

INFORMATION BILL

GOVERNMENT EXPLAINS THE PROTECTION OF STATE INFORMATION BILL

1. Why does a democratic state such as ours require legislation such as the Protection of State Information Bill (POSIB)?

All democracies need mechanisms to defend the constitutional order. All those aligned to human security, put laws in place to protect the people from fear and ensure that they are safe to enjoy the freedoms they have.

The aim of the POSIB is to repeal the unconstitutional apartheid legislation that is still on our statute book with pre-publication censorship provisions. The proposed legislation aims to, among other things, address the rising threat of espionage and hostile activities, the selling of information and the protection of critical databases in government, without impeding the constitutional rights of citizens to access information.

It will create a system for classification and declassification of information held by the State. In addition, it will protect valuable information while at the same time not inhibiting the free flow of ideas and information.

The apartheid regime followed a narrow approach to national security, aimed at protecting the State, mainly from those fighting the oppression. From 1994, the democratic State followed a broader approach to national security, which goes beyond securing the State to include protecting the people from fear or want. This Bill is heeding the clarion call of the Freedom Charter that: "All apartheid laws and practices shall be set aside".

2. Who may classify information and under which circumstances may information be classified?

It is important to emphasise that not all information in the hands of government will be classified. Only the information which relates to national security will be classified and even here, it's not all government departments that will have the power to classify. Classification is restricted to the security services, state security agency, police and defence, and their oversight structures.

The Bill ensures that before sensitive information can be classified, the relevant Head of Department provides a clear, justifiable and legitimate national security reason for doing so (to show there is a demonstrable need to protect such information). This test ensures that information cannot just be classified on a whim, and should an individual be found guilty of the unlawful classification of information, they can be sentenced to between five and 15 years in prison.

These protections ensure that South Africa keeps its legitimate secrets safe while at the same time remaining an open, accountable and democratic society marked by the free exchange of information and ideas.

3. Is there not a danger that corruption will be hidden and kept secret once the Bill becomes law?

The conditions for classification make it quite clear as to what information may or may not be classified. This section provides that information which shows corruption, maladministration or which prevents scrutiny or embarrassing information cannot be classified.

The power to classify has only been limited to heads of organs of state and may only be delegated to senior officials. Any wrongful classification will see officials spending up to 15 years behind bars. This demonstrates government's commitment and seriousness about the fight against corruption.

As an additional measure, an independent Classification Review Panel has also been provided for and it will act as a review and oversight body, ensuring that there is compliance with the legislation.

A public interest override has been built into the Bill to ensure that there is speedy access to certain information pertaining

to an imminent public safety or environmental danger. Access to certain information must be provided within 14 days.

In the case of criminal offences, the normal period for requesting access (30 days) is maintained in line with the Promotion of Access to Information Act (PAIA), 2000 and the Bill for the declassification of the information.

4. Is there any recourse for the media or members of society to access information which has been classified?

Classification does not necessarily mean the automatic denial of access to information. The Bill sets out measures for automatic declassification of information where a request for access has been received in terms of the PAIA, 2000.

In terms of the Bill, "any person who is refused access to information in terms of this Act may appeal to the relevant Minister of the organ of state in question".

The Bill goes even further and allows for the applicant to apply to a court to request access.

The Bill also makes it possible for an applicant to ask a court for urgent relief without having exhausted the internal appeal procedure.

5. Does the Bill not infringe on citizens' right to know?

No, The Bill seeks to balance the presumption of openness with the needs of national security. The consequence flowing from the enactment of the Bill would be to significantly reduce the volume of information classified, from four categories to three, at the same time to strengthen the protection of state information that truly requires protection.

In fact, the Bill protects citizens through the protection of valuable information by all organs of state which is vulnerable to alteration, loss or destruction. This is to prevent individual hardship resulting from such alteration, loss or destruction. To this end, it counters difficulties citizens experience when their birth certificates, identity documents or driver's licences are falsified, manipulated or destroyed.

The Bill also protects businesses from unscrupulous individuals who hijack companies worth millions of rands, by illegally altering the information at the Company Registry. So, for the daily interaction of citizens with the State, it seeks to ensure that this is done on the basis of authentic, valid, correct and usable information.

6. Why have appeals by civil society and the media to have a public interest clause not been incorporated in the Bill?

Given that information relating to corruption, maladministration and corruption is excluded from classification and further that the Bill protects people who blow the whistle in line with the whistle blowers act, the questions becomes: at what point will such a defence be required?

A "public interest defence" is defined as a defence that will allow someone to disclose classified information and later to plead as a defence in court that such disclosure was made in the public interest.

This approach could have serious consequences for the national security of the Republic in that it allows such a person to subjectively take a decision that the information is in the public interest.

If it is later determined by the court that such claims were in fact not true and the disclosure was in fact not in the public interest, the Republic of South Africa and its people would suffer irreparable harm as the sensitive information would already be in the public domain.

Instead of a public interest defence, the Government opted for a public interest override, which is similar to Section 46 in the PAIA, 2000, which has been built into the Bill. This allows

journalists who come across classified information and believe that it is in the public interest to publish it to apply to the court to have that information declassified. This ensures that everyone operates within the realm of the rule of law.

The exclusion of the public interest defence in the PAIA, 2000 is in line with international best practices as no country has included such a reckless practice. It has been rejected in both the United States and the United Kingdom.

7. Why was a public domain defence clause not included?

The exclusion of the public domain defence clause stems from the Constitutional Court ruling in the case of Independent Newspapers (Pty) (Ltd) v Minister for Intelligence Services and Others (2008), where the court ruled that a leaked confidential document into the public domain does not lose its classification and therefore could not be included in the Bill. It is this same court that would have to make a judgment on the constitutionality of the Bill and therefore taking its judgments seriously is critical for ensuring that the Bill passes constitutional muster.

8. How will the POSIB be protected from abuse?

The POSIB's Section 49 prohibits and criminalises improper classification and has a penalty of imprisonment of up to five years for such transgressions. In addition, it imposes a penalty of two years to heads of organs of state who do not heed the provisions of the Bill.

The establishment of the Classification Review Panel – an independent body, accountable to Parliament, charged with overseeing that classifying authorities comply – will also act as a further deterrent to the abuse of classification of information. Some have argued that this body would not be independent enough despite an elaborate multiparty system that is responsible for short-listing, interviewing, and recommending the appointment of members of the Classification Review Panel.

In line with government's approach of balancing secrecy and openness in upholding national security, this Bill introduces a system of declassification of sensitive information. It introduces a practice and culture of regular reviews of classified state information. There are compulsory reviews after 10 years and mandatory declassification after 20 years, unless there is compelling circumstance to keep sensitive information still classified.

9. Will the POSIB not result in censorship and the muzzling of journalists?

The POSIB is a security Bill, not a media Bill, which is aimed at protecting and promoting the national security of the Republic. This Bill is not regulating the media. There is no single mention of the media in this Bill.

The amendments made by the Ad-hoc Committee during the processing of the Bill further enhanced its alignment with the PAIA, 2000 as well as the Protected Disclosures Act, 2000.

It is firmly in line with international best practice, as states have constitutional obligations to protect their people and territorial integrity.

Pre-publication censorship boards, akin to the apartheid era, are not being established. Journalists are not being intimidated. They are not being detained without trial and they are not house-arrested. These were apartheid methods and have no place in our democracy.

This Bill does not amend the Constitution and freedoms in the Bill of Rights remain firmly in place. We are partners in this process. In fighting corruption, exposing incompetence and maladministration, protecting sources and ensuring the free flow of information in a national security environment that is safe and secure – we are all partners.



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