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PROTECTION OF STATE INFORMATION BILL

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Introduction

The PAIA Civil Society Network (the Network), established in 2009, is an umbrella body of organisations working to advance the right of access to information. The member organisations are committed to improving the implementation and usage of the Promotion of Access to Information Act (PAIA), raising awareness about the right amongst citizens and working with bodies subject to the Act to improve understanding.

The Network welcomes the opportunity to comment on the Bill.

While most public debate on the Bill has focussed on the offences and penalties contained in the Bill and the need for a public interest defence, there has been little public commentary on the effect that the Bill will have on PAIA. This is perhaps because early debates on the issue resulted in a commitment by government in mid-November 2010 to align the Bill with PAIA. As a result a clause was inserted into the Bill providing that requests made under PAIA for access to classified records would be dealt with under that Act.

That position remained until 17 August 2011 when the procedure now contained in clause 19 of the Bill, which deals with requests for access to classified information, was inserted in its place. The position was amended even further when on 31 August, just six days before the passage of the Bill through the ad-hoc committee, clause 1(4) of the Bill, which provides for the Bill to override PAIA, was inserted**.**

Those amendments to the Bill dramatically changed the relationship between the Bill and PAIA and ultimately the impact of the Bill on the right to information in South Africa. That the amendments appear to have gone largely unnoticed and unchallenged in the public arena may be explained by their insertion less than 3 weeks before the passage of the Bill by the ad-hoc committee, the technical nature of the amendments and the numerous oral commitments made by government representatives that the Bill will not impact on the right to information provided under PAIA.

As a Network consisting of the leading right to information organisations and users of PAIA in South Africa, the Network is well positioned to comment on the effect that the Secrecy Bill, if enacted, will have on PAIA.

Effect of the Bill on PAIA

Bill overrides PAIA

Section 5 of PAIA provides that:

> *"This Act applies to the exclusion of any provision of other legislation that –*
> *(a) prohibits or restricts the disclosure of a record of a public body or private body; and*
> *(b) is materially inconsistent with an object or a specific provision of this Act."*

Therefore, PAIA currently stands as the authoritative legislation in determining restrictions on the right of access to information in South Africa.

The Bill proposes to amend that position. Clause 1(4) of the Bill provides that:

> *"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 provision of another Act of Parliament that regulates access to classified information."*

This provision ensures that restrictions on access to information within the Bill prevail over the release of information under PAIA.

The Network notes that there has been some suggestion by government representatives that PAIA does not regulate 'classified' information and, as such, clause 1(4) of the Bill will have no affect on PAIA. However, respectfully, that interpretation is based on a misunderstanding of PAIA. PAIA regulates access to records. The term 'record' is defined in PAIA to include all records in the possession or under the control of the information holder regardless of form or medium. Therefore, in the absence of an express exemption, classified documents must fall within the definition of a record and therefore the release of those records is regulated by PAIA.

The Network's interpretation is consistent with the current operation of PAIA. Many previously classified documents have been released to Network members on the basis of a request for access under PAIA. Though classified documents are currently declassified in accordance with the MISS guidelines prior to release, the position concerning the right of access is determined under PAIA. That is, a classified record must be declassified and released if it cannot lawfully be refused in accordance with an exemption ground in PAIA.

Furthermore, the interpretation favoured by some government representatives ignores that the drafters of the Bill recognised the need to make express reference to section 5 of PAIA, evidencing that the drafters envision a conflict arising between the two laws.

Therefore, the correct legal interpretation must be that should the Bill become law, restrictions on the release of information under the Bill will apply even where the provisions of PAIA would require that information to be released.

Furthermore, it is arguable that any procedural inconsistencies between PAIA and the Bill would be determined in favour of the provisions under the Bill. The reference in clause 1(4) of the Bill to the 'regulation' of access to classified information is likely to be interpreted to include the process applicable in respect of access to classified information. Therefore, the process in the Bill will also 'prevail' where there is a conflict.

In light of this analysis there are two key areas of concern where the Bill will have a substantial and negative effect on the right to information under PAIA – by allowing information holders to refuse

access to information merely because a record is classified and by indefinitely extending the time period for responding to a request for access to information.

New ground of refusal – mere classification of a record is sufficient to refuse access

Chapter 4 of Part 2 of PAIA sets out an exhaustive list of grounds on which public bodies may refuse a requester access to information. In refusing access on one of those grounds the public body must establish that the relevant criteria for refusal exist and provide reasons to the requester explaining those grounds.

The Bill extends the restriction on the constitutional right of access to information by allowing access to information to be refused merely on the basis that the requested record is classified. Clause 34(2) of the Bill expressly states that "*unless ordered by a court, no classified information may be made available to the public until such state information has been declassified"*. This operates in conjunction with clause 19 of the Bill, which establishes a process for considering the declassification of a record on receipt of a request for access to that record.

The Bill therefore effectively inserts a new ground for refusal into PAIA, allowing access to records to be refused merely on the basis of their status as a classified document.

The Network has been unable to identify any discussion or document where the need for such an additional ground for refusing access to information is contended by the government. Nor have information officers implementing PAIA identified to members of the Network that the current grounds for refusal are insufficient to protect the national security interests of the state. In fact, section 41 of PAIA provides an extensive list of circumstances in which an information holder may refuse a requester access to information on the basis that it may prejudice the defence, security or international relations of South Africa. The decision to extend the protection of national security documents to encompass any document on the basis of its classification therefore appears to have been taken absent any evidence of current inadequacies in the protection of those documents and without meaningful debate.

Furthermore, the Bill does not require information holders to provide reasons for classifying or refusing to declassify a record. Accordingly, the Bill makes no provision for a requester refused access to information on the basis of its classification to receive reasons from the information holder for that decision. It is unclear whether the requirement to provide reasons for refusal in the context of section 25(3) of PAIA will apply to a decision to refuse access to information on the basis that it is classified. Specifically, it is unclear whether the information holder would need to provide reasons establishing the demonstrable harm criteria for the classification of a document (see clause 12 of the Bill). The Bill does not expressly remove the obligation on the information holder to provide reasons for the classification of a record, it is simply silent on the issue. It is therefore arguable that no direct conflict arises between PAIA and the Bill in this respect, in which case the obligation to provide reasons under PAIA would remain, even where access was refused on the basis of the classification of a record. However, the issue is unclear and a requirement to provide reasons should be inserted in the Bill for the purpose of clarity.

Time for responding to a request for access

Where a person makes a request for access to information, section 25 of PAIA requires that the information holder determine whether to grant access and inform the requester of their decision as soon as reasonably possible, but in any event within 30 days after receipt of the request.

Clause 19(6) of the Bill provides that where a person requests access to classified information the information holder must determine whether to declassify the information 'within a reasonable time'

(with the exception of where the release of the record satisfies the public interest override, in which case it must be determined within either 14 or 30 days, depending on the circumstances).

There is no indication within the Bill what may constitute a 'reasonable time' in respect of a declassification decision. However, the express mention of a 30 day time period for response within the provision addressing the release of information in the public interest, suggests that a 'reasonable time' would be greater than 30 days.

As outlined above, the Bill overrides PAIA to the extent of inconsistency. Therefore, clause 19(6) operates to extend the time for responding to a request for access to information under PAIA for an indeterminate period where the request relates to access to classified information.

The decision to extend the time for responding to a request under PAIA in these circumstances is concerning. The value of information is often time-bound and therefore any extension to the period of time for response may impact on the worth of that information to the requester. Furthermore, the current period of time for responding to a request in South Africa, 30 days, is already out of step with growing international best practice. For example, the recently passed Nigerian access to information law allows information holders only 7 days to respond to a request.

Of further concern in respect of the time provided to information holders for responding to a request is clause 19(5) of the Bill. That clause seems to suggest that a court may condone the non-observance by an information holder with the 14 day time frame for responding to a request for a record which evidences an imminent and serious public safety or environmental risk.

This suggests that where an information holder failed to provide a record of the nature indicated within the 14 days provided under the Bill, the requester would be forced to bring an urgent application to court seeking an order for the immediate provision of the information. At that time it would be open to the court to condone the failure by the information holder to provide the information within the 14 day period, if good cause were shown. This places an unreasonable burden on the requester in an environment where court as an avenue of appeal has already proved out of the reach of most South Africans.

Failure to learn from implementation challenges experienced with PAIA

In addition to the concerns noted above in respect of the effect that the Bill, if enacted, will have on PAIA, the Bill fails to recognise challenges in implementation that have been experienced under PAIA, instead adopting the same processes that have proved problematic under PAIA. In particular the Bill adopts the PAIA public interest override test and fails to afford the classification review panel the power to review decisions to refuse requesters access to classified information.

<u>Public interest override</u>

Section 46 of PAIA obliges public bodies to release information to a requester, where that information could otherwise be refused under the Act, if the release of the information is in the public interest. However, the threshold of the public interest test established in the Act is so high as to render it almost entirely useless.

In order for a record to be released in the public interest PAIA requires that:

(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 release of information in the public interest is therefore limited to records which involve either of the circumstances in subsection (i) or (ii); a contravention of, or failure to comply with, the law or an imminent and serious public safety or environmental risk.

There are therefore very few circumstances in which PAIA allows the release of information in the public interest. Data collected by the PAIA Civil Society Network from August 2010 to July 2011 shows that despite members of the Network being refused access to information in 102 instances during that period, the public interest override was not once applied in favour of the requester.

The high threshold of the public interest test in PAIA does not accord with international best practice. Particularly significant is that both the Ethiopian and Liberian access to information laws allow the release of information despite the applicability of an exemption where the public interest in the release of the information outweighs the harm that would be caused by release. The application of the test is not limited to circumstances which involve a contravention of, or failure to comply with, the law or an imminent and serious public safety or environmental risk. The model access to information law for African Union member states currently being developed by the African Special Rapportuer for Freedom of Expression and Access to Information is also more favourable to the requester than PAIA, reflecting a similar position to the Ethiopian and Liberian laws.

Unfortunately, despite the problems with the public interest override in PAIA, the same test has been inserted verbatim into the Bill. The Bill requires an information holder to review the classification status of a record where a person requests access to the classified document. The record may only be released to the requester if a decision is made to declassify the record.

In assessing the classification status of the record the Bill requires the information holder to assess the public interest in the record, requiring declassification and release if the relevant public interest threshold is met. The applicable public interest threshold is identical to that in PAIA. It is therefore unlikely that the public interest clause in the Bill will provide any significant benefit to citizens in ensuring the Bill does not restrict access to records, the release of which would be in the public interest.

Lack of an accessible independent review mechanism

Clause 20 of the Bill establishes the Classification Review Panel (the Panel). One of the functions of the Panel is to review and oversee status reviews, classifications and declassifications of records (clause 21(1)(a)).

To ensure that the Panel is able to adequately perform its functions, provision has been made within the Bill to ensure that there is substantial expertise on the Panel. Specifically, clause 22(5) of the Bill provides that the Panel must consist of at least one member with expertise in the Constitution and the law, one member with knowledge and experience of national security matters and one member with knowledge and experience of archive related matters.

Despite the establishment of an independent expert body with functions in respect of declassification, no right is established in the Bill for requesters denied access to information on the basis of its classification to apply to the Panel for a review of a decision not to declassify information. Appeal rights are limited to an administrative appeal to the relevant Minister and judicial review.

While the appeal rights provided are consistent with those afforded to requesters of information from public bodies under PAIA, it has long been argued by civil society that the appeal rights provided under PAIA are inadequate for the full realisation of the right to information.

Data collected by the PAIA Civil Society Network from August 2010 to July 2011 demonstrates that the right of internal appeal to the political head of the same body that originally refused access to information is rarely effective in reversing a decision. During the stated period, members of the network lodged 28 internal appeals in response to 102 refused applications for information. Of those 28 applications, only 5 resulted in the release of information to the requester. More significantly, in 21 instances the Minister or other relevant party failed to even respond to the appeal.

Currently, where an internal appeal under PAIA is refused (or not responded to) the only available option for requesters is to make an application to court. However, the very small number of cases in which court action has been pursued, despite the high level of refusals to requests for information, evidences the inaccessibility of court for most South Africans and civil society organisations. The data collected by the PAIA Civil Society Network, referred to above, indicates that no member organisations filed court applications for the release of information during the assessment period, despite access being refused in 60 per cent of cases.

The repeated failure of the appeal mechanisms under PAIA have long been recognised by civil society organisations who have called for the establishment of an information commissioner, or similar body, that would provide for a less expensive, flexible and timely resolution of PAIA disputes by an independent, skilled arbiter. The failure to recognise the opportunity presented by the Bill to empower the Panel to fulfil such a role in respect of disputes over the release of classified information signifies a lost opportunity.

Conclusion

If the Secrecy Bill is passed in its current form it will represent an erosion of the right to information in South Africa without justification. Adequate protections for records containing issues of national security, defence and international relations are already provided under PAIA. Accordingly, the Bill must be aligned with PAIA by providing that requests for information must be dealt with in accordance with the provisions of PAIA, including both the grounds for refusal and timelines provided in that Act.

Furthermore, government should utilise this opportunity to undertake a review of PAIA to ensure that provisions being adopted in the Bill do not represent the same processes that have hindered the effective implementation of PAIA.

Should you require further written or oral submissions on these issues the Network would be happy to assist. Please contact Tammy O'Connor on the details listed below.

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