC should not govern. We have to liberate ourselves from our own histories. The problem is not that the government is filled with old struggle comrades; many old struggle comrades have left government. The civil service is now largely filled with old hacks of various kinds and new hacks with little skill and ideological capacity. In a situation like this, we should be very careful of recreating the same patterns of authoritarian decision-making we had in the past. It is very easy for the ANC to err on the side of being too closed; thereby not liberating itself from its own history. The ANC must err in favour of too open to liberate us from the past.

PH: Mike was not attacking effectiveness; he was attacking accountability, and there is a signal lack of accountability in the public service at the moment. There are historical reasons for that. It is an objective of the National Democratic Revolution that safe party hands should be on all the levers of power and there are plenty of levers of power in the public service. Why is it that stories like the allegation that Table Bay was sold by Transnet do not get run past the corporation beforehand? Is this not something that should happen? Should the victim of the story not have a chance to comment before the story is published?

ND: This story appeared in the Argus two months earlier and Transnet responded to it. The Sunday Times did approach Transnet with an initial set of questions and got some replies. This whole thing could have been avoided if the

underlying information about the sale and about Transnet's obligations to the new owners were in the public domain. This would have not left so much space for people to project their imaginations into it. It is established as part of our defamation law that if you fail properly to give people right of reply will find it hard to claim you acted reasonably in publishing the story. This kind of thinking should inform our ethics. Having to apologise hurts a newspaper in a lot of ways. Had the Sunday Times not been forced to apologise on its front page twice in a row, it would have been easier to defend the recent Zapiro cartoon.⁸

BG: What do we disagree on? The differences are the broadness of the definition and the concern of the media that they want the right to have a public interest defence after publishing material without referring it to the person in question. The essence of the debate is that we agree that government has right to classify information, we want it to be done properly and with precision and a structured, rational system, we want it be reviewable, and we want it to result in more information being made public, not less. It is not an access to information Bill (and there are lots of things wrong with the implementation of the Promotion of Access to Information Act). The challenge of talking about our constitutional imperatives for openness and transparency is that the inclination of civil servants is to hold onto information, classified or not. That is the culture, and this culture will have to be dealt with. This Bill won't change that culture. But it will create some certainty and precision and rationality around the way government information is officially classified. It will force civil servants to think about classification more carefully than they do at the moment. NIA is that government department responsible for overseeing co-ordinating information security in government. It is not an access to information department. That is its role; it is in the legislation; it is part of its counter-intelligence mandate. Performing this would include providing the information that officials need in a digestible form – how they should think about a document they might have to classify, what they can do, and what they cannot do. What they cannot do is to classify a document to protect themselves or their departments.

DD: Nobody here denies that government has a right to secret information. This is axiomatic. There is a sense in which the Bill is being transposed into a particular culture, a situation where the constitutional values of openness and transparency are honoured more in the breach than in the observance. The Masetla judgment illustrates the tension between judges who are deferential and judges who want to aggressively assert principles of openness and transparency. What creates some anxiety is if you look at this context and then you look at the Bill, why we are drafting legislation in a way that has aspects that are so reminiscent of the legislation of old? There lies the problem.

¹ The Protection of Information Act.

² Like the Protection of Access to Information Act (PAIA).

³ Section 14.

⁴ The full text of Section 15 reads:

15. (1) The national interest of the Republic includes—

(a) all matters relating to the advancement of the public good; and
(b) all matters relating to the protection and preservation of all things owned or maintained for the public by the State.

(2) The national interest is multi-faceted and includes—

(a) the survival and security of the State and the people of South Africa; and
(b) the pursuit of justice, democracy, economic growth, free trade, a stable monetary system and sound international relations.

(3) Matters in the national interest include—

(a) security from all forms of crime;
(b) protection against attacks or incursions on the Republic or acts of foreign interference;
(c) defence and security plans and operations;
(d) details of criminal investigations and police and law enforcement methods;
(e) significant political and economic relations with international organisations and foreign governments;
(f) economic, scientific or technological matters vital to the Republic's stability, security, integrity and development.

(4) The determination of what is in the national interest of the State must at all times be guided by the values referred to in section 1 of the Constitution.

⁵ Section 16(2)(a) defines commercial information as 'information of an organ of state or information which has been given by an organisation, firm or individual to an organ of state or an official representing the State, on request or invitation or in terms of a statutory or regulatory provision, the disclosure of which would prejudice the commercial, business, financial or industrial interests of the organ of state, organisation or individual concerned'.

⁶ The owner of such publications as Sunday Times and Business Day.

⁷ Truth and Reconciliation Commission.

⁸ Which depicted Jacob Zuma getting ready to rape justice with the help of a number of his allies.