

Protection of Information Bill

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DOUBLETHINK

In George Orwell's classic, 1984, 'doublethink' is the ability to hold two diametrically opposing views on the same topic at the same time. As Orwell put it "to repudiate morality while laying claim to it, to believe that democracy was impossible and that the Party was the guardian of democracy." Doublethink appears to have been the mindset of the authors of the Protection of Information Bill that is currently before Parliament.

On the one hand the Bill recognizes the "harm of excessive secrecy" and the need to "promote the free flow of information within an open and democratic society". On the other it establishes the basis for the extreme and arbitrary restriction of public access to government information. It does so by creating such broad scope for the classification of information; such wide executive powers and such draconian punishments - that the government would be able to staunch the flow of information to the public as it sees fit.

Any government information can be classified if its disclosure would be harmful to the 'national interest'. The 'national interest', in turn, is defined so broadly that it could affect any government activity. It includes "all matters relating to the advancement of the public good" and "the pursuit of justice, democracy, economic growth, free trade, a stable monetary system and sound international relations". It also covers the "the protection and preservation of all things owned or maintained for the public by the State" - thus potentially removing from public scrutiny information about problematical parastatals like Eskom and SAA .

The Bill goes further. It extends classification to commercial information in the government's possession if the disclosure of the information could endanger the 'national interest' or the interests of organizations or individuals. Thus, documents relating to state tenders could be classified and kept away from public examination.

Heads of state organs would be able to delegate their responsibility for classification to any 'subordinate staff member' - so the free flow of information could be shut down at a relatively low level. Whole file series - or classes of information - could be classified on a collective basis.

The public can appeal to have information declassified: to whom? - to the minister whose department classified it! Fortunately, the public could still request access to classified information via the Promotion of Access to Information Act. Where the Minister refuses such requests, applicants would be able to lodge an appeal with a PAIA tribunal. There is, however, a catch: If the requested information is classified as top secret the government may refuse to confirm or deny it even exists!

The draconian penalties prescribed by the Bill include sentences between 3 and 25 years without the option of a fine. This is particularly intimidating, because the accused would, according to legal experts, not even be able to mount a public interest defence.

All governments have legitimate reasons for protecting secret military, security and diplomatic information - as well as private and personal financial and medical records. However, experience shows that they also have a strong inclination to conceal information exposing corruption, incompetence and the illegitimate pursuit of private and party interests (vide the Arms Deal). The bill does, indeed, make classification of information for such illegal purposes punishable by prison sentence up to three years (with the option of a fine). However, in another Orwellian twist, it is most unlikely that information concerning illegal classification would ever come to light since it would itself be classified! Everything depends on the government's intentions - and there are some disturbing pointers to the intentions behind this Bill.

Firstly, the authors have almost entirely ignored the recommendations of the 2006 Ministerial Review Commission on Intelligence that was established to consider the Bill's predecessor which was withdrawn after a vehement outcry in 2008. The Commission comprised Joe Matthews, Dr Frene Ginwala and Laurie Nathan. It acknowledged that "the 2008 Bill recognized "the importance of transparency and the free flow of information"... but added that it "also has a number of provisions that are likely to promote secrecy. In particular the Bill's approach to 'secrecy in the national interest' is reminiscent of apartheid-era legislation and is in conflict with the constitutional right of access to information."

The Commission was critical of the Bill's complexity and of the central role that it gives to the National Intelligence Agency precisely because the NIA "... is not oriented towards promoting the constitutional right of access to information." It observed that "even if

the disclosure of certain state information does endanger some aspect of the national interest, from a constitutional perspective it might often be the case that non-disclosure poses a greater threat to the national interest.”

The Commission scathingly criticised the all-encompassing concept of ‘national interest’ and recommended that it should be scrapped. It said that only the Minister of Intelligence should have the prerogative to classify categories of information - subject to comment by parliament and interested parties. It called the government’s ability to refuse to confirm or deny the existence of top secret information ‘Orwellian’ and recommended that declassification appeals should be directed - not to the minister involved - but to the Human Rights Commission or to a court.

The second pointer is that - unlike the 1982 Act that it is meant to replace - the Bill’s penalties do not include the option of a fine. This will further intimidate whistle-blowers and journalists by ensuring that those who divulge state information will serve long prison sentences without the possibility of others paying their fines.

Thirdly, the reintroduced Bill has scrapped the important limitation included in the 2008 Bill that classification “should be used sparingly”.

Finally, the Minister of National Intelligence, Dr Siyabonga Cwele, has made it clear that he intends to criminalise the activities of what he calls “information peddlers”. NIA’s legal advisers have admitted that whistle-blowers would be charged if they were caught with classified documents. Cwele has insisted that government wrong-doers should not be exposed in the media - but should rather be reported to the relevant authorities.

The Bill is irreconcilable with the Constitution’s founding principles which “ensure accountability, responsiveness and openness.” The Constitution guarantees freedom of expression, including the freedom to receive and impart information or ideas. Section 32 states that everyone has the right “to access to any information held by the state”. The courts have repeatedly upheld these rights, most recently last month when the South Gauteng High Court held that ‘The role of the media in a democratic society cannot be gainsaid. It ... includes informing the public about how our government is run, and this information may very well have a bearing on elections.... Access to information is crucial to accurate reporting and thus to imparting accurate information to the public’.

The Bill’s professed support for the free flow of information is cynical doublethink. Its single-minded intention is to control the flow of government information by inhibiting whistle blowers and stopping investigative journalism. It is a direct assault on the Constitution and should be vigorously opposed by all South Africans who support constitutional government. Our Centre for Constitutional Rights and several other NGOs have expressed their strong opposition in submissions to the intelligence parliamentary portfolio committee. The remedy is simple: the Bill should be withdrawn and redrafted in accordance with the recommendations of the Ministerial Review Commission.

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