NELSON MANDELA CENTRE OF MEMORY

POSITION PAPER ON THE PROTECTION OF STATE INFORMATION BILL

21 November 2011

BACKGROUND

1. According to press reports, the National Assembly will vote on Tuesday 22 November 2011 on the Protection of State Information Bill. If passed, the Bill will then be considered by the National Council of Provinces in terms of the procedures in section 75 of the Constitution. It is hoped that the NCOP process will offer a further opportunity to propose amendments to the Bill. This document makes the case for four such amendments.

2. The Bill results from alaw-reform project that has been in progress since 2006-7. The Bill is intended to repeal South Africa's existing official secrets law and replace it with a new law. This new law is intended to be both constitutionally compliant and in line with the new technologies that are used to generate, preserve and disseminate information. Working closely with the Wits Law School, the Nelson Mandela Centre of Memory (NMCM) has followed and provided input on this important project since its inception. It has done so because its mission requires it to take an interest in legislation governing the management and provision of access to archival records. It has done so from the point of view that reform of the state'santiquated information security law is necessary and long overdue.The old law is constitutionally unacceptable and it must be replaced.

3. The Protection of Information Bill introduced in Parliament in the middle of 2010 has generated unprecedented controversy and alarm about the Bill's possible impact on freedom of information and media information. In June 2011, the NMCM and Wits Law School convened a focus group with the intention of bringing together role-players from Parliament, government and civil society to encourage conversation and

productive dialogue about the Bill.The group met again on two occasions, the most recent meeting taking place on 1 November 2011.

4. At its November meeting, the focus group considered the draft of the Bill that had been finalised by Parliament's Ad Hoc Committeeon the Protection of Information Bill. It is on this version of the Bill that the National Assembly will vote on Tuesday.Though much progress has been made since the group first convened in June, there were still a number of aspects of the Bill that are cause for concern for the NMCM and many of the participants. Some of these concerns were motivated by the conviction that aspects of the Bill are unconstitutional. Others were motivated by the conviction that some aspects of the Bill are undesirable for reasons of policy or for practical reasons.

5. In what follows, four of these aspects are highlighted and proposals are made for the amendment of parts of the Bill. It must be emphasised that, while this paper has been informed by the discussions and debate of the focus group, it represents the viewpoint of the NMCM and not necessarily that of any of the other participants in the focus group.

AREAS OF CONCERN

The Bill is no longer in harmony with the PAIA and is in direct conflict with the right of access to state information

6. Section 32 of the Constitution provides that everyone has a right of access to any information held by the state. Like any other right in the Constitution, this right may be limited by law to the extent necessary to protect other important rights and interests.

7. South Africa has a comprehensive law setting out the procedures for relying on the right of access to information and the reasons why a request for information may be refused. This is the Promotion of Access to Information Act 2 of 2000 ("the PAIA").Though it limits the right of access to information, the PAIA is widely regarded

as doing so in a constitutionally permissible manner. It strikes, in other words, the proper balance between the right to governmental transparency and the need to protect important countervailing interests. These include national security, defence, economic interests and the criminal justice system.

8. A law, like the Protection of State Information Bill,that is intended to restrict access to information that has been classified in order to protect national security will necessarily be one that limits section 32 of the Constitution. However, previous drafts of the Protection of State Information Bill found a way to avoid unnecessary conflict with section 32 and, at the same time, to ensurethat the Bill and the PAIA were harmonised.

9. Since the first version of the Bill was introduced in Parliament in 2008, it has contained a provision that permits anyone to make a request for classified information in terms of the PAIA in the same way as a request can be made for any other record in the hands of the state. That request must then be dealt with by the state body that holds the information in the same way as it would treat any other request made in terms of the PAIA. If, in terms of the PAIA, there is no ground for withholding the record, it must be declassified and disclosed to the requester who may, in turn, disclose it to anyone else.

10. The NMCM has always maintained that this provision is crucial to the Bill's constitutionality. The provision avoided any direct conflict between the Bill and section 32 and also avoided any direct conflict between the Bill and the PAIA. Its effect was that the Bill did not have to attempt the difficult taskof striking the correct balance between the constitutional right and the need to protect national security; it simply deferred this balance to the one that has already been struck by the PAIA. It also meant that the Bill did not need to provide procedures for dispute-resolution between a requester of a classified record and the body that holds it. Those procedures are already provided for in the PAIA.

11. The provision for the direct application of the PAIA to a request for classified information was an elegant and effective solution to the problem of reconciling the Bill with the constitutional right of access to information. It did no harm to the fundamental principles of the Bill. Classification is pre-eminently an administrative measure: it entails a set of instructions to state officials about the identification and handling of official secrets. Public access to official information should remain a matter of the ordinary application of the freedom of information laws. It should not be deterred or made more difficult by the fact that a record happens to have been classified.

12. This crucial provision has been removed from the most recent drafts of the Bill. The differences between the Bill as introduced and the Bill that will be voted on by the National Assembly are set out in Table1 in the annexure to this paper.As a result of several far-reaching changes in the late stages of the ad hoc Committee's deliberations, the Bill now squarely excludes the operation of the PAIA. In other words, the Bill has now chosen to directly conflict with the PAIA. A request for access to classified information must now be handled by requesting a review of the classified status of the information. A refusal of access is now dealt with by an appeal procedure described in clause 31 of the Bill. This entails an appeal first to the relevant Minister and, thereafter to court.

13. The NMCM is unable to support these fundamental changes to the Bill which, for the first time, squarely place the Bill at odds with the constitutional right and with the PAIA. The constitutionality of the central operative provisions of the Bill – its criteria for classification -- now turns on the justifiability of its restriction of the right of access to information. Besides the substance of the criteria for classification, the procedures for access and appeal must now be scrutinised to ensure they do not inhibit the right of access to information any more than is necessary to achieve their purpose. Previous versions of the Bill simply avoided this problem and, with it, the possibility of

a court holding that the balance has not been correctly struck. There is now every reason to anticipate such a holding.

14. The NMCM accordingly recommends thatthe amendmentsdetailed in Table 1 in the annexure to this paper are reversed and that the Bill is again harmonised with the PAIA (and, accordingly, with section 32 of the Constitution) by restoring what was clause 28 of the original 2010 version of the Bill.

The offences provisions penalise the unauthorised disclosure of classified information rather than penalising the harm caused by disclosure

15. One of the most important reforms of the current information law proposed by the Bill is its chapter providing for astatutory scheme of criminal offences and penalties to protect classified information.

16. It is this chapter that has attracted considerable criticism from the Bill's opponents. In particular, this criticism focuses on clause 49 which prohibits the intentional disclosure or publication of classified information. Recent amendments of the Bill have restricted the ambit of this provision by confining it to a narrower class of classified information: a "state security matter", defined as classified matter dealt with by the State Security Agency.In terms of clause 43, a less severe penalty is applicable to the disclosure of classified information in the wider sense (ie, information classified on grounds of national security).

17. In the view of the critics of the Bill, these penalties will have a chilling effect on whistleblowing and investigative journalism, inhibiting the publication of stories that originate from classified material. It is also feared that they will encourage the cynical misuse of classification by officials wishing to conceal evidence of malfeasance or corruption. The solution, so the argument goes, is the statutory recognition of a "public-interest defence".Such a defence would allow a whistleblower or journalistwho discloses or publishes classified information to argue that the disclosure wasjustified in the public interest, for instance because it revealed evidence of

significantincompetence, criminality, wrongdoing, or hypocrisyon the part of government officials. In addition, it is argued, the Bill should be amended to include a public domain defence.This defence would be available to someone who publishes information that is classified but is already circulating in thepublic domain.

18. The ANC has so far resisted the inclusion of a public-interest defence in the Bill. Its reasoning is that such a defence would undermine the very purpose that the Bill is intended to achieve: the protection of a narrow class of official secrets from unauthorized disclosure. Properly applied, the Bill will permit classification of an extremely limited class of information. This is information that could, if it falls into the wrong hands, be harmful to the national security of the Republic. Allowing the publication of such information, even if the publication is motivated by the public interest, would risk causing the very harm that classification is intended to prevent.

19. There is considerable merit in this view. At the same time, it is indisputable from the point of view of constitutional law that freedom of expression and media freedom may be inhibited only to the least degree necessary to protect national security.

20. In the view of the NMCM, a constitutionally acceptable compromise can be achieved without undermining the fundamental purpose of the Bill. This can be done by reformulating the wording of the offences to focus on the harm caused by the mishandling or disclosure of classified information rather than, as is currently the case, the mere fact that information is classified.

    20.1. In terms of the current law (ie, the Protection of Information Act 1982 and the MISS), the criminal offences relating to the use and possession of classified information are regulatory offences. This means that criminalization attaches to the disclosure, or use, or possession of a *record that has been classified*, without more. It is essentially the action of accessing or disclosing the information that is criminalized.

20.2. The Bill, as introduced in 2008, took a different approach to criminalization. Its approach was to criminalize the harm caused by disclosure of classified information rather than the fact that classified information had been disclosed. Thus, for instance, the action of communicating information which may cause serious harm to the Republic was criminalized.

20.3. The 2010 version of the Bill (the version on which the National Assembly will vote) has reverted to defining the offences as regulatory offences.

21. In the view of the NMCM, a return to the 2008 drafting style of the offences would allow accused persons to argue and attempt to demonstrate that the disclosure has not in fact harmed the security of the state. This substantive drafting style puts the focus thus not on the mere disclosure to information that has been classified but rather on the actual or potentiallyharmful consequences of disclosure of that classified information. Certainly, it cures one unintended consequence that opponents of the Bill fear will result from the current penalties. This is the fear that unscrupulous officials may classify information that does not merit classification in order to cover up wrongdoing or embarrassing evidence. A journalist who discloses cynically classified information in the public interest will not be criminally liable since, self-evidently, the disclosure will not harm national security.

22. However, for this proposal and our other proposals to be most effective, it is crucial that the current public-interest *override*is reformulated.This issue is addressed in the next section.

The public-interest override is unconstitutionally narrow

23. The Bill does not currently have a public-interest defence. It does however have, in clause 19(3), a public-interest *override*.

24. As noted above, previous versions of the Bill provided for the application of the PAIA to the consideration of requests for access to classified information.Because it was

subject to the PAIA, the Bill in effect incorporated the PAIA's public-interest override (section 46 of the PAIA). As the Bill was previously formulated, a request for classified information would have been dealt with as follows:

24.1. A classified record in the hands of a public body may be the subject of a PAIA request.

24.2. This request must be considered in terms of PAIA – in other words the record must be disclosed unless one or more of the mandatory or discretionary grounds for refusal of access applies to it.

24.3. Should disclosure be mandated by PAIA, the record must be declassified and disclosed.

24.4. Even if there is a ground of refusal applicable to a particular record, the record must be disclosed if, in the language of section 46, disclosure "*would reveal evidence of … a substantial contravention of, or failure to comply with the law; or … an imminent and serious public safety or environmental risk*" and the public interest in disclosure outweighs the reasons for non-disclosure.

25. The last of these provisions is now in clause 19(3).As the Bill is currently formulated, a request for classified information must be referred to the head of the organ of state that holds the information for a review of the classification status of the information. The head must consider whether the Bill has been properly applied, in other words, whether the information has been justifiably classified. The record must be declassified if it reveals evidence of *a substantial contravention of, or failure to comply with the law; or … an imminent and serious public safety or environmental risk*" and the "*public interest in the disclosure of the state information clearly outweighs the harm that will arise from the non-disclosure*". It is clear that clause 19(3) simply borrows the language of section 46 of the PAIA.

26. We have argued above for a return to the direct use of the PAIA to deal with requests for access to classified information. Even if this proposal is accepted, the public-interest override as currently formulated will have to be revised. The same goes for clause 19(3), if it is retained.

27. Although an important source of flexibility in the Bill, the effectiveness of the public-interest override is limited by the unreasonably high threshold that it imposes. This has been a major and a longstanding flaw in the PAIA. The wording of the PAIA's override is the product of changes introduced during the Parliamentary committee process in early 2000 that were intended to restrict the scope of the override. But the restriction, which entailed the addition of content qualifications to section 46, has rendered the override largely nugatory and unconstitutionally narrow.

28. The NMCM accordingly recommends that Parliament considers including a consequential amendment to the PAIA that would have the effect of correcting this flaw. Alternatively, if the recommendation that PAIA applies directly to requests for classified information is not accepted, then it is clause 19(3) that should be reformulated. In either case, this would entail the deletion of the content qualifications of the override, as follows:

> **Mandatory disclosure in public interest**
>
> **46.** 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 … 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~~
>
> ~~*(b)*~~the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question.

The provisions for automatic declassification of old-order classified information are unnecessarily narrow

29. The 2008 version of the Bill contained progressive provisions for dealing with archives and automatic declassification, particularly of old-order records. These provisions were welcomed by the NMCM in its input to the National Assembly on this version of the Bill. In the view of the Centre, the proposed measures took account of the legacy of oppressive use of information classification by the apartheid state, and covered effectively the records of state structures which stay outside of archival custody beyond a period of twenty years.

30. The subsequent revisions to the Bill and the current measures in the Bill that is before the National Assembly have diluted these provisions. The revisions seem to have been motivated by a fear of the consequences of a mass declassification of older (apartheid-era) records, and in particular seem to have assumed that declassification necessarily results in declassified records being placed in the public domain. This is not so. The PAIA provides robust protection from public access to a range of records categories, irrespective of their age or of whether they are classified or not. Mass declassification would merely facilitate application of PAIA in archival domains and simplify determinations of public access. In any case, the Bill provides for the extension of classification beyond 20 years in defined circumstances.

31. The NMCM accordingly strongly recommends that the archival and automatic declassification dimensions of the 2008 version of the Bill be reinstated.

Annexure: Comparative tables

Table 1: Comparative table showing the harmonisation provisions of Bill 6 of 2010 and their removal in Bill 6B of 2010

Protection of Information Bill 6 of 2010	**Protection of State Information Bill 6B of 2010*** (following amendments by the Ad hoc committee on the Protection of Information Bill)
Definitions and interpretation **1. …** (3) When considering an apparent conflict between this legislation and other information-related legislation, every court must prefer any reasonable interpretation of the legislation that avoids a conflict over any alternative interpretation that results in a conflict. …	**Definitions and interpretation** **1. …** (3) When considering an apparent conflict between this legislation and other information-related legislation, every court must prefer any reasonable interpretation of the legislation that avoids a conflict over any alternative interpretation that results in a conflict. <u>(4) In respect of classified information and despite section 5 of the Promotion of Access to Information Act, this Act prevails if there is a conflict between a provision of this Act and a provision of another Act of Parliament that regulates access to classified information.</u> …
Objects of Act **2.** The objects of this Act are to – … (j)harmonise the implementation of this Act with the Promotion of Access to Information Act and the National Archives	**Objects of Act** **2.** The objects of this Act are to – … ~~(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);	~~and Records Service of South Africa Act, 1996 (Act No. 43 of 1996);~~
Request for classified information in terms of Promotion of Access to Information Act **28**.(1) A request for access to a classified record that is made in terms of the Promotion of Access to Information Act must be dealt with in terms of that Act. …	**Request for access to classified information and status review** **19.** (1) If a request is made for access to information and it is established that the information requested is classified, that request must be referred to the relevant head of the organ of state for a review of the classification status of the state information requested in terms of the provisions of this Act. (2) In conducting such a review the head of an organ of state must take into account the conditions for classification and declassification as set out in this chapter. (3) (a) The head of the organ of state concerned must declassify the classified information in accordance with section 14 and grant the request for state information if that state information reveals 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 (b) the public interest in the disclosure of the state information clearly outweighs the harm that will arise from the disclosure. (4) The head of the organ of state must— (a) within 14 days of receipt of the request contemplated in subsection (3)(a)(ii)

	grant the request for the declassification of classified information; or (b) within 30 days, of receipt of the request contemplated in subsection (3)(a)(i) grant the request for the declassification of classified information. (5) A court may condone non-observance of the time-period referred to in subsection (4)(a) on good cause shown where an urgent application is brought before court. (6) If an application for a request referred to in subsection (1) is received, the head of the organ of state concerned must within a reasonable time conduct a review of the classified information held by that organ of state relating to the request for declassification.
	~~**Request for classified information in terms of Promotion of Access to Information Act**~~ ~~**28**.(1) A request for access to a classified record that is made in terms of the Promotion of Access to Information Act must be dealt with in terms of that Act.~~ ~~...~~

Table 2: Comparative table illustrating the reformulation of the offences provisions to focus on the harm caused by disclosure

Protection of State Information Bill 6B of	**Proposed reformulation**

2010	
Disclosure of classified information **43**. Any person who unlawfully and intentionally discloses classified information incontravention of this Act is guilty of an offence and liable to a fine or imprisonment fora period not exceeding five years, except where such disclosure is— (a) protected under the Protected Disclosures Act, 2000 (Act No. 26 of 2000) orsection 159 of the Companies Act, 2008 (Act No. 71 of 2008); or (b) authorised by any other law.	**Disclosure of classified information** **43**. Any person who unlawfully and intentionally discloses classified information the disclosure of which may cause serious or irreparable harm to the national security of the Republicincontravention of this Act is guilty of an offence and liable to a fine or imprisonment fora period not exceeding five years, except where such disclosure is— (a) protected under the Protected Disclosures Act, 2000 (Act No. 26 of 2000) orsection 159 of the Companies Act, 2008 (Act No. 71 of 2008); or (b) authorised by any other law.